



**Asia-Pacific  
Economic Cooperation**

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**Guide to the Investment Regimes  
of APEC Member Economies**

*APEC Investment Experts Group*

**2007**

**Sixth Edition**

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Australia ♦ Brunei Darussalam ♦ Canada ♦ Chile ♦ People's Republic of China  
♦ Hong Kong, China ♦ Indonesia ♦ Japan ♦ Republic of Korea ♦ Malaysia ♦ Mexico  
♦ New Zealand ♦ Papua New Guinea ♦ Peru ♦ Republic of the Philippines ♦ Russia  
♦ Singapore ♦ Chinese Taipei ♦ Thailand ♦ United States of America ♦ Viet Nam



# **Guide to the Investment Regimes of the APEC Member Economies**

**Sixth Edition**

**August 2007**

**ASIA-PACIFIC ECONOMIC COOPERATION  
APEC INVESTMENT EXPERTS GROUP**

Published by the APEC Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616

Tel: (65) 6775-6012  
Fax: (65) 6775-6013  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

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ISBN: 978-981-05-8987-5

APEC#207-CT-03.2

Printed by Pirion Pty Ltd

# CONTENTS

Foreword.....	1
Introduction.....	3
Investment Trends in the APEC Region.....	5
Investment Agreements in the APEC Region.....	13
Australia.....	21
Brunei Darussalam.....	59
Canada.....	73
Chile.....	93
People’s Republic of China.....	111
Hong Kong, China.....	149
Indonesia.....	171
Japan.....	223
Republic of Korea.....	235
Malaysia.....	245
Mexico.....	261
New Zealand.....	281
Papua New Guinea.....	297
Peru.....	305
The Republic of the Philippines.....	331
Russian Federation.....	359
Singapore.....	419
Chinese Taipei.....	435
Thailand.....	455
United States of America.....	507
Viet Nam.....	531

Annex 1 —Survey Questionnaire .....	543
Annex 2 — APEC Non-Binding Investment Principles.....	547
Annex 3 — Excerpt from The Osaka Action Agenda .....	549
Annex 4 — Menu of Options.....	551
Annex 5 — Excerpt from Leaders’ Statement to Implement APEC Transparency Standards.....	563
General Acronyms .....	569

## FOREWORD

On behalf of ABAC, I am delighted to recognize the valuable work undertaken by IEG in preparing the sixth triennial edition of the *Investment Guidebook*.

The *Guidebook* aims to provide clear, concise and relevant information to potential investors in the APEC region. Equally, its audience includes the policy makers who frame and influence the investment regimes.

Investment growth is fundamental to strong economic growth, job creation and prosperity, so ABAC is particularly pleased to have been able to cooperate with the IEG in preparing this edition of the *Guidebook*. As business representatives of APEC we strongly endorse the objective of improving transparency of investment policies and regulations in the region.

Information in the *Guidebook* is presented primarily at the level of individual economies. In this form it should be most useful to all private sector investors – foreign and domestic. This presentation also allows the development of comparative frameworks, which should be valuable to policy makers in evaluating the quality of policies and in identifying improvements to attract broader and deeper capital flows.

Investors and policy makers will also see further benefits and challenges as bilateral trade and investment agreements increase across the region. The *Guidebook* provides useful analysis of these growing issues and on investment trends in the region.

ABAC has contributed to the region's investment environment by developing several check-lists. One deals with goals and best practices for economies to use in assessing the quality of financial and other service offering in the WTO Doha negotiations. Another proposes policies to remove barriers and impediments to FDI in APEC economies. We greatly value IEG's support for this work.

ABAC intends to continue this close cooperation with IEG. Improving the investment climate in the region will continue to be an ABAC priority, and we see the work of the IEG as critical to this effort.

Yours sincerely



Mark Johnson  
Chairman, ABAC



## INTRODUCTION

The chief purpose of this the 6<sup>th</sup> triennial edition of the *Guide to the Investment Regimes of the APEC Member Economies* (hereafter known as the *Investment Guidebook*), is to improve transparency on investment issues concerning APEC's Member Economies and, thus, promote safer and more efficient capital markets. It will provide business people and investors with up-to-date information so that they have a better understanding of the regulations and procedures involved in investing and doing business in APEC's Member Economies. Also, it will promote the exchange of information between government officials on each other's investment regimes.

The format of the APEC Investment Guidebook Survey Questionnaire (the 'Questionnaire') has been altered by APEC's Investment Experts Group, following consultation with APEC's Business Advisory Council (ABAC), in recognition of two factors:

- that globalization and the proliferation of bilateral agreements — which focus solely on investment or include an investment chapter — has increased the importance of accessible, accurate information (or of reliable conduits to that information); and
- that APEC needs to provide such information in a more business-friendly manner to facilitate investment decisions.

All 21 APEC Member Economies have completed the 'Questionnaire', the main vehicle through which information is collected for inclusion in the *Investment Guidebook*, and have provided further information upon request to Australia, the editor.

Each response provides information (to the extent it is available) on the following major topics covered in the 'Questionnaire':

1. Introduction to the Investment Regime
2. Screening of Foreign Investment
3. Sector-Specific Laws and Policies
4. Investment Protection
5. Investment and Development
6. Investment Promotion and Incentives
7. Mobility of Capital and Technology
8. Labor, Movement of People, and Senior Management and Boards of Directors
9. Government Procurement (Optional Question)
10. Competition Policy

Annex I contains a copy of the Questionnaire. Subsequent annexes contain copies of the “Non-binding Investment Principles” agreed by APEC Leaders in November 1994, the investment components of the Osaka Action Agenda, “Options for Investment Liberalisation and Business Facilitation to Strengthen the APEC Economies — For Voluntary Inclusion in Action Plan” (commonly referred to as the “Menu of Options”), and the APEC Transparency Standards. At the end of the document is a list of commonly used acronyms in the investment field.

Australia and the other APEC Member Economies can take no responsibility for the accuracy of the information contained in the *Investment Guidebook*. This publication is merely intended to put readers on the correct track to information suitable to their purposes; it is not a substitute for full range of laws and attendant regulations governing the investment regimes of APEC’s Member Economies. To this end, weblinks and contact details have been provided wherever feasible to provide direct means of access to the latest information and the capacity to communicate direct with the relevant decision-makers.

It is to be hoped that the *Investment Guidebook* will assist investors in making sound investment decisions and policymakers in producing consistent and coherent policy decisions.

Australia welcomes feedback on any issues that may contribute to the improvement of the *Investment Guidebook*. Please contact:

Dr. Paul Kennelly (Editor)  
Foreign Investment and Trade Policy Division  
Department of Treasury  
Parkes ACT 2600  
AUSTRALIA  
Tel: (63) 2 6263-3764  
Fax: (63) 2 6263-2940  
[paul.kennelly@treasury.gov.au](mailto:paul.kennelly@treasury.gov.au)

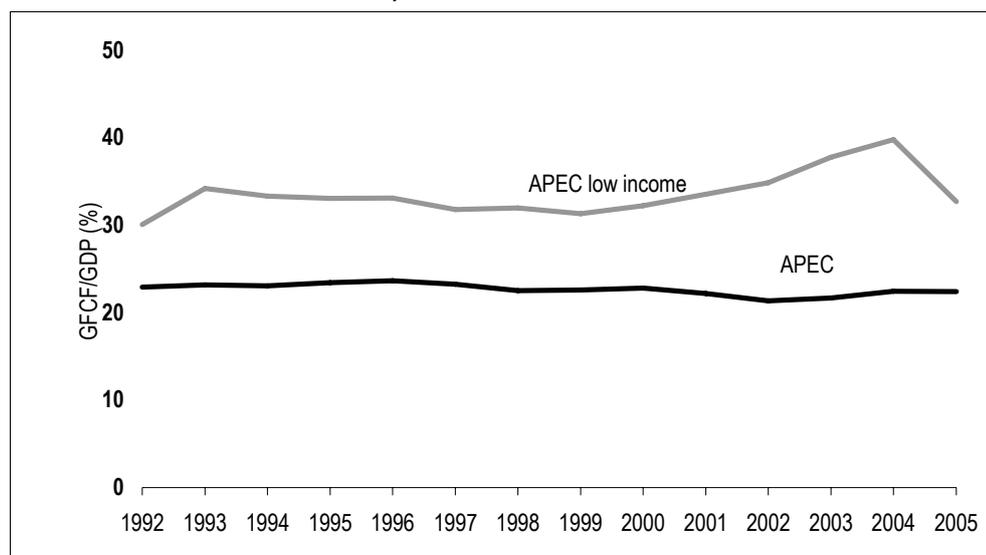
## INVESTMENT TRENDS IN THE APEC REGION

Investment levels in APEC economies are high, particularly for lower income economies that are ‘catching up’ to developed economies (chart 1). For these economies, gross fixed capital formation peaked at 40 per cent of GDP in 2004 before declining to around 30 per cent in 2005.

The vast majority of investment is domestic investment (chart 2). This is particularly the case for lower income APEC economies in which domestic investment comprised 89 per cent of gross fixed capital formation over the period 2002 to 2005. Lower income economies receive a greater share of their investment from FDI, although they receive less foreign investment overall due to smaller portfolio flows.

FDI has made up only a small share of investment in APEC economies over the past few years. FDI inflows, which measure the change in the holdings of direct investments by foreigners, were only 5 per cent of total investment in APEC economies in 2005. It has been a more important source of financing for both APEC and the rest of the world in previous years (chart 3). FDI inflows have started to rise again, since the trough in 2003. This is reflective of global trends in FDI and capital movement. World capital movements have doubled as a per cent of world GDP since 1997 (Battellino 2006).

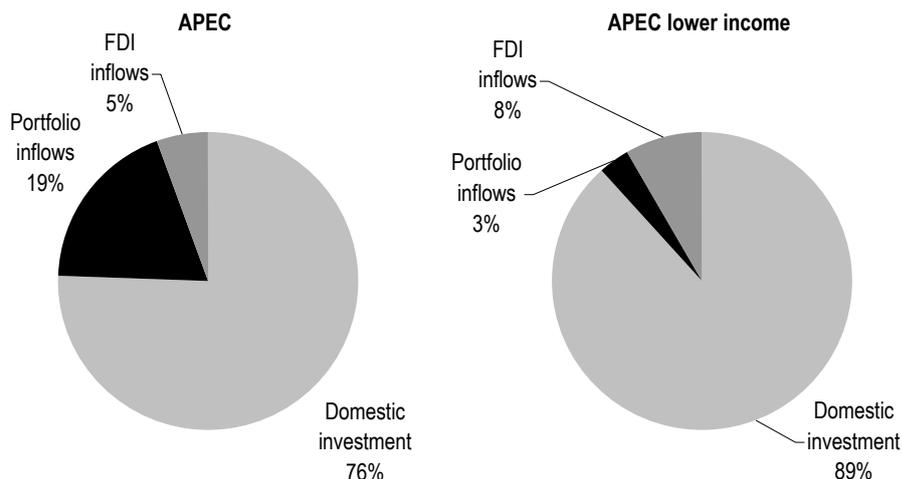
**Chart 1** Gross fixed capital formation in APEC



Data source: UNCTAD and CIE calculations

Aggregate FDI inflows and outflows are set out in Annexes 1 and 2, respectively. They provide data for 1992-2005 (almost the whole life of APEC) and detail the performance of each APEC member economy, APEC as a whole and that of APEC’s low income economies.

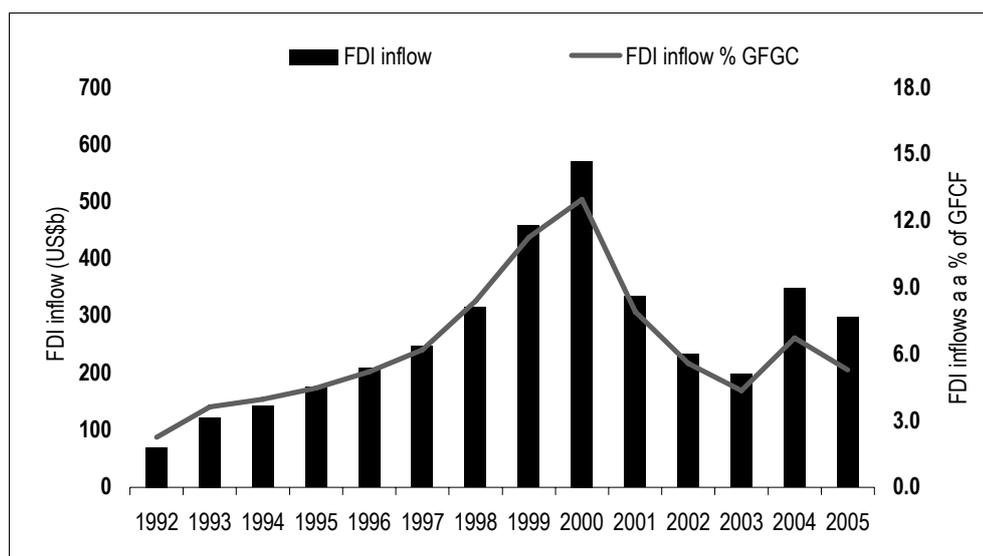
**Chart 2** Composition of investment in APEC (average 2002 to 2005)



Note: APEC lower income economies are those classified as low income or lower-middle income by the World Bank (China, Indonesia, Papua New Guinea, Peru, Philippines, Thailand and Vietnam). The UNCTAD data is averaged over 2003-05 and the IMF data over 2002-04 but the margin of error is minimal.

Data source: UNCTAD (2006), IMF (2005) and CIE calculations.

**Chart 3** FDI inflows into APEC economies



Note: This is FDI inflow into APEC economies rather than into the APEC region.

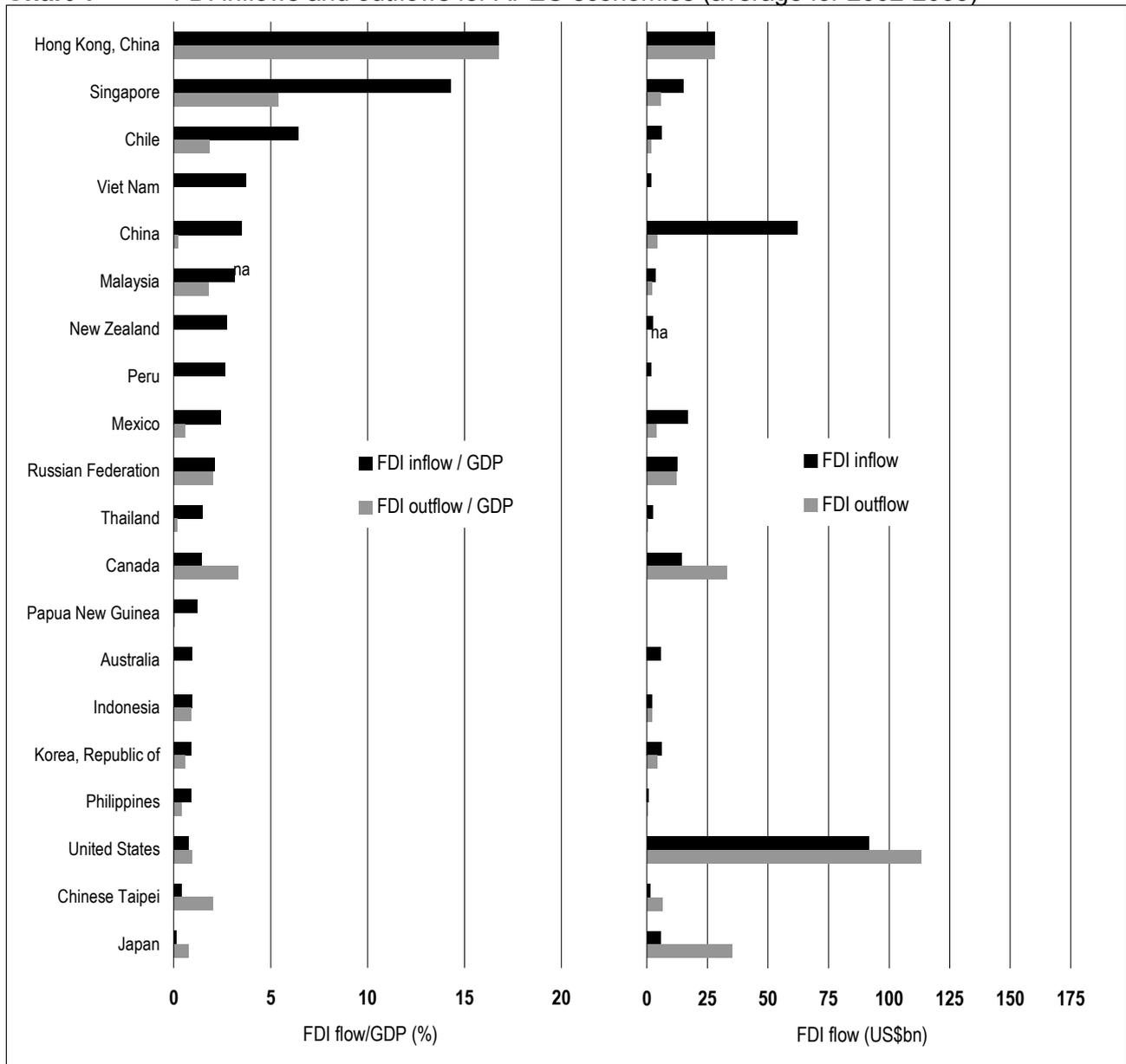
Source: UNCTAD (2006).

FDI flows have not been uniform across APEC economies. The largest flows from 2002 to 2005 were to the United States and China, due to the large size of their economies (chart 4).<sup>1</sup> The United States, Japan and Canada are the largest sources of FDI, of the APEC economies.

FDI inflows and outflows were highest as a share of GDP in Singapore and Hong Kong. This is a data issue related to the status of these economies as financial centres. The transfer of investment through these economies leads to substantial over-statement of FDI flows. Chile, Australia and China all attract significant FDI inflows relative to the size of their economies.

<sup>1</sup> However, there are concerns about the quality of data for China. Inflows as reported by China are often significantly different to outflows to China reported by other economies. See UNCTAD 2006 for more information.

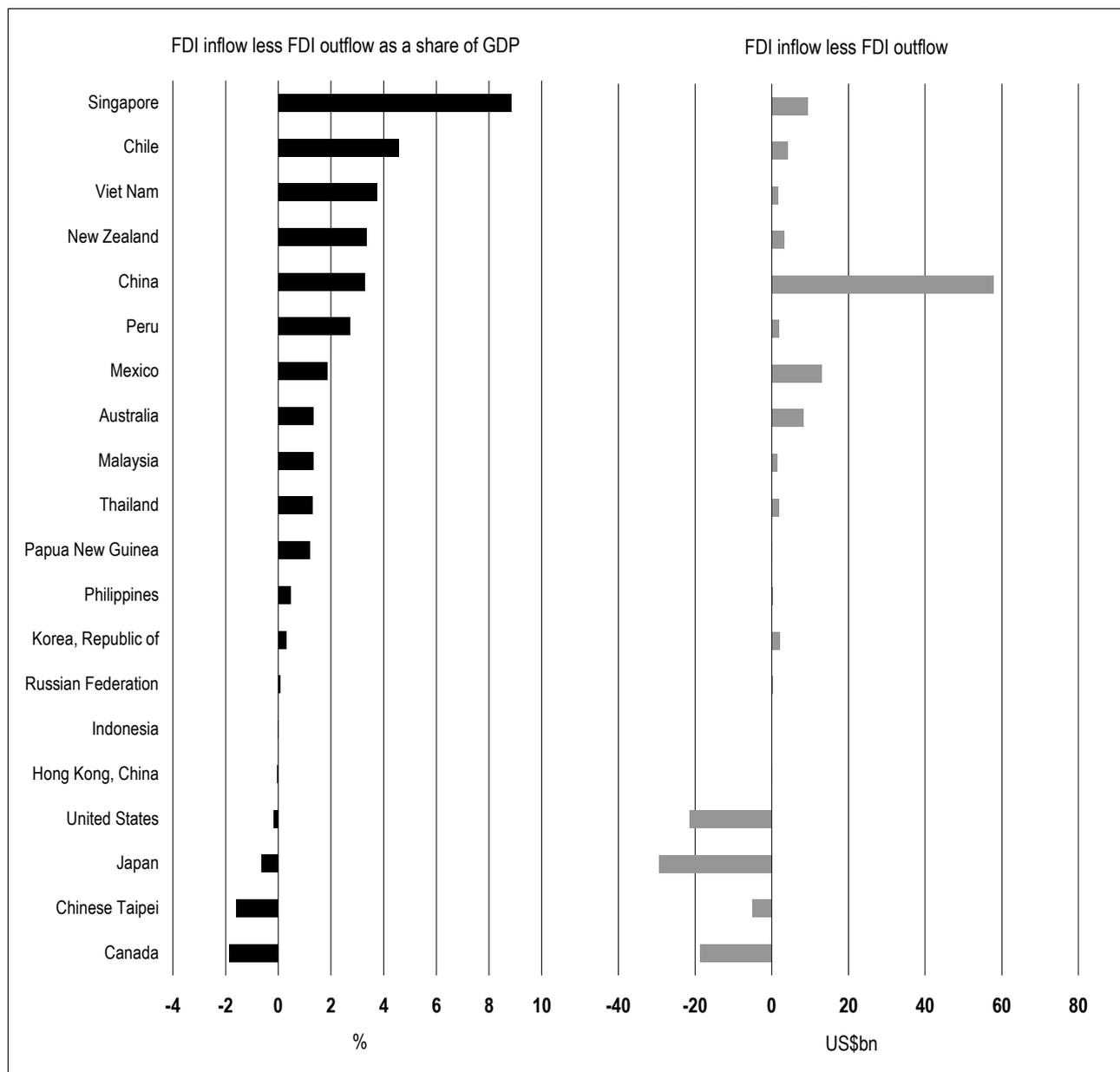
**Chart 4** FDI inflows and outflows for APEC economies (average for 2002-2005)



Data source: UNCTAD (2006)

Chile is the largest net importer of FDI relative to the size of its economy, with FDI inflows less FDI inflows surpassing 4 per cent of GDP (chart 5). In dollar terms, China is the greatest net FDI importer and the US the greatest net source of FDI.

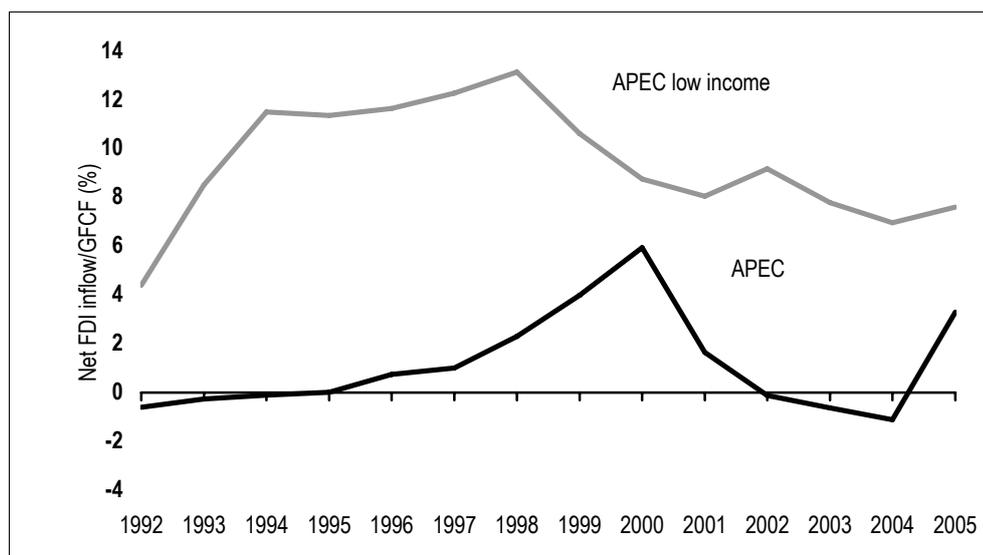
**Chart 5** FDI inflow less FDI outflow for APEC economies (2002-2005)



Data source: UNCTAD (2006)

In 2004, the APEC region as a whole was a net FDI donor with more FDI flowing out of the region than was coming into the region (chart 6). However, this trend reversed in 2005. Within APEC, FDI flows typically move from developed economies to developing economies (chart 6). This is what economic theory would suggest, with lower-income economies potentially having many more profitable investment opportunities and a higher expected marginal product of capital.

**Chart 6** FDI inflows less FDI outflows for APEC economies



Source: UNCTAD (2006).

However, across all types of capital flows (including portfolio investment), investment is actually moving out of developing APEC economies and into developed APEC economies, particularly the US. This is reflected in capital account surpluses of many developing APEC economies and capital account deficits for rich economies such as the US, Australia and New Zealand. Many APEC developing economies are saving more than they invest domestically. The driver of capital movement to rich economies is government and central bank buying of US securities.

Ideally, FDI data would allow us to measure bilateral relationships with precision and determine the sectors into which FDI is flowing. Such data do exist for some economies but not all. Data issues, which also exist for overall FDI data, become more of a constraint at this disaggregated level (see UNCTAD 2006a).

The FDI data that does exist by source/destination and industry suggests that the about 40 per cent of inflows into APEC economies are from other APEC economies. More than 50 per cent of FDI is in services sectors and about 40 per cent in manufacturing. Only a small share of FDI is in primary industries. Note that these estimates only cover a selection of APEC economies for which data is available.

## References

Battellino, R. (2006), *Regional Capital Flows*, Talk to 6<sup>th</sup> APEC Future Economic Leaders Think Tank, 28 June.

IMF (2006), *Coordinated Portfolio Investment Survey*, IMF website.

UNCTAD (2006), *World Investment Report 2006: Statistical Annex Tables*, New York and Geneva.

UNCTAD (2006a), 'Better Data Needed to Assess FDI Impact', *UNCTAD Investment Brief*, No. 2, 2006.

**ANNEX 1. APEC INWARD FDI FLOWS, 1992-2005 (US\$ 000,000S)**

ECONOMY / REGION	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
AUSTRALIA	5 729	4 285	5 033	11 970	6 109	7 657	6 015	3 269	14 019	8 314	17 698	9 722	42 390	- 34 547
BRUNEI DARUSSALAM	7	8	6	583	654	702	573	748	549	526	1 035	3 375	212	275
CANADA	4 724	4 732	8 204	9 255	9 634	11 527	22 809	24 743	66 791	27 663	22 156	7 615	1 533	33 822
CHILE	999	1 734	2 521	3 041	4 815	5 271	4 628	8 761	4 860	4 200	2 550	4 307	7 173	6 667
CHINA	11 008	27 515	33 767	37 521	41 726	45 257	45 463	40 319	40 715	46 878	52 743	53 505	60 630	72 406
HONG KONG, CHINA	3 887	6 930	7 828	6 213	10 460	11 368	14 765	24 578	61 924	23 777	9 682	13 624	34 032	35 897
INDONESIA	1 770	2 003	2 108	4 346	6 194	4 678	- 241	- 1 865	- 4 550	- 2 978	145	- 597	1 896	5 260
JAPAN	2 756	210	888	42	228	3 224	3 192	12 741	8 323	6 241	9 239	6 324	7 816	2 775
KOREA, REPUBLIC OF	567	546	795	1 247	2 012	2 641	5 068	9 631	8 651	3 866	3 043	3 892	7 727	7 198
MALAYSIA	5 138	5 741	4 581	5 815	7 297	6 323	2 714	3 895	3 788	554	3 203	2 473	4 624	3 967
MEXICO	4 393	4 389	10 973	9 526	9 185	12 830	12 409	13 631	17 588	27 151	18 275	14 184	18 674	18 055
NEW ZEALAND	2 095	2 350	2 543	3 659	2 231	2 624	1 191	1 412	3 863	820	1 755	3 695	2 580	1 603
PAPUA NEW GUINEA	134	158	179	595	654	88	110	296	96	63	18	101	26	32
PERU	- 79	761	3 289	2 557	3 471	2 139	1 644	1 940	810	1 144	2 156	1 335	1 599	2 579
PHILIPPINES	776	1 238	1 591	1 459	1 520	1 249	1 752	1 247	2 240	195	1 542	491	688	1 132
RUSSIAN FEDERATION	1 161	1 211	690	2 066	2 579	4 865	2 761	3 309	2 714	2 748	3 461	7 958	15 444	14 600
SINGAPORE	2 204	4 686	8 550	11 535	9 682	13 753	7 314	16 578	16 484	15 649	7 338	10 376	14 820	20 083
CHINESE TAIPEI	879	917	1 375	1 559	1 864	2 248	222	2 926	4 928	4 109	1 445	453	1 898	1 625
THAILAND	2 151	1 807	1 369	2 070	2 338	3 882	7 492	6 091	3 350	3 886	947	1 952	1 414	3 687
UNITED STATES	19 222	50 663	45 095	58 772	84 455	103 398	174 434	283 376	314 007	159 461	74 457	53 146	122 377	99 443
VIET NAM	474	926	1 945	1 780	1 803	2 587	1 700	1 484	1 289	1 300	1 200	1 450	1 610	2 020
APEC	69 995	122 810	143 329	175 610	208 911	248 310	316 014	459 111	572 438	335 566	234 089	199 382	349 163	298 579
APEC LOW INCOME	16 233	34 408	44 247	50 328	57 706	59 880	57 919	49 512	43 949	50 487	58 751	58 237	67 863	87 116

**ANNEX 2. APEC OUTWARD FDI FLOWS 1992-2005 (US\$ 000,000S)**

ECONOMY / REGION	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
AUSTRALIA	5 276	1 949	2 821	3 284	7 086	6 448	3 352	- 421	3 174	11 986	8 045	15 602	17 995	- 40 946
BRUNEI DARUSSALAM	185	19	67	43	100	3	- 16	12	20	9	24	76	4	..
CANADA	3 591	5 702	9 294	11 462	13 096	23 069	34 358	17 247	44 675	36 028	26 773	21 516	43 254	34 083
CHILE	398	434	911	752	1 133	1 463	1 483	2 558	3 987	1 610	343	1 606	1 527	2 146
CHINA	4 000	4 400	2 000	2 000	2 114	2 562	2 634	1 774	916	6 885	2 518	- 152	1 805	11 306
HONG KONG, CHINA	8 254	17 713	21 437	25 000	26 531	24 407	16 985	19 369	59 352	11 345	17 463	5 492	45 716	32 560
INDONESIA	714	481	3 283	1 319	600	178	44	72	150	125	182	15	3 408	3 065
JAPAN	17 304	13 913	18 121	22 630	23 428	25 993	24 152	22 743	31 558	38 333	32 281	28 800	30 951	45 781
KOREA, REPUBLIC OF	1 162	1 340	2 461	3 552	4 670	4 449	4 740	4 198	4 999	2 420	2 617	3 426	4 658	4 312
MALAYSIA	115	1 063	2 329	2 488	3 768	2 675	863	1 422	2 026	267	1 905	1 370	2 061	2 971
MEXICO	647	- 110	1 058	- 263	38	1 108	1 363	1 901	363	4 404	891	1 253	4 432	6 171
NEW ZEALAND	- 806	1 276	1 725	- 337	- 1 533	- 45	928	803	752	- 1 078	394	516	- 906	- 1 300
PAPUA NEW GUINEA	182	4	1	- 22	28	99	- 78	1	- 1	55	- 1	- 3	0	6
PERU	0	- 13	0	8	- 17	85	62	128	- 146	74	0	60	- 215	60
PHILIPPINES	101	374	302	98	182	136	160	133	125	- 140	65	303	579	162
RUSSIAN FEDERATION	1 566	1 022	281	606	923	3 184	1 270	2 208	3 177	2 533	3 533	9 727	13 782	13 126
SINGAPORE	1 317	2 152	4 577	6 787	7 951	10 904	2 165	8 002	5 915	20 168	2 287	3 143	8 512	5 519
CHINESE TAIPEI	1 967	2 611	2 640	2 983	3 843	5 243	3 836	4 420	6 701	5 480	4 886	5 682	7 145	6 028
THAILAND	146	234	494	887	932	584	132	349	- 22	346	106	486	125	246
UNITED STATES	42 647	77 247	73 252	92 074	84 426	95 769	131 004	209 391	142 626	124 873	134 946	129 352	222 437	- 12 714
VIET NAM	-	-	-	-	-	-	-	-	-	-	-	-	-	-
APEC	88 766	131 811	147 053	175 351	179 299	208 313	229 437	296 311	310 347	265 724	239 256	228 269	407 271	112 583
APEC LOW INCOME	5 143	5 480	6 080	4 290	3 839	3 645	2 954	2 457	1 022	7 346	2 870	709	5 702	14 845



# INVESTMENT AGREEMENTS IN THE APEC REGION

## Systemic Issues in International Investment Agreements (IIAs)

International investment agreements (IIAs) have proliferated at the bilateral, regional and interregional levels over the past decade. By the end of 2005, the total number of IIAs exceeded 5,200.<sup>2</sup> The evolving system of international investment rules contributes further to the enabling framework for FDI. At the same time, the increasingly complex multilayered and multifaceted universe of IIAs is becoming more demanding, particularly in order to keep it coherent, to ensure its effective functioning and to make it conducive for national development objectives.

International investment rules are increasingly being adopted as part of bilateral, regional, interregional and plurilateral agreements which address and seek to facilitate trade and investment transactions. These agreements cover a range of trade liberalization and promotion provisions, and also contain commitments to liberalize, protect and/or promote investment flows between the parties. They also often address investment-related issues such as IPR, competition, services and the movement of labour. The proliferation of IIAs in recent years is one of the key developments in international economic relations which have arisen in response to the increasing global competition facing national economies as they seek resources and markets.

As a result of these developments, foreign investors and countries have to operate within an increasingly complicated framework of multi-layered and multi-faceted investment rules, which may contain overlapping or even inconsistent provisions. While the number of BITs continues to expand, albeit at a slower pace than previous years, the momentum is shifting to Preferential Trade and Investment Agreements (PTIAs). These are sometimes called regional trade agreements (RTAs) or free trade agreements (FTAs). PTIAs feature a structure and approach to investment issues not found in earlier agreements. Even similar types of agreements may exhibit important differences. PTIAs increasingly encompass a broader range of issues, and their investment provisions tend to be increasingly sophisticated.

## Bilateral Investment Treaties (BITs)

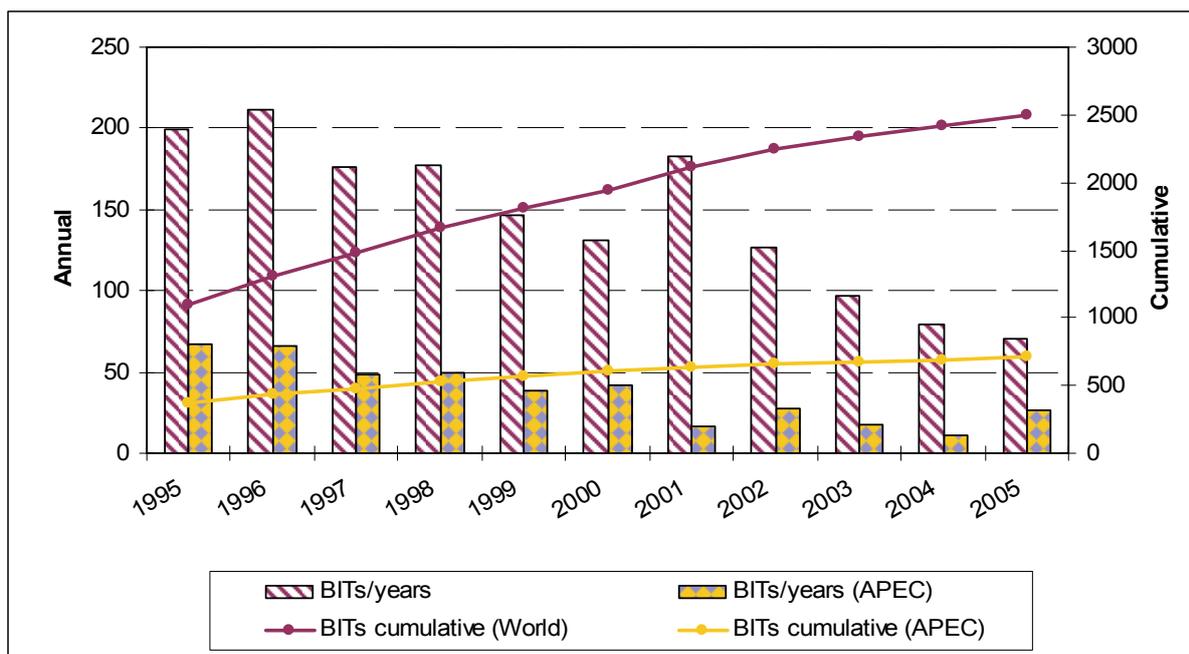
During 2005, 70 new BITs were concluded, bringing the total number of BITs to a new peak of 2,495 (Figure 1). At the same time, the slowdown in the number of BITs concluded annually continued for the fourth consecutive year. Forty-five of the 70 BITs involved developed countries. The participation of developing countries in the network of BITs continued to increase, as they were involved in 60 of the 70 new agreements. Twenty of these BITs were concluded between developing countries. Annex 1 lists the number of BITs concluded by APEC economies, and the number concluded between APEC economies at end 2005.

The largest number of BITs continues to be concluded between developed and developing countries. While earlier agreements almost exclusively fell into this category, a growing number of BITs now involve two developing countries. In the last five years, the share of such agreements almost doubled (from 14% to 27%). The overwhelming majority of BITs continues to be those that establish binding obligations for the contracting parties only in respect of the post-establishment phase.

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<sup>2</sup> *Source:* UNCTAD. The IIAs universe is composed of bilateral treaties for the promotion and protection of investment (or bilateral investment treaties [BITs]), treaties for the avoidance of double taxation (or double taxation treaties [DTAs]), other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment.

**Figure 1. Number of BITs concluded, cumulative and year by year, 1990 – end 2005**



Data source: UNCTAD (2006 statistics not available at this point)

Of the 2,495 BITs concluded until the end of 2005, 1,891 (i.e. 75.8 %) had entered into force. As BITs aim to provide foreign investors with enforceable rights in their host countries, the distinction between the conclusion of an agreement and its entry into force is important. This is most obvious with regard to the legal rights and obligations deriving from it.

The Investment Protection section of each of the APEC Member Economies' contributions to the *Investment Guidebook* aims to address issues that are likely to be covered by BITs. These include conversion, repatriation and transfers (including any balance of payments safeguards); expropriation and compensation; IPR; and dispute settlement.

### Preferential Trade and Investment Agreements (PTIAs)

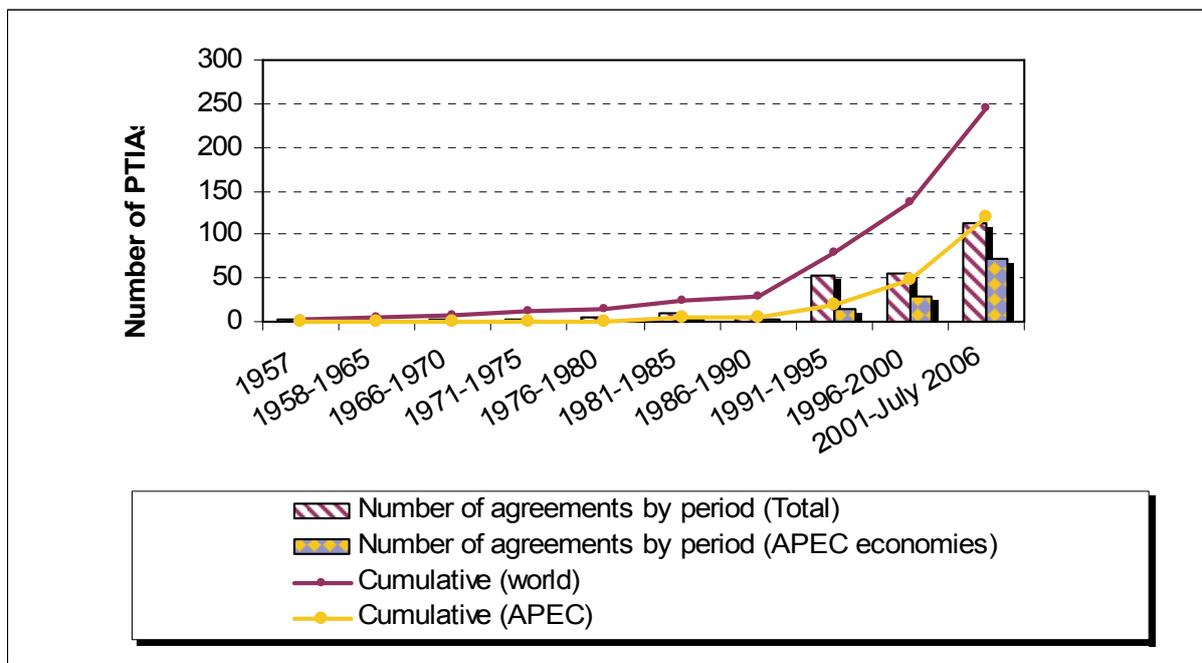
The proliferation of PTIAs continued in 2005.<sup>3</sup> The increase in PTIAs partly reflects the political will of a growing number of countries for closer economic cooperation. They may therefore prefer a comprehensive treaty covering trade and investment (and potentially also other areas) simultaneously. From the perspective of investment promotion, potential host countries might also see the protection provisions within a broader legal framework as a way to increase their attractiveness to potential investors.

During 2005, fourteen new PTIAs were concluded involving 28 countries, bringing the total number of these agreements to 232 as of end 2005 (Figure 2). Among the developing regions, Asian countries were the most active with 38% of the total PTIAs concluded at the end of 2005, followed by Latin America with 26%. Altogether, developing countries were parties to 79% of the PTIA network, while developed countries were involved in 54% of the agreements. South-South PTIAs have also increased to reach 86 agreements at the end of 2005. While the total number of

<sup>3</sup> These agreements appear under a variety of names, often but not exclusively as regional trade agreements (RTAs) and free trade agreements (FTAs). They also manifest as closer economic partnership agreements (EPAs), regional economic integration agreements or framework agreements on economic cooperation.

PTIAs is still small compared to the number of BITs (less than 10%), they almost doubled during the past five years. In addition, as of 1 July 2006, at least 67 agreements were under negotiation involving 106 countries. This suggests an even more pronounced increase in such treaties in the near future. Annexes 2 and 3 list, respectively, the intra-APEC PTIAs concluded, and those either announced or where negotiations have commenced by end 2006.

**Figure 2. Number of PTIAs concluded, cumulative and by period, 1957 - July 2006**



Data source: UNCTAD.

Besides trade and investment, PTIAs may also cover services, intellectual property, competition, labour, environment, government procurement, the temporary entry for business persons, and transparency issues, amongst others. This broad coverage demonstrates a trend towards an integrated approach in dealing with interrelated issues in international investment rulemaking.

The ‘Screening of Foreign Investment’ and ‘Sector-specific Laws and Policies’ sections of each of the APEC Member Economies’ contributions to the *Investment Guidebook* aim to address issues that are likely to be covered by PTIAs. These include pre- or post-establishment screening/review/notification mechanisms (including a description of their transparency and a summary of relevant laws/regulations and policies pertaining to investment); and the more specific laws/regulations and policies that affect the establishment, expansion or operation of foreign investment.

## Some Implications

The greater number and diversity of IIAs in terms of their scope, structure and content reflects the flexibility that countries would like to have in choosing the partners to enter into an agreement, and to tailor individual agreements to their specific situations, development objectives and public concerns. Furthermore, more elaborate rules may enhance legal clarity on the rights and obligations. Multiple coverage under more than one IIA may also contribute effect and filling possible gaps in the overall treatment of foreign investment.

On the other hand, the growing diversity of the IIA universe poses new challenges for keeping it coherent. One potential risk in this respect is the emergence of BITs with more detailed provisions on certain protection clauses. Although these clauses are only meant to clarify the content of the treaties and do not therefore intend to introduce substantive amendments, they nevertheless may have a decisive impact on the interpretation of these provisions by arbitration tribunals. As a result, courts might arrive at different conclusions with regard to basically the same legal issues, depending on whether the BIT contains an interpretative statement or not. The risk of incoherence is especially high for developing countries that lack expertise and bargaining power in investment rulemaking. They may have to conduct negotiations on the basis of divergent model agreements of their negotiating partners.

Coherence may also be at stake between the more protection-oriented BITs, on the one hand, and the more liberalization-oriented PTIAs, on the other hand. While both types of agreements ideally complement each other, they often overlap, resulting in the risk of inconsistencies. There is also the broader question of how the relationship between BITs and PTIAs will develop in the long-run.

## References

United Nations Conference on Trade and Development (UNCTAD) (2006). “Developments in international investment agreements in 2005”, *IIA Monitor No. 2* ([http://www.unctad.org/en/docs/webiteia20067\\_en.pdf](http://www.unctad.org/en/docs/webiteia20067_en.pdf)).

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\_\_\_\_\_ (2006). “Systemic issues in international investment agreements”, *IIA Monitor No. 1* ([http://www.unctad.org/en/docs/webiteia20062\\_en.pdf](http://www.unctad.org/en/docs/webiteia20062_en.pdf))

**Annex 1. Number of BITs concluded by APEC economies, end 2005**

(Excluding FTAs with investment chapters. At this juncture, 2006 statistics are not available.)

<b>APEC Economy</b>	<b>Number of BITS Concluded</b>	<b>Number of BITS Concluded with other APEC Economies</b>
<b>China</b>	<b>117</b>	<b>15</b>
<b>Korea</b>	<b>80</b>	<b>13</b>
<b>Malaysia</b>	<b>66</b>	<b>8</b>
<b>Indonesia</b>	<b>59</b>	<b>9</b>
<b>Russia</b>	<b>53</b>	<b>8</b>
<b>Chile</b>	<b>51</b>	<b>9</b>
<b>Viet Nam</b>	<b>49</b>	<b>12</b>
<b>United States</b>	<b>48</b>	<b>1</b>
<b>Thailand</b>	<b>39</b>	<b>10</b>
<b>Philippines</b>	<b>35</b>	<b>10</b>
<b>Peru</b>	<b>30</b>	<b>7</b>
<b>Singapore</b>	<b>28</b>	<b>6</b>
<b>Canada</b>	<b>25</b>	<b>3</b>
<b>Australia</b>	<b>23</b>	<b>9</b>
<b>Mexico</b>	<b>21</b>	<b>2</b>
<b>Chinese Taipei</b>	<b>19</b>	<b>5</b>
<b>Hong Kong, China</b>	<b>15</b>	<b>5</b>
<b>Japan</b>	<b>11</b>	<b>5</b>
<b>Brunei Darussalam</b>	<b>5</b>	<b>3</b>
<b>Papua New Guinea</b>	<b>5</b>	<b>3</b>
<b>New Zealand</b>	<b>4</b>	<b>3</b>

## **Annex 2. Intra-APEC<sup>4</sup> PTIAs concluded by end 2006**

Australia-New Zealand

Australia-Singapore

Australia-Thailand

Australia-United States

Canada-Chile

China-Chile

China-Hong Kong

Japan-Malaysia

Japan-Mexico

Japan-Philippines

Japan-Singapore

Korea-Chile

Korea-Singapore

Mexico-Chile

North American FTA (NAFTA)

New Zealand-Singapore

New Zealand-Thailand

Peru-Chile

Peru-Mexico

Peru-United States

Papua New Guinea-Australia

Trans-Pacific Strategic Economic Partnership Agreement

United States-Singapore

United States-Chile

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<sup>4</sup> The definition of 'Intra-APEC' used here excludes any agreement that involves economies that are not APEC members but are members of regional groupings (such as ASEAN) where the majority of members belong to APEC.

**Annex 3. Intra-APEC PTIAs either announced or where negotiations have commenced by end 2006**

Australia-Malaysia

Chile-Australia

Chile-Thailand

China-Australia

China-New Zealand

Japan-Australia

Japan-Brunei

Japan-Chile

Japan-Indonesia

Japan-Viet Nam

Korea-Canada

Korea-Japan

Korea-Mexico

Peru-Mexico

Singapore-Canada

Singapore-Mexico

Singapore-Peru

Thailand-Japan

United States-Indonesia

United States-Korea

United States-Malaysia

United States-Thailand



## AUSTRALIA

### Acronyms

ABTC	APEC Business Travel Card
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
APRA	Australian Prudential Regulation Authority
AUSFTA	Australia-United States Free Trade Agreement
ETA	Electronic Travel Authority
FATA	<i>Foreign Acquisitions and Takeovers Act (1975)</i>
FIRB	Foreign Investment Review Board
FSSA	<i>Financial Sector (Shareholdings) Act (1998)</i>
PTIS	Pay-Roll Tax Incentive Scheme
QLD	Queensland
RDBS	Regional Business Development Scheme
VIPP	Victorian Industry Participation Policy
WA	Western Australia

## INTRODUCTION

The Australian Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests. In recognition of the contribution that foreign investment has made and continues to make to the development of Australia, the general stance of policy is to welcome foreign investment. Foreign investment provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

Australia recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy (the policy) is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

The policy provides the framework for Australian Government scrutiny of proposed foreign purchases of Australian businesses and real estate. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) to block those proposals subject to the FATA which would result in a foreign person acquiring control of an Australian corporation or business or an interest in real estate where this is determined to be contrary to the national interest. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* provide monetary thresholds below which the relevant FATA provisions do not apply, and separate thresholds for acquisitions by US investors.<sup>5</sup> For a summary of all monetary thresholds see [http://www.firb.gov.au/content/monetary\\_thresholds.asp](http://www.firb.gov.au/content/monetary_thresholds.asp) The FATA also provides a legislative mechanism for ensuring compliance with the policy.

In the majority of industry sectors, smaller proposals are exempt from the FATA or notification under the policy and larger proposals are approved unless determined to be contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board (the Board) enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase real estate. In this way the Government is able to encourage foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

By far the largest number of foreign investment proposals involves the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate increases the supply of dwellings and is not speculative in nature. The policy seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (that is, new developments such as house and land, home units and townhouses) and brings benefits to the local building industry and its suppliers.

The effect of the more restrictive policy measures on developed residential real estate is twofold. Firstly, it helps reduce the possibility of excess demand building up in the existing housing market. Secondly, it aims to encourage the supply of new dwellings, many of which would become

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<sup>5</sup> Under the Australia-United States Free Trade Agreement (AUSFTA) which came into effect on 1 January 2005.

available to Australian residents, either for purchase or rent. The cumulative effect should be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

**A detailed chronology of liberalisation** of Australia's foreign investment restrictions is at <http://www.firb.gov.au/content/Publications/AnnualReports/2003-2004/AppendixC.asp>

Changes since 1995 also appear in Australia's Individual Action Plans at [http://www.apec-iap.org/default.asp?pid=/search/fuzzy\\_search](http://www.apec-iap.org/default.asp?pid=/search/fuzzy_search)

## SCREENING OF FOREIGN INVESTMENT

### (i) What is screened?

Australia maintains a pre-establishment foreign investment screening process to ensure that foreign investments in Australia are not contrary to the national interest. Responsibility for Australia's foreign investment policy rests with the Australian Government. Australia's foreign investment policy is comprised of the FATA, regulations made under this Act, Ministerial policy statements, and sector or company specific legislation.

An advisory body, the Foreign Investment Review Board (FIRB) examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the Australian Government on whether those proposals are suitable for approval. Under Australia's foreign investment policy, the types of investment proposals by foreign interests that require prior notification and approval from the Australian Government are as follows<sup>6</sup>:

- acquisitions of substantial interests in an Australian business where the value of its gross assets, or the proposal values it above, \$100 million.<sup>7</sup> For US investors<sup>8</sup> different exemption thresholds apply:<sup>9</sup> \$100 million<sup>10</sup> for investments in prescribed sensitive sectors<sup>11</sup> or by an entity controlled by a US government, or \$871 million<sup>12</sup> in any other case;
- proposals to establish new businesses involving a total investment of \$10 million or more require prior approval. Proposals by US investors, except an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements;
- portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;
- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed \$200 million<sup>13</sup> and represent less than 50 per cent of global assets. For US investors the \$871 million threshold applies, except for offshore takeovers involving prescribed sensitive sectors or an entity controlled by a US government, where a \$200 million threshold applies;

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<sup>6</sup> Note that increased screening thresholds apply for US investors.

<sup>7</sup> \$50 million prior to December 2006.

<sup>8</sup> The FATA does not apply to investments by US investors in those financial sector entities which are subject to the operation of the *Financial Sector (Shareholdings) Act 1998*.

<sup>9</sup> The US thresholds are subject to annual indexation.

<sup>10</sup> \$52 million during the calendar year 2006.

<sup>11</sup> The AUSFTA prescribed sensitive sectors are set out in Attachment B.

<sup>12</sup> \$831 million during the calendar year 2006.

<sup>13</sup> \$50 million prior to December 2006.

- direct investments by foreign governments and their agencies irrespective of size;
- acquisitions of interests in Australian urban land<sup>14</sup> (including interests that arise via leases, financing and profit sharing arrangements) that involve:
  - developed non-residential commercial real estate, where the property is subject to heritage listing, valued at \$5 million or more and the acquirer is not a US investor;
  - developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at \$50 million or more, or \$871 million for US investors;
  - accommodation facilities irrespective of value;
  - vacant real estate irrespective of value;
  - residential real estate irrespective of value; or
  - shares or units in Australian urban land corporations or trust estates, irrespective of value.
- proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.)

*A **substantial interest** occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of a corporation, business or trust.*

*A ‘**US investor**’ is a national or permanent resident of the United States of America; a US enterprise;<sup>15</sup> or a branch of an entity located in the United States of America and carrying on business activities there.<sup>16</sup>*

Australia’s foreign investment policy operates under the presumption that foreign investment proposals are generally in the national interest and should go ahead. However, where the Treasurer considers the matter is ‘contrary to the national interest’, he may reject applications to control an Australian business or acquire an interest in urban land under the provisions of the FATA. The Act also provides legislative backing for ensuring compliance with policy.

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<sup>14</sup> **Urban land** is defined as all land situated in Australia other than rural land. Rural land is land that is used wholly and exclusively for carrying on a substantial business of primary production. Further details of the urban land policy are provided in the document *Foreign Investment Policy - Urban Land (real estate)*, available on the website at [www.firb.gov.au](http://www.firb.gov.au).

<sup>15</sup> A US enterprise is an entity constituted or organised under a law of the United States. The form in which the entity may be constituted or organised may be, but is not limited to a corporation, a trust, a partnership, a sole proprietorship, and a joint venture.

<sup>16</sup> A branch may be ‘carrying on business activities in the United States of America’ where it is doing so in a way other than being solely a representative office; and in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and by having its administration in the United States of America.

(ii) Transparency of the screening process

The Government seeks to ensure that proposals are dealt with quickly and efficiently. The time taken from the filing of a proposal to a decision varies, depending on the nature of the proposal and the contents of the submission. However, the majority of proposals are considered and a decision reached by the Government within 30 days of lodgement. While the legislation provides for a period of 30 days by which time a decision must be taken by the Treasurer, many proposals are completed before the expiry of 30 days.

In 2005-06, 92 per cent of proposals were decided within 30 days. Most real estate cases, representing the majority of proposals received, were decided within two weeks. For those proposals that took more than 30 days to decide, this generally reflected delays in receiving sufficient information from the parties or because the application involved significant complexity or sensitivity.

In 2005-06, 5,781 applications for foreign investment approval were considered, comprising 5,186 approved, 37 rejected and 373 withdrawn by the parties with the remaining 185 determined as exempt or not subject to the policy or the FATA. This compares with 4,360 the previous year, representing an increase of 19 per cent. The majority of this increase occurred in the real estate sector, with 4,755 approvals (20 per cent higher than the 3,949 approvals in 2004-05). There were 431 proposals approved in other sectors in 2005-06 compared with 411 in 2004-05, an increase of 5 per cent.

In 2005-06, 25 proposals were rejected by the way of a Final Order, compared with 55 in 2004-05. Five Divestiture Orders (six in 2004-05) required foreign persons to dispose of their interests. All Final and Divestiture Orders related to proposals involving residential real estate. There were 61 Interim Orders (65 in 2004-05), extending the 30-day statutory decision-making period by up to a further 90 days.

Approvals in 2005-06 involved proposed investment of \$85.8 billion. This represented a 28 per cent decrease on the previous year's approvals of \$119.5 billion (60 per cent of this decrease was attributable to the 2004-05 figures including two large proposals for a single target company).

The services sector was the largest industry sector by value, with investment approvals in 2005-06 of \$27.1 billion (compared with \$30.5 billion in 2004-05). The other major sectors were: mineral exploration and development, with investment approvals of \$19.7 billion (\$33.5 billion in 2004-05); real estate, with approved investment proposals valued at \$16.2 billion (\$20.9 billion in 2004-05); and manufacturing, with approvals of \$13.7 billion (\$22.1 billion in 2004-05).

The United States of America was again the largest source country for foreign investment in 2005-06, involving proposed investment of \$23.4 billion representing 27 per cent of total approved proposals. Switzerland, China, the United Kingdom and Germany were the other major sources of proposed investment approved during 2005-06, accounting for 17 per cent, 8 per cent, 8 per cent and 5 per cent, respectively.

The application forms to lodge proposed investments are available on the Internet [http://www.firb.gov.au/content/application\\_form.asp?NavID=46](http://www.firb.gov.au/content/application_form.asp?NavID=46) and investors are able to meet with government officials to discuss foreign investment policy and its application to specific proposals. Contact information is also on the website <http://www.firb.gov.au/content/contact.asp?NavID=16>

(iii) Who should apply?

The policy applies to such acquisitions by foreign persons. A foreign person is defined as:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

For further information see <http://www.firb.gov.au>

(iv) AUSFTA

For US investors subject to the AUSFTA, the prescribed sensitive sectors are:

- media;
- telecommunications;
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia);
- the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

Acquisitions in these sectors are subject to different thresholds under the FATA.

For further information see:

Australia's foreign investment policy summaries

<http://www.firb.gov.au/content/policy.asp?NavID=1>

*Foreign Acquisitions and Takeovers Act 1975*

<http://www.comlaw.gov.au/ComLaw/Management.nsf/current/bytitle/BB037DB35BC3396CCA256F710006F1D7?OpenDocument&mostrecent=1>

*Foreign Acquisitions and Takeovers Regulations 1989*

<http://www.comlaw.gov.au/ComLaw/Management.nsf/current/bytitle/6650A5A69073BDF8CA256F710006B363?OpenDocument&mostrecent=1>

## SECTOR-SPECIFIC LAWS AND POLICIES

### (A) FEDERAL GOVERNMENT MEASURES

#### (i) Banking

Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* (FSSA) and banking policy, including prudential requirements. Any proposed foreign takeover or acquisition of an Australian bank will be

The Government will permit the issue of new banking authorities to foreign owned banks where the Australian Prudential Regulation Authority (APRA) is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with APRA's prudential supervision arrangements.

Further information is at [www.apra.gov.au](http://www.apra.gov.au)

#### (ii) Civil Aviation

##### *Domestic Services*

Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100 per cent of the equity in an Australian domestic airline (other than Qantas), unless this is contrary to the national interest.

##### *International Services*

Foreign persons (including foreign airlines) can generally expect approval to acquire up to 49 per cent of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

(iii) Airports

Foreign investment proposals for acquisitions of interests in Australian airports are subject to case-by-case examination in accordance with the standard notification requirements. In relation to the airports leased by the Commonwealth, the *Airports Act 1996* stipulates a 49% foreign ownership limit, a 5% airline ownership limit and a 15% limit on the cross ownership of Sydney (Kingsford Smith) / Melbourne, Sydney (Kingsford Smith) / Brisbane and Sydney (Kingsford Smith) / Perth airports. Moreover the owners of Sydney (Kingsford Smith) Airport are precluded by their share sale agreement (entered into in June 2002) from acquiring more than a 15% stake in the airport operator companies for the other Sydney Basin Airports (Bankstown, Hoxton Park and Camden) for a period of five years. From June 2007, the owners of Sydney (Kingsford Smith) Airport are precluded by their share sale agreement from acquiring more than a 15% stake in the airport operator companies for the other Sydney Basin Airports (Bankstown, Hoxton Park and Camden) without prior notification to the Australian Competition and Consumer Commission.

(iv) Shipping

The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (that is, owned by an Australian citizen, a body corporate established by or under law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

(v) Media

The requirements that previously applied to broadcasting and newspapers were removed following proclamation of the *Broadcasting Services Amendment (Media Ownership) Act 2006* which came into effect on 4 April 2007.

(vi) Telecommunications

Around 83 per cent of Telstra Corporation Limited (Telstra) is owned by institutional and individual investors, with the remaining approximately 17 per cent to be transferred by the Government to the Future Fund, a fund established by the Government to fund its public service superannuation liabilities. Shares transferred to the Future Fund will be held in escrow for a two year period.

Under the *Telstra Corporation Act 1991* Telstra is subject to ownership restrictions that limit foreign groups to 35 per cent of Telstra's listed capital and a maximum holding of 5 per cent for individual foreign entities.

The Act also contains provisions that require Telstra's head office, its base of operations and place of incorporation, to remain in Australia and the Chairperson and the majority of directors to be Australian citizens.

Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and will be normally approved unless judged contrary to the national interest. Further information is available through the Foreign Investment Review Board, whose website is at [www.firb.gov.au](http://www.firb.gov.au).

Telecommunications-specific licensing, consumer protection and competition legislation also applies, both to foreign and domestic entities, on a non-discriminatory basis. The licensing regulation is contained in the *Telecommunications Act 1997*. The agency responsible for licensing is the Australian Communications and Media Authority (ACMA), whose website is at [www.acma.gov.au](http://www.acma.gov.au).

In addition to being subject to the general competition and consumer protection laws which apply to business generally, carriers and carriage service providers are subject to the following industry-specific legislation:

- Telecommunications consumer protection legislation contained in the Telecommunications (Consumer Protection and Service Standards) Act 1999, administered by the ACMA.
- Telecommunications competition regulatory regime contained in Parts XIB and XIC of the Trade Practices Act 1974. This legislation augments the general competition law (outlined later), and creates an industry specific access regime. The access regime is administered by the Australian Competition and Consumer Commission, whose website is at [www.accc.gov.au](http://www.accc.gov.au).

(vii) Real Estate

The Australian Government seeks to ensure that foreign investment in residential real estate increases the housing stock. Australia, therefore, seeks to channel foreign investment into activity that directly increases the supply of new housing (that is, new developments — house and land packages, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or a trust;
- foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a ‘special category visa’ purchasing either in their own name or through an Australian corporation or a trust; and
- foreign nationals purchasing, as joint tenants, with their Australian citizen spouse.

Proposed acquisitions of real estate for development (generally vacant land) are normally approved subject to specific conditions requiring continuous substantial construction to commence within 12 months. Once construction is complete, the parties are required to provide advice of the completion date and actual development expenditure.

Foreign persons are normally given approval to buy:

- **vacant land** for residential or commercial development, including house and land packages where construction has not commenced, subject to a condition imposed under the FATA that continuous construction commences within 12 months; and
- **new dwellings** such as house and land packages, home units and townhouses purchased ‘off-the-plan’ that is under construction or newly constructed, but never occupied or previously sold. ‘Off-the-plan’ sales to foreigners are only permitted for new development

projects or extensively refurbished commercial structures, which have been converted to residential, on condition that no more than half the dwellings in a development are sold to foreign persons.

Certain categories of foreign nationals, who hold a visa that permits them to reside in Australia continuously for at least the next 12 months, may be given approval to purchase **developed residential real estate** (that is, **second hand dwellings**) for use as their principal place of residence (that is, not for rental purposes) while in Australia. A condition of such purchases is that the dwelling must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

Foreign companies, with an established substantial business in Australia, buying for named senior executives resident in Australia for periods longer than 12 months, may be eligible for approval provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of properties that may be acquired, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

Proposals by foreign persons to acquire developed residential real estate that do not fall within the above categories are subject to the FATA but are not normally approved.

Proposed acquisitions of developed non-residential commercial real estate are normally approved unless they are determined to be contrary to the national interest.

Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer had designated as an 'Integrated Tourism Resort' (ITR) prior to September 1999 are exempt from examination. For resorts designated as ITRs from September 1999, the exemption only applies to developed residential property, which is subject to a long term (10 years or more) lease to the resort/hotel operator, making it available for tourist accommodation when not occupied by the owner. All other property, including vacant land for development, within the ITR would be subject to the normal foreign investment restrictions. Strict conditions must be fully met to qualify for ITR status.

Proposed acquisitions of hotels and motels operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Proposed acquisitions of strata titled hotel accommodation may be approved in certain designated hotels. Full details of the requirements for designated hotels are contained in the *Foreign Investment Policy Urban Land (Real Estate)*. Other accommodation facilities such as guesthouses, hostels, holiday flats and undesignated strata titled hotels or motels are examined under policy applying to the residential real estate sector.

All contracts by foreign persons to acquire interests in Australian urban land should be made conditional upon foreign investment approval, unless approval was obtained prior to entering into the contract. Contracts should allow a minimum of **40 days from date of lodgement** for such a decision. Foreign investors are in breach of the FATA if they enter an unconditional contract to acquire property before approval is granted and may be subject to significant penalties.

Exempt acquisitions include:

- acquisitions by Australian citizens living abroad purchasing either in their own name or through an Australian corporation or a trust resident abroad;

- acquisitions of property zoned residential by foreign nationals who hold permanent resident visas or hold, or who are eligible to hold, a ‘special category visa’ (for example, a New Zealand citizen); and
- acquisitions of property zoned residential by foreign nationals purchasing, as joint tenants, with their Australian citizen spouse.

**Where to find more information see:**

Urban Land

[http://www.firb.gov.au/content/\\_downloads/Urban\\_Land\\_Policy\\_2007.pdf](http://www.firb.gov.au/content/_downloads/Urban_Land_Policy_2007.pdf)

Off the Plan Pre-approval for Developers’ Policy

[http://www.firb.gov.au/content/\\_downloads/OTP\\_policy.rtf](http://www.firb.gov.au/content/_downloads/OTP_policy.rtf)

Integrated Tourism Resorts and Strata Titled Hotels

[http://www.firb.gov.au/content/\\_downloads/ITR\\_policy\\_2007.rtf](http://www.firb.gov.au/content/_downloads/ITR_policy_2007.rtf)

**(B) SUB-FEDERAL MEASURES**

As Australia has a federal system of government, there are some sector specific sub-federal measures that can impact on foreign ownership or control

*New South Wales*

The New South Wales Government through its agency The Department of State and Regional Development pro-actively seeks to attract foreign investment to the State. The Department offers a range of programs to assist investors. Further information is available at the Department’s website: [www.business.nsw.gov.au](http://www.business.nsw.gov.au) The New South Wales Government does not screen foreign investment.

There are no sector specific laws in New South Wales that relate specifically to foreign investors.

There are no limitations on foreign purchase of real property in New South Wales apart from those which apply under the Commonwealth legislation.

The State of New South Wales does not restrict the inflow of foreign investment in any way.

Inwards foreign investment is encouraged into metropolitan and regional areas of the State.

*Northern Territory*

Restrictions, and any associated performance requirements, are generally the same for urban land in the Northern Territory as in other states. However, a number of unique restrictions do exist that apply to all potential investors. These are:

- No pastoral landholder, either alone or together with associates, can own more than 13,000 sq. kms without the consent of the Minister for Planning and Lands. For consent to be granted a proposal must be shown to be in the Territory's interest. This requirement is set out in Section 34 of the *Pastoral Lands Act*.  
See [http://www.austlii.edu.au/au/legis/nt/consol\\_act/pla142/s34.html](http://www.austlii.edu.au/au/legis/nt/consol_act/pla142/s34.html) )
- More than 50 per cent of the Territory is either held by Land Trusts pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* of the Commonwealth Government or is subject to an application under the Act. Special provisions apply and the various Land Councils established under the Act have a statutory role to assist the traditional Aboriginal owners.

## *Queensland*

The Queensland Government's approach to examinable foreign investment proposals on an industry sector basis is outlined below.

### **Urban Real Estate**

The Queensland Government supports the existing Commonwealth policy regarding the acquisition of or investment in urban real estate by foreign investors. The Queensland Government would expect that urban real estate proposals (other than those explicitly exempted from examination under Commonwealth guidelines) would generally add value or other tangible economic benefits to attract Queensland Government support.

The Queensland Government would oppose proposals which it believed indicated an intention to participate in "land banking". Broadly, land banking is defined as the acquisition of undeveloped real estate without identifiable plans to commence an approved form of development within a reasonable period (normally defined as 12 months).

Although joint ventures involving Australian-owned interests are preferred, the Queensland Government would be prepared to accept up to 100% foreign ownership of manufacturing concerns provided that tangible economic benefits will result.

In assessing economic benefit to the State, the Queensland Government notes that some of the benefits of foreign investments in manufacturing include:

- introduction of new manufacturing technology;
- increased access to export markets;
- import replacement;
- employment generation or maintenance; and
- establishment of new industry.

### **Mining and Resource Industries**

For examinable proposals involving a new mining business, the Queensland Government has a preference for a minimum of 50% Australian equity and control. In assessing the proposals for a

new mining business with a level of foreign ownership exceeding 50%, the Queensland Government will pay regard to:

- economic benefit to Queensland as a result of the project;
- the extent to which the unavailability of sufficient Australian equity capital on reasonable terms and conditions would unduly delay development;
- the possibility of Australian equity participation during the course of the project; and
- whether the foreign proponent has been actively engaged in the exploration phase of the project.

The Queensland Government would not normally object to proposals for the acquisition of an interest in an existing mine where economic benefits are considered sufficient to offset any reduction in Australian ownership and control, or where the foreign interest making the acquisition is Australian controlled.

The Queensland Government particularly encourages foreign investment in the area of downstream mineral processing.

### **Rural Sector**

In considering potential implications of primary industry sector proposals on the State's economy, the Queensland Government will generally require that an industry impact assessment be undertaken for proposed foreign investments in the form of establishing new businesses or the acquisition of existing businesses. These assessments will be undertaken by Invest Queensland after prior consultation with the foreign investor and the FIRB.

Invest Queensland will also monitor the impact of foreign investment in more sensitive sectors of the rural economy, particularly where the level of foreign ownership and control is high.

In addition, the Queensland Government opposes freehold acquisition by foreign investors of dedicated prime agricultural land for purposes other than primary production, unless it is demonstrated that foreign ownership will provide significant net offsetting benefits to the Queensland economy.

### **Tourism**

The Queensland Government encourages foreign investment in the tourism industry but would prefer joint venture projects between Australian and foreign companies.

However, in assessing foreign investment proposals in the tourism sector, the Queensland Government will also pay regard to:

- the impact of development on the local and regional communities;
- the potential of the foreign investor to make a positive contribution to the local tourism industry; and
- the level of foreign ownership and control within the local tourism industry.

In considering foreign investment proposals involving offshore islands, the Queensland Government will apply the following approach:

- Australian ownership should be maintained at a minimum of 50% unless otherwise approved by the relevant State Ministers;
- tenure to be on long-term leasehold land; and
- management to be in accordance with approved Commonwealth and Queensland Government island environmental management plans and other lawful requirements of Queensland's Environmental Protection Agency .

Queensland's foreign investment policy, as it relates to offshore islands, remains current whilst under review.

Contact details for the Queensland Government's Invest Queensland follow.

The Manager  
 Commercial Assessment  
 Department of State Development & Trade  
 Level 20, 111 George Street  
 Brisbane QLD 4000  
 Australia.

or

The Manager  
 Commercial Assessment  
 Department of State Development & Trade  
 PO Box 15168  
 City East QLD 4002  
 Australia.

Tel: (61-7) 3405-6504  
 Fax: (61-7) 3210-0739  
 Web: [www.sd.qld.gov.au](http://www.sd.qld.gov.au)

### *South Australia*

The South Australian Government welcomes foreign investment that contributes to the long-term economic growth and development of the State. The combination of cost-competitiveness, innovation, time zone, quality of life and government investment generates significant opportunities for international companies across a wide range of sectors including:

- Resources
- Defence
- Manufacturing
- Aerospace and Aviation
- Automotive
- Agribusiness

- Bioscience
- Information and Communications Technology

The Department of Trade and Economic Development is the South Australian Government's lead agency promoting economic development in the State.

Working closely with the State's Economic Development Board and in collaboration and partnership with business, other government agencies and the community the Department's strategic directions are closely aligned with the key economic development targets outlined in *South Australia's Strategic Plan*. See <http://www.stateplan.sa.gov.au/>

At the State level there are no formal processes or legislation in place governing the screening of potential foreign investment in South Australia.

South Australian Government policy encourages investment across all industry sectors, however, there is a current strategic focus on the following strategic industry sectors within both metropolitan and regional South Australia.

- Resources
- Defence
- Services
- ICT/Electronics/Creative Industries

At the State level restrictions to ownership of real property may apply in relation to the occupation of aboriginal lands.

### *Victoria*

There are no sector-specific laws and policies which apply to foreign investment in Victoria.

The Victorian Government is focused on promoting and attracting international business investment. The Department of Innovation, Industry and Regional Development is the primary Victorian Government Department responsible for investment attraction and facilitation activities, both foreign and domestic. Its aim is to position Victoria as an attractive destination for investment that stimulates growth and development across the State.

Invest Victoria (<http://invest.vic.gov.au>) acts as the single entry point into the Victorian Government for potential investors and is responsible for:

- attracting FDI by positioning Victoria in the global market as a world class investment location,
- facilitating potential and existing foreign investors by providing a high level of service and advice, and;
- providing Government and investors with coordinated intelligence on local and global FDI trends and their impact on Victoria.

The Victorian Government generally does not impose any restrictions on foreign investments. Foreign investors that approach the Victorian government for assistance are assessed based on the level of strategic value and contribution that the company will potentially make to the Victorian economy. Investments that are facilitated into the state with a grant component are subject to performance requirements. In these cases, companies are expected to reach contracted milestones and outcomes in order to be paid in accordance with the grant agreement.

### *Western Australia*

Western Australia (WA) has a thriving economy providing a diverse range of investment opportunities, demonstrated by the 17.5 per cent average yearly increase in business investment since 2001. Investments that enhance the value of WA's rich endowment of natural resources and knowledge based industries are keenly sought.

WA is one of the world's largest producers of diamonds, alumina, seaborne-traded iron ore, salt, tantalum, ilmenite, rutile, zircon, gold, nickel and lithium. It is also the location for the majority of petroleum exploration and production in Australia. The State also produces 11 per cent of the world's liquefied natural gas (LNG) and two-thirds of Australia's oil and gas production. This figure is set to significantly increase with planned LNG projects in WA. The future continues to look promising with more than \$81 billion worth of resource projects either underway or planned for the State over the next few years.

The State's remarkable economic growth has also been boosted by the development and adoption of advanced technologies. WA's science and innovation industries are incredibly rich with potential. WA has one of the leading technology parks in Australia and a marine services precinct that is world class in terms providing infrastructure to support industries servicing marine, defence, mining and petroleum industries. The State is aiming mostly to develop industries in the ICT, biotechnology, marine and defence, renewable energy and biofuels sectors.

WA companies and individuals compete successfully on the world stage everyday. Intelligent management of the natural resources and a spirit of innovation and hard work have increased recognition for WA's emerging knowledge based industries.

WA has a population of nearly two million people represented through a diversity of cultures with 12 per cent speaking a language other than English at home. The population enjoys a clean and healthy lifestyle characterised by blue skies, warm climate and white sandy beaches. More than 450,000 students are catered for in WA's education system, which is made up of five universities, a state-wide technical and further education system and public and private schools.

WA provides easy access and a similar time zone to countries in the Indian Ocean Rim and Asia Pacific region, a region that is home to over one-third of the world's population and the fastest growing economies of the world. WA has well-established trading relationships in the region as result of an outwardly focused business culture. This is exemplified by the State's oil and gas sector which is becoming recognised as a global hub for supplying LNG, undertaking research and providing services to the region.

The State's world-class infrastructure, highly skilled workforce, low sovereign risk and pro-development policies are all strong reasons for local and international investors to consider WA as a long-term investment destination. The Government of WA welcomes your investment and is committed to promoting and developing innovation, science, technology and research to secure a vibrant future for the State.

Useful websites include the following.

### **Investment Infrastructure**

General infrastructure information

[www.doir.wa.gov.au/investment/29F01DFD4E314C379132DC84F6EAC7B9.asp](http://www.doir.wa.gov.au/investment/29F01DFD4E314C379132DC84F6EAC7B9.asp)

Australian Marine Complex

[http://www.landcorp.com.au/portal/page?\\_pageid=331,210268&\\_dad=portal&\\_schema=PORTAL](http://www.landcorp.com.au/portal/page?_pageid=331,210268&_dad=portal&_schema=PORTAL)  
Technology Park

[www.techparkwa.org.au](http://www.techparkwa.org.au)

Kwinana Industrial Estate — Kwinana Industries Council

[www.kic.org.au](http://www.kic.org.au)

Kemerton Industrial Park

[www.kemerton.com.au](http://www.kemerton.com.au)

State Government land development agency — Landcorp

[www.landcorp.com.au](http://www.landcorp.com.au)

### **Western Australia Government**

Department of Industry and Resources

[www.doir.wa.gov.au](http://www.doir.wa.gov.au)

Business Migration

[www.sbdc.wa.gov.au](http://www.sbdc.wa.gov.au)

Economic Information

[www.dtf.wa.gov.au](http://www.dtf.wa.gov.au)

Government of Western Australia

[www.wa.gov.au](http://www.wa.gov.au)

Chamber of Industry and Resources Western Australia

[www.cciwa.com.au](http://www.cciwa.com.au)

Chamber of Minerals and Energy Western Australia

[www.cmewa.com.au](http://www.cmewa.com.au)

### **INVESTMENT PROTECTION**

(i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

The Australian dollar is a convertible currency.

The Australian Government does not maintain currency controls or limit remittance, loan and lease payments. Such payments are processed through standard commercial channels, without governmental interference or delay.

Exchange rates are determined on the basis of demand and supply conditions in the exchange market, but the Reserve Bank of Australia retains discretionary power to intervene in the foreign exchange market. There is no official exchange rate for the Australian dollar. There are no taxes or subsidies on purchases or sales of foreign exchange. Authorised foreign exchange dealers may deal among themselves, with their customers, and with overseas counterparties at mutually negotiated rates in any currency.

(ii) Expropriation and Compensation

Private property can be expropriated for public purposes in accordance with established principles of international law. Due process rights are established and respected, and prompt, adequate and effective compensation (under just terms) is paid under the Constitution.

Over the last three years, there have not been any cases of expropriation involving foreign investors under domestic law.

(iii) IPR

Australian law protects patents, trademarks, designs, copyrights and integrated circuit layout rights. Australia is a member of the WIPO, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the Geneva Phonogram Convention, the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, and the Patent Cooperation Treaty. The U.S. Free Trade Implementation Bill 2004 included amendments that allow Australia to accede to the WIPO Copyright Treaty 1996 (WCT) and the WIPO Performances and Phonograms Treaty 1996 (WPPT).

A number of Commonwealth laws give effect to the international obligations. These include the *Copyright Act 1968*, the *Circuit Layouts Act 1989*, the *Patents Act 1990*, the *Plant Breeder's Rights Act 1994*, the *Trade Marks Act 1995* and the *Designs Act 2003*.

IP Australia is the Australian government agency responsible for registrations of patents, trademarks and designs. Contact details for IP Australia are: Tel: 61-2 6283-2999; Fax: 61-2 6283 7999; or (<http://www.ipaustralia.gov.au/>).

For copyright matters contact:

Commonwealth Copyright Administration  
Copyright Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600  
Australia  
Tel: 61-2-6250-6666  
Website: <http://www.ag.gov.au/cca>

(iv) Dispute Settlement

In general, for settlement of disputes associated with their investment in Australia, foreign investors would have access to the same courts and tribunals as domestic investors, provided that jurisdiction over the dispute could be established. These include State and Territory Supreme Courts, and the Federal Court of Australia

In addition, they would have access to a range of alternative dispute resolution mechanisms, such as arbitration, mediation and conciliation. There are a number of private sector organisations providing alternative dispute resolution services and facilities across Australia for both international and domestic dispute resolution. Further information on the facilities available can be obtained from Chambers of Commerce and Industry, and Law Societies in each State and Territory. Contact details for the Australian Chamber of Commerce and Industry follows.

Australian Chamber of Commerce and Industry  
Commerce House  
PO Box 6005  
KINGSTON ACT 2604  
Australia  
Tel: 61 2 6273 2311  
Fax: 61 2 6273 3286  
Email: [info@acci.asn.au](mailto:info@acci.asn.au)  
Website: <http://www.acci.asn.au/>

Links to the Law Societies in each State and Territory are available on the Law Council of Australia website <http://www.lawcouncil.asn.au/links.html>

Australia signed the ICSID Convention on 24 March 1975 and ratified it on 2 May 1991. The Convention entered into force for Australia on 1 June 1991 and is given effect under the International Arbitration Act 1974 (Cth). It is standard practice for Australia to include a clause in its bilateral investment protection agreements enabling disputes between a Contracting Party to the agreement and a national of the other party to be referred to ICSID for conciliation and arbitration under the ICSID Convention provided both Parties to the agreement are Contracting States under the ICSID Convention. Over the last three years, there has been no disputes involving Australia as a party brought to resolution by ICSID

## **INVESTMENT AND DEVELOPMENT**

(i) Performance Requirements

*Federal Government*

There are no performance requirements imposing limits on trade and investment or any TRIMS in Australia.

## *Sub-federal*

### **South Australia**

The State's Industry Participation Policy seeks to maximise local participation in major infrastructure and construction projects.

The South Australian Government recognises that local industry participation in infrastructure and major construction projects provides benefits to both the South Australian economy and to the project proponent through greater local value adding and project cost savings. There is an expectation that project proponents would support the achievement of these benefits.

Whilst recognising that investment decisions are made in a competitive global market, it is desirable to achieve the maximum level of local content in goods, services and labour where these are competitive as to price, quality, and delivery requirements.

The Commercial Division within the Department of Trade and Economic Development, the South Australian Government's key agency for economic and industry development policy, works in partnership with business and other government agencies to facilitate [international business](#) activities for South Australia.

### **Victoria**

Approvals for foreign investment are handled directly by the Federal Government although the Foreign Investment Review Board refers significant investment proposals to relevant States for comment.

The Victorian Government generally does not impose any restrictions on foreign investments. Foreign investors that approach the Victorian government for assistance are assessed based on the level of strategic value and contribution that the company will potentially make to the Victorian economy. Investments that are facilitated into the state with a grant component are subject to performance requirements. In these cases, companies are expected to reach contracted milestones and outcomes in order to be paid in accordance with the grant agreement.

#### (ii) Other Policy Measures affecting Inward Foreign Investment

Australia does not use policies targeting foreign investment in the area of the environment or sustainable development, or affecting indigenous persons, to promote broad economic development objectives.

## **INVESTMENT PROMOTION AND INCENTIVES**

#### (i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

### ***Federal Government***

Invest Australia is the Australian Government's national inward investment attraction agency responsible for attracting productive foreign direct investment into Australia. Invest Australia undertakes investment attraction work through 14 overseas offices: London, Paris, Frankfurt, New

York, San Francisco, Seoul, Mumbai, New Delhi, Beijing, Shanghai, Guangzhou, Singapore, Tokyo, and Dubai.

Invest Australia is the first national point of contact for investment inquiries. It provides free and comprehensive advice including:

- information on Australian industry capabilities, skills availability, R&D capacities, infrastructure, business costs, intellectual property issues, regulations and tax matters.
- an initial contact point for Australian Government approvals and direct investors to key State/Territory and local government agencies.
- information on the range of relevant government assistance programs.
- Major Project Facilitation status for significant, strategic projects.
- access to tailored business immigration agreements through the Invest Australia Supported Skills Program.
- investment incentives for strategic projects, through the Strategic Investment Coordination process, in limited and special circumstances where projects are expected to generate significant net economic benefits for Australia.

Invest Australia's website is at <http://www.investaustralia.gov.au> and contact details for its offices around the world can be found at <http://www.investaustralia.gov.au/index.cfm?menuid=3D5D8296-EB77-C709-36153CFE42024159&setLanguage=AU>.

Invest Australia works closely with all the States and Territories in promoting, attracting and facilitating foreign direct investment into Australia. There are a range of mechanisms in place with the State and Territory investment promotion bodies covering cooperation on research, marketing, events, re-investment, and protocols for investment leads.

### Incentives

Invest Australia administers two programs in attracting and facilitating investment projects into Australia.

#### **Supported Skills Program**

This program allows companies that make a significant investment in Australia to bring out key expatriate managerial and specialist employees from within the company group that are essential to establish operations in Australia. Agreements will be granted for three years. Details and eligibility criteria can be found at <http://www.investaustralia.gov.au/index.cfm?menuid=0DA862B8-B0D0-36D2-5CFA57191BEEE29A&setLanguage=AU>.

#### **Strategic Investment Coordination**

The Strategic Investment Coordination process considers requests for investment incentives where a project:

- Provide significant net economic benefits to Australia;
- Complement Australia's areas of competitive advantage;

- Would not occur in Australia without an incentive;
- Is viable in the long term without subsidy; and
- That assistance is consistent with our international obligations, including under the World Trade Organisation.

Eligibility is not limited to foreign investors. Details of the process can be found at <http://www.investaustralia.gov.au/index.cfm?menuid=7AA9CD69-D0B7-180C-1609A505287904C9&setLanguage=AU>

Aside from the programs described above, investors are able to access the full range of government programs, subject to eligibility, availability to industry in areas like research and development, export development, and innovation. Further information can be obtained by contacting Invest Australia or from the Australian Government business website <http://www.bep.gov.au/Business+Entry+Point/Business+Topics/Grants+assistance/>.

### *Film Industry*

Ausfilm promotes Australia as the world's best destination for filmmaking, acting as a one-stop shop or gateway for filmmaking in Australia. Ausfilm is an association of over 40 corporate members from Australia's screen production industry and the state and territory film offices, with Australian Government support. Ausfilm can offer information on locations, incentives, facilities, crew depth and a range of production services. Please see [www.ausfilm.com.au](http://www.ausfilm.com.au) for further information.

The refundable film tax offset (the offset) is the Australian Government's incentive to attract high-budget film and television production to Australia. The offset provides a 12.5% tax refund on all qualifying expenditure of eligible film and television productions. A minimum qualifying spend of A\$15 million is required and if the production has a qualifying spend of less than A\$50 million, 70% of its total production expenditure must be qualifying spend in Australia. The offset is jointly administered by the Department of Communications, Information Technology and the Arts and the Australian Tax Office. Please see [www.dcita.gov.au/filmtaxoffset](http://www.dcita.gov.au/filmtaxoffset) for further information.

### ***Sub-federal***

All State and Territory Governments in Australia are actively involved in investment promotion. They have dedicated investment promotion personnel based domestically and most have representatives abroad who offer facilitation services to investors.

#### *New South Wales*

The Department of State and Regional Development pro-actively seeks to attract FDI to New South Wales. The Department offers a range of programs to assist investors. Further information is available on the Department's website: [www.business.nsw.gov.au](http://www.business.nsw.gov.au).

The Department provides a one stop shop for investors. Please contact:

Executive Director  
Investment Division  
Department of State and Regional Development  
L49 MLC Centre  
19 Martin Place  
Sydney NSW 2000  
Australia  
Tel: (61 2) 9338-6641  
Fax: (61 2) 9338-6728  
E-mail: [investment@business.nsw.gov.au](mailto:investment@business.nsw.gov.au)  
Website: <http://www.directory.nsw.gov.au/showorgunit.asp?id=%7BA0A8A5AE-009D-45F8-B6EC-EBE6C469A50C%7D>

- New South Wales offers project facilitation and assistance packages to attract FDI. Whether assistance will be offered and the nature and extent of assistance is assessed on a case by case basis taking into account the economic benefits that will flow to the State from the new project.
- Businesses locating in certain areas of the State can qualify for special incentive programs. These programs are:
  - the Regional Business Development Scheme (RBDS)

The RBDS facilitates economic development in regional (areas outside Sydney) NSW by providing short-term financial assistance to businesses contemplating relocation, establishment or expansion in non-metropolitan areas. It is equally available to foreign and domestic investors.

Applications for assistance through the RBDS are assessed on a case by case basis with regard to the degree of influence assistance will have in gaining a positive benefit for the project for regional NSW which would otherwise not be attained.

Assistance levels are up to \$5,000 per new job created and up to 10% of the capital investment.
  - the Pay-Roll Tax Incentive Scheme (PTIS).

The PTIS assists new and existing businesses to establish and grow in a range of eligible regional and metropolitan locations. It is available to both foreign and domestic investors. However it is not available to employers liable for payroll tax in NSW in previous years.

The scheme provides rebates of payroll tax amounting to a maximum amount of \$575,856 paid over a five year period.
- Further information on the New South Wales assistance schemes is available on the Department's website: [www.business.nsw.gov.au](http://www.business.nsw.gov.au).

### *Northern Territory*

The Department of the Chief Minister (Major Projects, Asian Relations and Trade) facilitates major economic and resource development projects, works to attract business to the Territory, and promotes Territory trade and business opportunities across Australia and throughout the wider Asian region. The Department coordinates other government agencies to help the private sector in developing major projects such as the \$3 billion Bayu-Undan gas field and 500 kilometre pipeline to Darwin, the \$1.6 billion Darwin Liquid Natural Gas Plant and Alcan's \$2.5 billion expansion of the Gove Alumina Refinery.

The Department of the Chief Minister promotes the Territory's competitive advantages and works to build closer economic ties with our Asian neighbours. The Department works in partnership with key stakeholders, including industry, professional associations, peak bodies, investors and government counterparts, to secure economic growth and employment for the Territory.

For further information contact:

Executive Director

Major Projects, Asian Relations and Trade

Department of the Chief Minister

GPO Box 4000

Darwin NT 0801

Australia

Tel: (61-8) 8946-9555

Fax: (61-8) 8946-9556

Email: [majorprojects.info@nt.gov.au](mailto:majorprojects.info@nt.gov.au)

Websites: <http://www.dcm.nt.gov.au/dcm/trade/index.html> ; and <http://www.theterritory.com.au>

### *Queensland*

- Invest Queensland is the official investment attraction agency for the Queensland Government, providing a one-stop-facility for foreign investors.
- Invest Queensland pursues global investment opportunities in the following target industry sectors:
  - Aviation, Marine and Defence
  - Biotechnology / Pharmaceuticals
  - Food and Agribusiness
  - Advanced Manufacturing
  - ICT / Creative Industries
  - Professional services
  - Mining and related services
  - Tourism and Business Events

- Invest Queensland has a strong relationship with Invest Australia.
- Contact details for Invest Queensland follow.

The Director  
 Invest Queensland  
 Department of State Development & Trade  
 Level 24, 111 George Street,  
 Brisbane QLD 4000  
 Tel: (61 7) 3224 4051  
 Fax: (61 7) 3224-4910  
[www.investqueensland.com.au](http://www.investqueensland.com.au)  
[www.sd.qld.gov.au](http://www.sd.qld.gov.au)

The Queensland Government welcomes foreign investment as a major contributor to Queensland's economic development. The Government recognises that Australia has historically been capital deficient and that foreign investment has played a significant role in the development of Queensland and Australian economic capacity, particularly in the export sector.

The Queensland Government encourages foreign investment in all sectors of the State's economy. However, the Government seeks to influence the flow of such investment into sectors of the economy which will provide the greatest contribution to the long term growth and development of Queensland.

Invest Queensland provides financial incentives to attract businesses to Queensland. The scheme is discretionary and projects are considered on a case-by-case basis. To be eligible for consideration, a company or project must:

- provide a significant net economic benefit to the state;
- demonstrate commercial viability in the absence of incentives;
- demonstrate a need for the government to provide support to overcome a short-term impediment to a project's development in Queensland; and
- demonstrate no significant detriment to and/or substitutes for existing businesses in Queensland.

Should financial incentives be offered to eligible projects, types of support may be in the form of payroll tax rebates or establishment grants. Offers are conditional and subject to the fulfilment of due diligence requirements and contractual obligations.

Invest Queensland can also offer:

- comparative information on business costs, skills availability and other business investment opportunities for you in Queensland
- site visits for you, to explore the investment opportunities here
- facilitated introductions to local companies and service providers, such as education and training organisations and raw materials suppliers
- business migration assistance with visa entry options for key staff relocating to Queensland or information about relevant business visas for senior executives or investors.

- a network of 10 Queensland Government Trade and Investment Offices which provides advice assistance, contacts and intelligence to companies looking to expand into international markets.

Overall, the Queensland Government adopts a balanced and positive approach to foreign investment. Such investment should provide benefit to Queensland's economy as well as to the investors themselves. The role of the State Government with regard to foreign investment is recommendatory.

Invest Queensland is responsible for implementing the Queensland Government's approach to foreign investment. The Secretariat has responsibility for:

- data gathering and analysis of foreign investment trends within the State;
- liaising with potential foreign investors and/or their agents in respect of foreign investment issues; and
- assessing applications for foreign investment approval referred by the FIRB and provision of advice to the Government.

There is no legislative requirement for prospective foreign investors to make submissions direct to Invest Queensland. However, proponents are encouraged to consult with the Secretariat on significant and possibly contentious proposals at the same time as making submissions to the FIRB. Such consultation may enable the early identification, and remedy, of potential issues of concern. The Commonwealth Government consults with the Queensland Government as it recognises that particular State interests should be taken into account.

The Queensland Government fully recognises that much of the information provided to Invest Queensland will be sensitive, commercial information, and thus confidential. The Queensland Government will respect this confidence and will award it appropriate security.

For the purposes of foreign investment policy, the Queensland Government adopts the same definition of 'foreign person' as the Commonwealth Government.

### *South Australia*

The Investment Branch of the Commercial Division attracts and secures private sector investment into South Australia and maximises future investments by organisations currently located within South Australia. The Branch establishes and markets the case for South Australia as an investment destination and identifies financing opportunities for investment sourced from both the private sector and government. The Branch develops and maintains high level networks and gathers and disseminates market intelligence to other key divisions and agencies across government in relation to strategic industries. The Investment Branch is responsible for investment attraction across the breadth of the economy, with a particular focus on the following strategic industry sectors within both metropolitan and regional South Australia:

- Resources
- Defence
- Services

- ICT/Electronics/Creative Industries

Further information and key contacts can be found at the Department of Trade and Economic Development's website <http://www.southaustralia.biz>

Although there is potential for assistance to be provided for projects of significant strategic value the State Government focuses on facilitating and promoting economic development and creating a business environment that encourages investment opportunities.

### *Tasmania*

The Tasmanian Department of Economic Development is the first point of contact for companies wishing to invest in Tasmania. The Department acts as a conduit to State and Australian Government departments, Local Government and Tasmanian business.

A Tasmanian prospectus showcases Tasmania as a place to invest and details the assistance available to investors. The prospectus is available at:

<http://www.development.tas.gov.au/investintas/economy/prospectus.html>

Contact information follows.

General Manager  
Investment Attraction and Research  
Department of Economic Development  
22 Elizabeth Street  
Hobart Tasmania 7000  
Australia.  
Tel: (61-3) 6233 5800  
Tel: (61-3) 6233 5800 (same as for telephone)  
Email: [info@development.tas.gov.au](mailto:info@development.tas.gov.au)  
Website: [www.development.tas.gov.au](http://www.development.tas.gov.au)

### *Victoria*

Victoria's investment promotion and attraction activities are undertaken by Invest Victoria, which acts as the Victorian Government's single entry point for potential investors.

Contact details follow.

CEO  
Invest Victoria  
Level 36 / 121 Exhibition Street  
Melbourne, Victoria 3000  
Australia  
Tel: (61-3) 9651 8100  
Fax: nil  
Email: [info@invest.vic.gov.au](mailto:info@invest.vic.gov.au)  
Website: <http://invest.vic.gov.au>

Invest Victoria also markets and promotes Victoria in overseas markets and has a network of 11 international offices which actively promote the State in those markets and receive inquiries from potential investors.

Invest Victoria provides a range of free and confidential services to international companies designed to make investing and re-investing in Melbourne as simple as possible. These services include:

- working with companies in their market, through one of Invest Victoria's eleven international business offices,
- arranging itineraries and programs for prospective investors visiting Melbourne with relevant contacts and introductions,
- providing information on Australian and Victorian market conditions and identifying partners or client groups,
- identifying suitable local suppliers and service providers, helping with employee recruitment and providing training assistance, and;
- identifying a range of available sites and assisting with negotiation for land, infrastructure and approvals.

Invest Victoria also provides assistance to Victorian companies looking to develop export opportunities, through the Access Program, which offers short-term desk and office facilities to pre-qualified Victorian companies requiring a temporary base for exploring market opportunities in the US, China, India and the Middle East. Further details on the Access Programs can be found at:

<http://invest.vic.gov.au/About+Melbourne/Export+Assistance+Programs.htm>

Detailed information about the Victorian Governments grants programs can be found under the 'grants and assistance' section of the Victorian Government's business website:

<http://www.business.vic.gov.au>

(ii) Fiscal, Financial, Tax or Other Incentives

Invest Australia has responsibility for a number of programs described below which were designed specifically to encourage investment in Australia:

- Regional Headquarters (RHQ) Program
  - Offers assistance with immigration arrangements for executives and specialists and tax concessions for international companies considering Australia as the location for regional headquarters and regional operating centres.
- Immigration
  - The issuing of an Immigration Agreement is a free service from Invest Australia and exempts expatriate employees from many of the migration tests.
- Tax Concessions

- Investment Incentives
  - The Australian Government will consider the provision of investment incentives to strategic investment projects in limited and special circumstances where the project would generate significant net economic and employment benefits for Australia.
- Feasibility Study Fund
  - Offers financial assistance, in conjunction with State and Territory Governments, to eligible companies to undertake pre-feasibility or feasibility studies into the commercial viability of new investment projects.

Aside from the programs described above, investors are also able to access the full range of government programs, subject to eligibility, available to industry in areas like R&D, export development, training and education and infrastructure.

Further information is available through:

Invest Australia  
 Department of Industry, Tourism and Resources  
 Industry House  
 10 Binara Street  
 Canberra ACT 2600  
 Australia  
 Tel: (61-2) 6213 7560, (61-2) 6213 7715  
 Fax: (61 2) 6213 7843  
<http://www.investaustralia.gov.au>

(iii) Free Trade Zones or ‘Special Investment Areas’

Australia does not operate such zones or areas.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

There are no restrictions on the repatriation of capital and earnings by foreign investors related to foreign investment. There is a reporting system for cash transactions over \$10,000 and a maximum of \$10,000 in cash (Australian or foreign currency equivalent) may be taken out of Australia by an individual. Any larger amounts must be transferred through the banking system.

There are no laws or regulations that restrict the export of technology.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

(i) Labour Laws and Regulations

The *Workplace Relations Amendment (Work Choices) Act 2005* is the principal industrial relations law in Australia. The Act took effect from 27 March 2006 and established a new system which provides a single, national set of rules for minimum terms, conditions, awards and agreements. Australian domestic law does not discriminate between foreign and locally owned enterprises.

Accordingly, a foreign firm employing Australian workers has the same legal rights and obligations in relation to conditions of employment and related matters as any local firm in a similar situation. For further information see <https://www.workchoices.gov.au/ourplan/legislation/> Foreign investors should note, however, that there are some 'grey areas' where it is either unclear whether the Australian or state laws refer, e.g. public servants, council workers, non-incorporated firms, etc. For further information please contact the Department of Employment and Workplace Relations <http://www.dewr.gov.au/dewr/Contact/Nationaloffice.htm>

For the purposes of obtaining entry to Australia for business temporary residence minimum salary and skill thresholds apply. Skilled positions are occupations that are classified as Managers and Administrators, Professionals, Associate Professionals, and Tradespersons and Related Workers.

(ii) Domestic labour laws which apply to foreign firms in the context of labour disputes/relations

*Overview*

Foreign firms are subject to the same laws as locally owned enterprises.

Australian domestic laws relating to the settlement of industrial disputes and industrial action vary in detail from one jurisdiction to another. The regulatory arrangements and the mechanisms available for resolving industrial conflict, however, are broadly similar. In each jurisdiction legislation provides for the settlement of industrial disputes by way of third party arbitration as well as by direct negotiation and other informal means. As a general rule any industrial dispute may be brought before the relevant industrial tribunal at the behest of either party.

The incidence of industrial action has declined dramatically since the early 1980s. The Australian system seeks to encourage the resolution of industrial disputes through direct negotiation rather than by third party arbitration. The overwhelming majority of disputes are settled by such means and, increasingly, awards and determinations have established grievance handling procedures for resolving disputes at the enterprise level without the need for third party intervention.

*Sub-federal*

**New South Wales**

Domestic and foreign firms are subject to the same labour regulations. For further details see [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au)

**South Australia**

The South Australian Government participates in a range of State-specific and regional migration schemes that attract favourable policy and priority processing.

Immigration South Australia, a division of the Department of Trade and Economic Development, encourages business and skilled people to invest and [migrate](#) to South Australia.

As part of the ‘South Australia: Make the Move Campaign, the government has compiled an information kit and companies or individuals can register at [www.southaustralia.biz/move](http://www.southaustralia.biz/move) to obtain a kit.

The government can also assist with relocation including settlement orientation and skills/qualification recognition and employment assistance for partners of relocating staff.

(iii) Permits/entry visa requirements for non-resident staff of foreign firms

All Australian State and Federal domestic labour laws apply to the subsidiaries of foreign firms operating in Australia in the context of labour disputes/relations within the boundaries of Australia’s jurisdictional coverage.

In the case of a secondment or a short-term deployment of a worker from an overseas foreign firm, where the employment relationship is entered into in a foreign country, the laws that would apply to that worker would be dependent on factors including the level, regularity and substantiveness of the work performed in Australia on or behalf of the overseas firm. It would therefore be difficult to provide advice without more detailed information about the relationship between the parties.

Temporary business entry arrangements provide for the entry of foreign personnel for both short and long stay business entry.

Short stay business visitor entry provides for a stay of up to three months on each occasion for business purposes such as pursuing investment opportunities, attending business meetings or attending to business interests in Australia, whereas long stay business entry visas are more appropriate for personnel seeking ongoing work in Australia.

Short stay visa options include a multiple entry visa, usually valid for one year. This visa is available in many APEC economies through Electronic Travel Authority (ETA) arrangements. There is an ETA option which is valid for the life of the holder’s passport (up to a maximum of 10 years).

Information on short stay business visas is available online can be found online: [www.immi.gov.au/allforms/visiting\\_business\\_short.htm](http://www.immi.gov.au/allforms/visiting_business_short.htm)

Passport holders of participating APEC Business Travel Card (ABTC) Scheme economies can apply for an ABTC for the purposes of short-term business visitor entry to Australia. The ABTC cuts through the red tape of business travel, and gives accredited business people pre-cleared entry to 17 participating APEC economies. Benefits include:

- Fast-track entry and exit through special APEC lanes at major Australian airports,
- Exemption from having to individually apply for visas or entry permits each time you travel to any of the participating economies,
- Multiple short-term entry to Australia for 90 days stay each visit, and
- Card validity of three years.

For information on eligibility criteria and where to apply for the APEC Business Travel Card, see [www.businessmobility.org/key/abtc.html](http://www.businessmobility.org/key/abtc.html).

Long-stay business entry provides for a stay of up to four years principally for:

- highly skilled personnel for companies operating in Australia;
- highly skilled personnel from offshore companies seeking to establish a business presence in Australia such as setting up a branch of the company or participating in joint ventures; and
- personnel coming under a Labour Agreement or Regional Headquarters Agreement.

Streamlined arrangements are in place for Australian companies sponsoring skilled personnel. These streamlined sponsorship arrangements extend to the entry of skilled personnel for the purpose of establishing a business presence of an overseas company in Australia. All applicants must be sponsored by their prospective employer and meet certain prescribed criteria including any qualifications or licensing/registration requirements.

(iv) Restrictions on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members

A spouse and dependent children who are part of the family unit of the principal applicant are granted a visa with the same conditions and period of validity as that of the principal. Spouses of approved business temporary residents are permitted to work while in Australia.

Further information about Australia's business temporary entry arrangements are available from: [www.immi.gov.au/allforms/temp\\_bus.htm](http://www.immi.gov.au/allforms/temp_bus.htm)

A spouse and dependent children who are part of the family unit of the principal applicant are granted a visa with the same conditions and period of validity as that of the principal. Spouses of approved long stay business entrants are permitted to work while in Australia.

Further information about Australia's business temporary entry arrangements are available at <http://www.immi.gov.au/skilled/skilled-workers/visa-temporary.htm>

(v) Laws or policies that restrict appointments by foreign investors to senior management positions or the board of directors.

The Australian Government does not impose nationality requirements on senior management positions.

Under the *Corporations Act 2001*, at least two of the directors of a public company must be ordinarily resident in Australia.

- Telstra Corporation — The Chairperson and a majority of directors of Telstra must be Australian citizens, and Telstra is required to maintain its head office, main base of operations, and place of incorporation in Australia.
- Qantas Airways Ltd — At all times, at least two thirds of the directors of Qantas must be Australian citizens.

(vi) Sub-federal Schemes

*South Australia*

The South Australian Government participates in a range of State-specific and regional migration schemes that attract favourable policy and priority processing. Immigration South Australia, a division of the Department of Trade and Economic Development, encourages business and skilled people to invest and [migrate](#) to South Australia. As part of the 'South Australia: Make the Move Campaign, the government has compiled an information kit and companies or individuals can register at [www.southaustralia.biz/move](http://www.southaustralia.biz/move) to obtain a kit.

The government can also assist with relocation including settlement orientation and skills/qualification recognition and employment assistance for partners of relocating staff.

## GOVERNMENT PROCUREMENT

(i) Federal Government

The procurement policy framework is a subset of the financial management framework related to the procurement of property or services. The Commonwealth Procurement Guidelines establish the core procurement policy framework and articulate the Government's expectations for all departments and agencies (agencies) subject to the *Financial Management and Accountability Act 1997* and their officials, when performing duties in relation to procurement.

*Value for money* is the core principle underpinning Australian Government procurement. In a procurement process this principle requires a comparative analysis of *all* relevant costs and benefits of each proposal throughout the whole procurement cycle (whole-of-life costing). Value for money is enhanced in Government procurement by:

- *encouraging competition* by ensuring non-discrimination in procurement and using competitive procurement processes;
- promoting the use of resources in an *efficient, effective and ethical* manner; and
- making decisions in an *accountable and transparent* manner.

**Further information may be found at:**

[http://www.finance.gov.au/procurement/docs/CPGs\\_-\\_January\\_20051.pdf](http://www.finance.gov.au/procurement/docs/CPGs_-_January_20051.pdf)

(ii) Sub-federal Level

*New South Wales*

Foreign owned companies are treated the same as domestically owned companies.

## *Tasmania*

The Tasmanian Government procurement policy framework is based on Instructions issued pursuant to the *Financial Management and Audit Act 1990* and additional guidance provided in guidelines, manuals and other documentation. The Act applies to all Tasmanian inner-Budget agencies.

All goods and service procurement, excluding common use contractual arrangements, and all building and construction procurement is devolved to individual Departments.

The primary principle underlying Tasmanian Government purchasing is the encouragement of fair and open competition between suppliers with the objective of achieving value for money purchasing outcomes. Government buyers must behave ethically and comply with a code of conduct. They must also enhance opportunities for local businesses to bid for government business, although preference cannot be given to local suppliers.

The Tasmanian Government is bound by certain international agreements which include specific Government procurement commitments and these have been incorporated into the Instructions. The relevant agreements are:

- The Australian and New Zealand Government Procurement Agreement; and
- The Australia - United States Free Trade Agreement.

The Tasmanian Government procurement policy framework is non-discriminatory with all suppliers having the same opportunities to compete for business. The policy framework does not provide for potential suppliers to be discriminated against on the basis of their degree of foreign affiliation.

Tasmania's procurement policies apply generally to procurement from all sectors. However, a small number of specific policies apply to some sectors as set out below:

Building and construction sector: where appropriate categories exist and certain thresholds are met, suppliers of services are to be pre-qualified with the Department of Treasury and Finance.

- Roads and bridges construction sector: where appropriate categories exist and certain thresholds are met, suppliers of services are to be pre-qualified with the Department of Infrastructure, Energy and Resources.
- Information technology sector: all providers are required to enter into a Government Information Technology Contract Head Agreement.

## *Victoria*

The Victorian Industry Participation Policy (VIPP) is designed to foster industry development by encouraging bidders to genuinely and systematically consider Australian and New Zealand<sup>17</sup> SME suppliers. Where a project or procurement involving a Victorian Government grant exceeds \$3 million in metropolitan Melbourne or \$1 million in regional Victoria, short-listed bidders need to provide information about the percentage of local content, number of local jobs and levels of skill

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<sup>17</sup> This includes New Zealand so as to be in accord with the Australia New Zealand Procurement Agreement entered into by Australian State and Federal Governments and New Zealand.

and technology transfer. The VIPP statement will be used to distinguish a winning bid when the competing bids can not be distinguished through value for money considerations. Where one bidder clearly offers the best value for money, that bidder will be successful provided the required VIPP information has been completed with reasonable estimations.

## COMPETITION POLICY

### (i) National Competition Policy

In April 1995, all Australian governments reached agreement to implement a National Competition Policy (NCP) to enable competition reform to be undertaken in a structured, transparent and comprehensive manner. NCP is underpinned by three intergovernmental agreements, which outline the reforms that Australian, State and Territory governments agreed to put in place under the NCP process.

The NCP consists of six essential elements:

- universal application of the competitive conduct rules contained in the *Trade Practices Act* to all sectors of the Australian economy;
- the review of legislation which restricts competition to ensure that such restrictions are necessary to achieve the objects of the legislation and that there is a net benefit to the community as a whole as a result of the restriction;
- structural reform of public monopolies where a government has decided to introduce competition or undertake privatisation;
- enabling access to services provided by means of significant infrastructure facilities;
- price oversight of firms (including government businesses) with a high degree of market power; and
- competitive neutrality principles which state that government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

Further information is available at <http://www.accc.gov.au>

### *Competitive Neutrality*

Under the umbrella of NCP, the Australian, State and Territory governments agreed in the *Competition Principles Agreement 1995* to abide by principles of competitive neutrality in respect of government businesses. The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities.

Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. In order to neutralise any net competitive advantage, the *Competition Principles Agreement* sets out a number of measures to be applied to significant government businesses including corporatisation, imposition of full taxes (or tax equivalents), debt guarantee fees, and imposition of regulation on an equivalent basis to the private sector.

Each government is required to report annually on their compliance with the *Competition Principles Agreement*.

The *Competition Principles Agreement 1996* and the Australian Government's policy documents on the application of competitive neutrality are available at:  
<http://www.pc.gov.au/agcnco/reports/external/index.html>

### *Competitive Conduct Rules*

Australia's primary competition laws are contained in the *Trade Practices Act 1974* and the *Prices Surveillance Act 1983*. The laws consist of rules against certain types of anti-competitive conduct (the competitive conduct rules) and laws relating to price oversight.

The competitive conduct rules contained in Part IV of the *Trade Practices Act* prohibit conduct which has the purpose or effect of substantially lessening competition in the relevant market. These prohibitions include secondary boycotts, exclusive dealing, and mergers which are likely to substantially lessen competition in a substantial market. In addition, collusive price-fixing, third-line forcing, primary boycotts, and resale price maintenance are prohibited, and subject to a per se prohibition (i.e. no competition test). Part IV also prohibits the misuse of market power by a corporation. Competitive conduct matters are determined exclusively by the Court. The Australian Competition and Consumer Commission (ACCC) is charged generally with bringing enforcement proceedings in the Court.

The *Prices Surveillance Act* establishes a price oversight regime administered by the ACCC. Under the regime, there are three types of oversight – surveillance, monitoring and public inquiries. Surveillance acts to restrain or limit price increases, is triggered by a Ministerial direction and is applied where there is a concern about prices in a significant market where competition is weak or ineffectual. Under monitoring, the ACCC collects data on prices, costs and profits in an industry or business and provides a report on its findings, as directed by the Australian Minister. Monitoring is intended to provide information on the industry's performance and whether any other policy actions are required.

There are specific exemptions from the competitive provisions of Part IV of the TPA:

- the authorisation/notification process set out in the TPA;
- legislative exceptions by the Federal Government and the States and Territories; and
- specific limited exemptions relating to matters which are regulated under a different regime, e.g. contracts of employment and provisions of intellectual property contracts.

Authorisation is a process whereby the ACCC, upon application, grants immunity from breach of the competitive conduct rules, where the conduct is likely to produce a net public benefit. Exclusive dealing conduct may also receive immunity from court action under a simple notification scheme until, and if, it is revoked by the ACCC, where it is of the opinion that there is no net public benefit from the conduct.

For further information please see the ACCC's website on  
<http://www.accc.gov.au/content/index.phtml/itemId/277796>

(ii) National Reform Agenda

In February 2006, the Council of Australian Governments (comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association) announced its commitment to deliver a substantial new National Reform Agenda, embracing human capital, competition and regulatory reform streams. The competition stream is a substantial addition to, and continuation of, the highly successful NCP reforms. It will further boost competition, productivity and the efficient functioning of markets by focusing on further reform and initiatives in the areas of energy, transport and infrastructure regulation and planning.

The COAG communiqué and the report of the NCP review are available at:

<http://www.coag.gov.au/meetings/100206/index.htm#related>

(iii) Regulatory Reform

The Australian Government is reducing the burden of red tape for businesses to further improve the economic environment so that all businesses, large and small, can prosper and grow. The Australian Government appointed a taskforce (the Banks Taskforce) to identify practical options for alleviating the compliance burden on business from Australian Government regulation. In August 2006, the Australian Government announced its final response to the Banks Taskforce report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, agreeing to the majority of the Report's recommendations. The Australian Government's response tackles the burden of business red tape now and into the future. The Australian Government has agreed to a range of measures to cut existing regulation across a wide range of sectors and business activities, including health, labour market, consumer, environment, financial and corporate, and taxation. The response also introduces a strengthened regulation-making and review framework to ensure that systems are in place to guard against the introduction of unnecessary regulation and improve the quality of existing and new regulation. Finally, the Australian Government has agreed to explore options for improving the administration of regulation and to improve efficiency across government.

The Banks Taskforce Report is available at:

<http://www.regulationtaskforce.gov.au/>

The Australian Government's response to the Banks Taskforce Report is available at:

<http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1141>



# BRUNEI DARUSSALAM

## Acronyms

BEDB	Brunei Economic Development Board
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## INTRODUCTION

Brunei Darussalam owes its economic prosperity mainly to its abundant petroleum and natural gas resources. However, recognising that a more diverse economic base is in the long-term interest of the nation and the community; the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam is also driving towards economic diversification in order to steer away from this continued dependence on non-renewable resources so as to ensure a more sustainable economy.

This aspiration is sought particularly through the strengthening of the currently under-developed private sector, by encouraging more FDI and corporatisation, commercialisation of government agencies and enhancing the capabilities of SMEs that make up more than 90% of Brunei's business operations.

In this regard, the investment regime of Brunei Darussalam has undergone a substantive revision in order to create an environment that is favourable and conducive for trade and investment. By establishing a strong legal infrastructure, supported by a competitive market environment, Brunei Darussalam intends to attract and facilitate the flow of more FDI into the country.

Competitive investment incentives are ready and available for investors throughout the business cycle of start up, growth, maturity and expansion. The *Investment Incentive Act* (1975) provides tax advantages at start up and ongoing incentives throughout growth and expansion that are comparable if not better than those offered by other countries in the region.

Industrial policies including manpower, ownership, government support and facilities remain open and flexible for all categories of industrial activities. Brunei Darussalam maintains a realistic approach where a variety of arrangements are feasible. Policies relating to ownership allow for full foreign ownership, majority foreign ownership and minority foreign ownership, as per the type of industry and situation.

In November 2001, the Brunei Economic Development Board (BEDB) was formed with the primary responsibility of attracting and retaining local and FDI to further diversify Brunei Darussalam's economy and create employment opportunities for its people. Its primary focus is in attracting investment in advanced technology industries and skill-intensive services with good export market prospects.

The BEDB also aims to coordinate with relevant ministries and agencies to facilitate investors and maximize benefits. As such its role is to prepare, promote and develop industrial sites and strategic competitive facilities for prioritised industries.

Targeted industries include developing downstream and manufacturing industries in Sungai Liang and Pulau Muara Besar. The strategy involves developing four prioritized industry clusters to complement the development of Sungai Liang and Pulau Muara Besar. This includes services, financial services, hospitality and tourism, and transport and logistics.

**Where to find further information:**

Brunei Economic Development Board website: <http://www.bedb.com.bn>

Ministry of Industry and Primary Resources website: <http://www.mipr.gov.bn>

Changes since 2001 also appear in Brunei Darussalam's Individual Action Plans at <http://www.apec-iap.org/>

## **SCREENING OF FOREIGN INVESTMENT**

(i) What is screened?

In general foreign ownership of investment in Brunei Darussalam is limited to 49%. However, investment made through negotiations with BEDB can allow for 100% foreign ownership.

Brunei Darussalam does however maintain its right to screen investment to ensure that foreign investments do not contradict and cause negative impact to the overall National Development Plan and to the national interest.

The point of responsibility for foreign investment policy does not rest with a central agency but with several sectoral agencies.

(ii) Transparency of the screening process

The Government of Brunei Darussalam seeks to ensure that proposals for foreign investment are dealt with quickly and efficiently.

The process of application does remain within the responsibility of sectoral agencies and potential investors are often advised to consult these relevant agencies.

## **SECTOR-SPECIFIC LAWS AND POLICIES**

(i) Banking

Foreign investment in the banking sector needs to be consistent with the *Banking Act* (1995).

(ii) Media, Broadcasting, Newspapers

Foreign investment in this sector is restricted in these areas.

(iii) Telecommunications

Foreign ownership in this industry is restricted under the *Telecommunications Act* (1974)

(iv) Real Estate

Under the *Land Code Act* (revised 2000), no foreign ownership of land is allowed. Lease of land for industrial development however is examinable and often allowed.

## **INVESTMENT PROTECTION**

(i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

The Brunei dollar is a convertible currency.

The Government does not maintain any currency controls or limit remittance, loan and lease payments.

Exchange rates are determined on the basis of demand and supply conditions in the exchange market.

(ii) Expropriation and Compensation

Brunei Darussalam is a signatory to the 1987 ASEAN Agreement for the Promotion and Protection of Investments which:

- extends protection to investment against expropriation; and
- guarantees repatriation of capital, profits and earnings on direct investments activities from nationality (legal or natural) of the contracting parties.

Provision for expropriation and compensation is usually included in bilateral investment agreements. There has been no instance of expropriation and compensation of foreign investment in Brunei.

(iii) IPR

The Registries Division of the Attorney General's Chambers is responsible for the registration and administration of IPR protection in Brunei Darussalam. The Division advises the government on all matters concerning IP, formulates and reviews IP policies, and drafts the relevant IP legislation. The Division is also the agency responsible for promoting awareness and disseminating information on IP in the country.

### *Membership of International Organizations*

- WIPO — 1994
- WTO — 1995

### *Membership of International Treaties and Agreements*

- TRIPS — 1995
- Berne Convention for the Protection of Literary and Artistic Works — 30 August 2006

Other conventions being studied for accession include the Paris Convention, Patent Cooperation Treaty, Madrid Protocol and the Singapore Treaty on the Laws of Trade Marks. Protection of IP rights is contained in various Administrative Orders and legislation: Copyright Order, new *Trademarks Act*, Industrial Designs Order, Layout Designs Order, and the Patents Order (pending completion of Rules).

The *Trademarks Act* (19Cap 98) and Trade Marks Rules (2000) are the legislation governing the registration of trademarks in Brunei Darussalam. To be registrable under the Act, a trademark must be visually perceptible, capable of being represented graphically (smell and scent marks are excluded) and capable of distinguishing goods and services of one undertaking from those of others. In addition, the proposed trademark must satisfy the formalities and substantive requirements as set out in the Act that governs the registration procedures. Once registered, a trademark is protected for 10 years but can be further renewed subject to the payment of the renewal fee.

### *Patents*

The Registries Division operates a re-registration system for patent grants which have been registered in the United Kingdom, Singapore or Malaysia. To be enforced in Brunei Darussalam, the patents must be registered within three years from the date of grant in any of the aforementioned countries. Such grants will remain valid as long as the patent remains valid in the said countries.

### *Copyright*

The categories of work that are protected under the Copyright Order are literary works, dramatic works, musical works, artistic works, films, sound recordings, broadcasts, cable programmes and published editions. Protection of copyright is automatic thus there are no formal procedures for registration in Brunei Darussalam. For literary, artistic, dramatic and musical works, protection is 50 years from the end of the calendar year in which the author died. For film and sound recordings, 50 years from the year in which they were made or released. For broadcasts and cable programmes, 50 years from the end of the year in which they were first broadcasted or transmitted. For typographical arrangements, 25 years from the end of the calendar year in which the edition was published.

### *Industrial Designs*

The Emergency (Industrial Designs) Order (1999) and the Industrial Designs Rules (2000) provide for registration of new industrial designs for the visual appearance of products. The Registry does not conduct prior art searches and only examines the formalities requirements. To be registrable, an industrial design must be new at the filing date of the application. An industrial design is new if it has not been registered, published, used or sold in Brunei Darussalam or elsewhere before the date on which the application for registration was lodged. Registration is for an initial period of

5 years extendable for two periods of 5 years each totalling a maximum of 15 years subject to the payment of a renewal fee at the end of the 5<sup>th</sup> year.

### *Layout Designs*

The Emergency (Layout Designs) Order provides statutory protection for original layout designs that are created after the commencement of the Order. A layout design must be original in that it is the result of its creator's own intellectual effort and is not commonplace among creators of layout designs and manufacturers of integrated circuits at the time of manufacture. Original layout designs are protected automatically as there is no requirement for registration or deposit of the layout. The duration of the protection is either 10 years after the first commercial exploitation, if the exploitation takes place within 5 years after the year it is created or, in any other case, 15 years after the year of the creation of the layout design.

### *Enforcement*

The agencies responsible for the enforcement of IPR in Brunei Darussalam are the Royal Brunei Police Force and the Customs and Excise Department. Prosecution of offences is initiated by the Criminal Justice Division of the Attorney General's Chambers. Enforcement of IP rights is based on complaints lodged by the registered owner. Both civil remedies and criminal sanctions are available in infringement cases.

Prosecutions of IP rights infringement is initiated by copyright owner/exclusive licensee through complaints and subsequent investigations by the Royal Brunei Police Force.

The Royal Brunei Police Force is responsible for general enforcement and the investigation of criminal offences under the relevant legislations while the Royal Customs and Excise Department is responsible for enforcement of border control measures.

#### **For further information please contact:**

The Registries Division  
1<sup>st</sup> Floor, The Law and Courts Building  
KM 1 Jalan Tutong  
Brunei Darussalam  
Tel: (673) 2231200, 2220382, 2231193/4/6  
Fax: (673) 2231230  
Website: [www.agc.gov.bn](http://www.agc.gov.bn)  
Email: [info@agc.gov.bn](mailto:info@agc.gov.bn)

#### (iv) Dispute Settlement

General settlement of disputes is covered under the *Arbitration Act (Cap 173)*. The Act incorporated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), as adopted by the United Nations Conference on International Commercial Arbitration on The 10th June 1958.

Other mechanisms used include BITS and ICSID to which Brunei Darussalam is a party. No cases have reached arbitration over the last three years.

The agency responsible for such matters is:

Attorney General's Chambers The Law and Courts Building,  
KM 1 Jalan Tutong  
Brunei Darussalam  
Tel: (673) 2231200; 2220382; 2231193/4/6  
Fax: (673) 2231230  
Website: [www.agc.gov.bn](http://www.agc.gov.bn)  
Email: [info@agc.gov.bn](mailto:info@agc.gov.bn)

## INVESTMENT AND DEVELOPMENT

### (i) Performance requirements

Brunei Darussalam does not impose any non WTO-inconsistent restriction or requirement as per its WTO commitment under TRIMS, 1995.

### (ii) Other policy measures affecting inward foreign investment

None.

## INVESTMENT PROMOTION AND INCENTIVES

### (i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

There are several agencies responsible for the promotion of investment into Brunei Darussalam namely the Ministry of Industry and Primary Resources and the Brunei Economic Development Board. Each agency is responsible for investment in different areas and investors are advised to consult these agencies prior to engaging in investment activities. Contact details follow.

AGENCY	ADDRESS/TELEPHONE/FAX
Brunei Economic Development Board	Block 2k, Bangunan Kerajaan Jalan Ong Sum Ping, Ba1311 Bandar Seri Begawan Negara Brunei Darussalam Tel: 673 2230111 Fax: 673 2230078 Website: <a href="http://Www.Bedb.Gov.Bn">Www.Bedb.Gov.Bn</a>

AGENCY	ADDRESS/TELEPHONE/FAX
Ministry Of Industry And Primary Resources	Jalan Menteri Besar Bandar Seri Begawan Negara Brunei Darussalam TEL: 673 2383822 FAX: 673 2382807 Website: <a href="http://www.Industry.Gov.Bn">Www.Industry.Gov.Bn</a>

(ii) Fiscal, financial, tax or other incentives

*Investment Incentives Act* (Cap 97) as amended under Investment Incentives Order (2001)

Industries Granted Pioneer Status	<p>Investment Incentives:</p> <ul style="list-style-type: none"> <li>• 30% corporate tax is exempted for a pioneer industry.</li> <li>• Exemption from taxes on imported duties on machinery, equipment, component parts, accessories or building structures.</li> <li>• Exemption from taxes on imported raw materials not available or produced in Brunei Darussalam intended for the production of the pioneer products</li> <li>• Carry forward losses and allowances</li> </ul> <p>Tax Exemption Periods are as follows:</p> <table border="1" data-bbox="486 1171 1414 1563"> <thead> <tr> <th data-bbox="486 1171 796 1238">Fixed Capital</th> <th data-bbox="796 1171 1082 1238">Tax Relief Period</th> <th data-bbox="1082 1171 1414 1238">Extension</th> </tr> </thead> <tbody> <tr> <td data-bbox="486 1238 796 1384">More than \$500,000, but less than \$2.5 Million</td> <td data-bbox="796 1238 1082 1384">5 Years</td> <td data-bbox="1082 1238 1414 1384">8 Yrs + further 11 years</td> </tr> <tr> <td data-bbox="486 1384 796 1491">More Than \$2.5 Million</td> <td data-bbox="796 1384 1082 1491">8 Years</td> <td data-bbox="1082 1384 1414 1491">Not exceeding 11 years</td> </tr> <tr> <td data-bbox="486 1491 796 1563">High Tech Park</td> <td data-bbox="796 1491 1082 1563">11 Years</td> <td data-bbox="1082 1491 1414 1563">Not exceeding 20 years</td> </tr> </tbody> </table>	Fixed Capital	Tax Relief Period	Extension	More than \$500,000, but less than \$2.5 Million	5 Years	8 Yrs + further 11 years	More Than \$2.5 Million	8 Years	Not exceeding 11 years	High Tech Park	11 Years	Not exceeding 20 years
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More Than \$2.5 Million	8 Years	Not exceeding 11 years											
High Tech Park	11 Years	Not exceeding 20 years											

<p>Pioneer Service Companies</p>	<p>Investment Incentives:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> <li>• Carry forward losses and allowance</li> </ul> <p>Tax exemption period is 8 years and can be extended (not exceeding 11 years in total).</p> <p>Activities Granted For Pioneer Services Status:</p> <ul style="list-style-type: none"> <li>• Any engineering or technical services including laboratory, consultancy and r&amp;d activities;</li> <li>• Computer-based information and other company-related services;</li> <li>• The development or production of any industrial design;</li> <li>• Services and activities which relate to the provision of leisure and recreation;</li> <li>• Publishing services;</li> <li>• Services which relate to the provision of education;</li> <li>• Medical services;</li> <li>• Services and activities which relate to agricultural technology;</li> <li>• Services and activities which relate to the provision of warehousing facilities;</li> <li>• Services which relate to the organization or management of exhibitions and conferences;</li> <li>• Financial services;</li> <li>• Business consultancy, management and professional services;</li> <li>• Venture capital fund activity;</li> <li>• Operation or management of any mass rapid transit system;</li> <li>• Services provided by an auction house;</li> <li>• Maintaining and operating a private museum;</li> <li>• Such other services or activities as the minister may prescribe.</li> </ul>
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<p>Post-Pioneer Companies</p>	<p>Investment Incentives:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax;</li> <li>• Deduction of losses;</li> <li>• Adjustment of capital allowances and losses.</li> </ul> <p>Tax exemption period is 6 years and can be extended (not exceeding 11 years in total).</p>
<p>Expansion of Established Enterprises</p>	<p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> </ul> <p>Tax Exemption Periods are as follows:</p> <ul style="list-style-type: none"> <li>• New capital not exceeding \$ 1 million – 3 years</li> <li>• New capital exceeding \$ 1 million – 5 years</li> <li>• Extension — not in aggregate to exceed 15 years</li> </ul>
<p>Expanding Service Companies</p>	<p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> </ul> <p>Tax exemption period is 11 years and can be extended (not exceeding 20 years in total).</p>
<p>Production for Export</p>	<p>Investment Incentives:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> <li>• Exemption from imports duties on machinery, equipment, component parts, accessories or building structures</li> <li>• Exemption from import duties on raw material</li> </ul> <p>Tax exemption period varies from 6 to 15 years for pioneer enterprises and 8 to 15 years for non-pioneer enterprises.</p>
<p>Export for Services</p>	<p>Investment Incentives:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> <li>• Deduction of allowances and losses</li> </ul> <p>Tax exemption is 11 years and can be extended not exceeding 20 years in total</p>
<p>International Trade Incentives</p>	<p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> </ul> <p>Tax exemption period is 8 years.</p>
<p>Foreign Loans for Productive Equipment</p>	<p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Exemption of approved foreign loan interest from paying tax</li> </ul>

Investment Allowances	<p>Used for:</p> <ul style="list-style-type: none"> <li>• For manufacture or increased manufacture of any product;</li> <li>• For the provision of specialized engineering or technical services;</li> <li>• For r&amp;d;</li> <li>• For construction operation?</li> <li>• For recycling of domestic industrial waste;</li> <li>• In relation to any qualifying activity under a pioneer services company;</li> <li>• For promotion of the tourist industry (other than a hotel) in Brunei Darussalam.</li> </ul> <p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Exemption from income tax</li> </ul> <p>Tax exemption period is 5 years except for tourism industry (other than hotel) which is 11 years.</p>
Warehousing and Servicing Incentives	<p>For Capital Expenditure of not less than \$2 Million.</p> <ul style="list-style-type: none"> <li>• Investment incentive — exemption from income tax</li> </ul> <p>Tax exemption period is 11 years and can be extended not exceeding 20 years in total.</p>
Investment in New Technology Companies	<p>To qualify for tax exemption, at least 30% of the paid-up capital must be owned by citizens or persons for whom a resident permit has been granted under regulations made under the <i>Immigration Act</i> (cap 17).</p> <p>Investment incentive- deduction allowable to eligible holding company.</p>
Overseas Investment and Venture Capital Incentives	<p>Investment Incentive:</p> <ul style="list-style-type: none"> <li>• Deduction allowable to eligible holding company.</li> </ul>

(iii) Tax Incentives

Income Tax (Cap 35)

i. Basic rights and guarantees to investors

Repatriation of capital is not restricted. No restrictions are imposed on remittance of earned profits and dividends on investment.

ii. Carry forward losses

iii. Carry forward capital allowances during the relief period

iv. Deduction from taxable corporate income (depreciation allowance)

Tax-payer is entitled to claim wear and tear allowance calculated as follows:-

a) Industrial Buildings:

an initial allowance of 10% is given in the year of expenditure, and an annual allowance of 2% of qualifying expenditure is provided on a straight line basis until the total expenditure is written off.

b) Machinery and Plant:

an initial allowance of 20% of the cost is given in the year of expenditure together with annual allowances calculated on the reducing value assets. The rate prescribed by the collector of income tax ranges from 3% to 25% depending on the nature of the asset.

**Further information is available through:**

Ministry of Industry and Primary Resources website: [www.industry.gov.bn](http://www.industry.gov.bn)

Brunei Economic Development Board website: [www.bedb.com.bn](http://www.bedb.com.bn)

(iv) Incentives:

None.

(v) Free Trade Zones or 'Special Investment Areas'

Brunei Darussalam does not operate a Free Trade Zone however a special zone — the Sungai Liang Industrial Area under the purview of the BEDB has been created. In general, foreign ownership of land on long-term lease is allowable within this area.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Brunei Darussalam does not impose any restrictions on the repatriation of capital and earnings by foreign investors.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

All foreigners require work permits which are valid for two years. Application must first be made to the Labour Department for a labour license. On the recommendation of the Labour Department, the Immigration Department will give grant visas for workers to enter Brunei Darussalam. .

The Labour Department requires either cash, or in lieu of that, a banker's guarantee when an employer submits an application for a work permit. The deposit or bank guarantee is used for

purposes in connection with the entry, subsistence allowance, housing, medical care and repatriation.

Identity cards must be obtained from the Immigration Dept and are subject to annual renewal.

(i) Domestic labour laws which apply to foreign firms in the context of labour disputes/relations

The *Trade Disputes Act* (Cap 129) accords to trade unions the customary immunities and protections in respect of acts done in furtherance of trade disputes. It prescribes procedures for conciliation and, subject to the consent of the parties, arbitration in disputes where machinery within the industry concerned does not exist or has failed to achieve settlement.

Trade unionism is not widespread in Brunei Darussalam. As has been already observed, the industrial structure consists almost entirely of small-scale enterprises. This state of affairs and the nature and cultural characteristics of the population are conducive to accommodation and a “give and take attitude” rather than a confrontational attitude. Except in the oil industry, the system of collective bargaining has not emerged.

Relations between employers and employees are generally good. Existing labour laws have adequate provisions such as for termination of employment, medical care and maternity leave and compensation for disablement. Labour disputes are very rare. The Government has implemented the *Workers’ Provident Fund Enactment* (1993) to cover workers both in the public and private sectors.

(ii) Permits/entry visa requirements for non-resident staff of foreign firms

Malaysian, Singaporean and British nationals with the right of abode in the UK are exempted from the requirement to obtain a visa for visits not exceeding 30 days.

Visas are also waived for visits ranging from 14 days – 90 days for various nationals. The updated list of visa exemptions for nationals of other countries can be found at:

<http://www.mfa.gov.bn/visainformation/visaarrangements.htm>

However, visas are required if nationals of these countries intend to stay in Brunei Darussalam for longer than 14 days.

All other nationals entering Brunei Darussalam must have visas obtainable from any Brunei Darussalam diplomatic mission or representatives of other governments who are performing consular functions on behalf of His Majesty’s Government.

Visitors who wish to enter Brunei Darussalam to take up employment must arrange with their employers to obtain employment passes prior to their arrival

Brunei Darussalam is a member of the APEC Business Travel Card scheme. This scheme cuts down red tape for business travel, and provides *bona fide* and accredited business people pre-cleared entry to participating APEC economies. Card holders enjoy:

- special APEC lanes at Brunei International Airport;
- no pre- application of visas or entry permits to any of the participating economies;

- multiple short-term entry to Brunei Darussalam for 90 days stay each visit; and
- cards are valid for three years.

For more information on the APEC Business Travel Card see [www.businessmobility.org/key/abtc.html](http://www.businessmobility.org/key/abtc.html)

- (iii) Restrictions on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members.

Spouses and children under 18 years of age of pass holders are required to obtain dependents' passes.

- (iv) Laws or policies that restrict appointments by foreign investors to senior management positions and Boards of Directors.

Brunei Darussalam does not restrict the appointment of foreign nationals to senior management position to Boards of Directors.

## **GOVERNMENT PROCUREMENT**

Brunei Darussalam undertakes a procurement process that is non-discriminatory and transparent.

## **COMPETITION POLICY**

Brunei Darussalam does not have any general competition laws. A *Price Control Act* (1974) (amended 1999) is in place to ensure that price tags are placed on all commodities offered for sale as well as to provide a mechanism for undertaking surveillance to ensure no price oversight, collusive price-fixing and unfair pricing activities occur.

The Department of Economic Planning and Development is responsible for enforcing the *Price Control Act*.

**Further information is available at:**

Department of Economic Planning and Development  
 Prime Minister's Office  
 Brunei Darussalam  
<http://www.depd.gov.bn>



# CANADA

## Acronyms

CCFTA	Canada-Chile Free Trade Agreement
CIPO	Canadian Intellectual Property Office
CISP	Community Investment Support Program
ERPA	External Relations and Public Affairs Branch (Competition Bureau)
FIPA	Foreign Investment Protection Agreement
HRDC	Human Resources Development Canada
ICA	<i>Investment Canada Act</i>
PWGSC	Department of Public Works and Government Services

## INTRODUCTION

FDI is recognized as bringing with it technology transfers, international management expertise, production know-how and product innovation and market access. It is an important element in the creation and preservation of high-value-added jobs, and is the source of other benefits, such as tax revenue and retained earnings. Thus Canada has continued to pursue policy objectives domestically and internationally with a view to enhancing investment.

The attitude of the Government of Canada to foreign investment was clearly articulated two decades ago with the passage of the *Investment Canada Act* (ICA) in 1985, which replaced the more restrictive *Foreign Investment Review Act*. Since 1989, Canada has been negotiating Foreign Investment Protection Agreements (FIPAs) in order to secure investment liberalisation and protection commitments on the basis of a model agreement developed under the auspices of the OECD. In 2003, Canada updated its FIPA model to reflect, and incorporate the results of, its growing experience with the implementation and operation of the investment chapter of the NAFTA.

The new Model FIPA can be found at [http://www.international.gc.ca/tna-nac/what\\_fipa-en.asp#structure](http://www.international.gc.ca/tna-nac/what_fipa-en.asp#structure).

Canada has responded directly to the increased importance of international investment (both inward and outward). It has taken concerted actions that have greatly improved the Canadian investment climate; developed targeted investment attraction strategies; and actively participated in the development and implementation of international rules governing investment.

Canada welcomes, and indeed actively seeks, beneficial foreign investment. The following pages provide information on Canada's foreign investment policy.

## SCREENING OF FOREIGN INVESTMENT

### (i) Review Required Only in Limited Circumstances

The ICA reflects Canada's policy of welcoming international investment and, indeed, of working to attract quality investment to all regions of Canada. At the same time, to ensure that such investment will be of net benefit to Canada, the ICA contains provisions for the review of certain acquisitions of control of Canadian businesses by foreign investors above a certain threshold (see below) and the establishment of new businesses in industries related to Canada's national identity or cultural heritage. To encourage investment by non-Canadians, Canadian government officials work with potential non-Canadian investors to help them develop investment plans and undertakings that will comply with relevant policies and fully satisfy the net benefit criterion.

The ICA specifies the factors to be taken into account in reviewable investments. Assessments are made in terms of the factors that are relevant to the individual investment proposal. Not all factors are relevant in all reviews. It is the net result of the assessment of the factors that determines the outcome; negative impacts can often be offset by positive impacts and result in an overall positive assessment. Each review is conducted on a case-by-case basis by examining the merits of the individual investment proposal. The factors of assessment are set out in Section 20 of the ICA and are as follows:

- the effect on the level of economic activity in Canada, on employment, on resource processing, on the utilization of parts and services produced in Canada, and on exports from Canada;
- the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within any industry in Canada;
- the compatibility of the investment with national, provincial and territorial industrial, economic and cultural policies; and
- the contribution of the investment to Canada's ability to compete in world markets.

### (ii) Notification is usually the only requirement

Foreign acquisitions of Canadian businesses with assets below the threshold (outlined below) and new businesses established by foreign investors which are not reviewable, are subject only to the notification provisions of the ICA. Notification entails the submission of a short filing which advises Industry Canada of the nature and size of the investment. A notification may be filed up to 30 days following the implementation of the investment.

(iii) General Exemptions from the ICA

The ICA contains a number of exemptions from the review mechanism in the Act:

- Securities Dealers;
- Venture Capitalists;
- Realization of Security (granted for a loan or other financial assistance);
- Financing (on the condition of divestiture within two years of acquisition);
- Corporate Reorganizations;
- Government Vendors;
- Tax-Exempt Vendors;
- Banks;
- Involuntary Acquisitions;
- Real Estate in a farming business;
- Insurance Company Portfolios.

(iv) Screening Requirements

<b>Proposal</b>	<b>Guidelines</b>
Direct Acquisitions	Except in sensitive sectors as set out in subsequent paragraphs, where either the non-Canadian investor or vendor is ultimately controlled in a wto country other than Canada, only the direct acquisition of control of a Canadian business that has assets equal to or greater than CAN\$265 million (for 2006) is a reviewable transaction. This figure is adjusted annually to reflect economic growth in Canada. See:  <a href="http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/h_1k00007e.html">http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/h_1k00007e.html</a> .
Mergers/Acquisitions	Where both the non-Canadian investor and vendor are ultimately controlled in a non-WTO country, the direct acquisition of control of a Canadian business that has assets greater than CAN\$5 million is reviewable, and the indirect acquisition of control of a Canadian business with assets greater than CAN\$50 million is reviewable, or CAN\$5 million where 50% or more of the total assets of the business acquired are located in Canada. These review thresholds are fixed and are not adjusted.

<b>Proposal</b>	<b>Guidelines</b>
Reviewable Decisions Below Fixed Thresholds	The acquisition of a Canadian business involved in cultural industries, financial services, transportation services or uranium production is subject to the lower thresholds regardless of the nationality of the investor or vendor. Acquisitions in cultural industries (i.e. publication and distribution of books, magazines, newspapers, videos, music recordings, etc.). Below these thresholds and the establishment of new businesses in these cultural industries may be reviewable, if the government so decides. Reviewable investments are allowed to proceed if they are likely to be of 'net benefit' to Canada.
Greenfield Investment	Review not required, unless ordered by the government in the case of an investment in the cultural sector.
Real Estate / Land	The acquisition of land is not subject to review.
Joint Venture	The establishment of a joint venture is not subject to review.

A website has been established which provides detailed information on the ICA and copies of the documentation/forms required. These may be completed and submitted on-line. This website is at [http://investcan.ic.gc.ca/en\\_form.htm](http://investcan.ic.gc.ca/en_form.htm) Hard copies of the relevant documentation can be obtained from the contacts listed in the section below. Contact details follow.

<b>Agency</b>	<b>Address/Telephone/Fax</b>
Investment Review Directorate Industry Canada	C.D. Howe Building 235 Queen Street, Room 301 B East Tower Ottawa, Ontario K1a 0h5 Telephone: (1 613) 954 1887 Fax: (1 613) 996 2515
Cultural Sector Investment Review, Department of Canadian Heritage	275 Slater Street, 7 <sup>th</sup> Floor, Suite 705 Ottawa, Ontario K1a 0m5 Telephone: 613-998-9266 Facsimile: 613-998-9200

The following website provides specific information on foreign investment in the cultural sector: [http://www.canadianheritage.gc.ca/progs/ac-ca/progs/eiic-csir/index\\_e.cfm](http://www.canadianheritage.gc.ca/progs/ac-ca/progs/eiic-csir/index_e.cfm). For additional information, please see the contact provided in the next section.

To ensure a prompt review and decision, the ICA sets certain time limits for the responsible Ministers. Within 45 days after a complete application has been received, the investor must be notified that the Minister (a) is satisfied that the investment is likely to be of net benefit to Canada; or (b) is unable to complete the review, in which case a further 30 days will be necessary for its completion (unless the applicant agrees to a longer period); or (c) is not satisfied that the investment is likely to be of net benefit to Canada.

If 45 days have elapsed from the completion date without such a notice, or if a further 30 days (or a number of further days agreed upon) have elapsed after notice that the Minister is unable to complete the review and no decision has been taken, then the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

The average period of time in processing an investment application is about 40 days. For cultural cases, the period is often extended to 75 days.

When advised that the Minister is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and to submit undertakings within 30 days of the date of notice (or any other period that is agreed upon between the applicant and the Minister). On the expiration of the 30-day period (or agreed extension), the applicant must be notified forthwith that the Minister (a) is satisfied that the investment is likely to be of net benefit to Canada; or (b) confirms that the investment is unlikely to be of net benefit to Canada. In the latter case, the applicant may not proceed with the investment or, if the investment has already been implemented, must relinquish control of the Canadian business.

After these further representations, a decision by the Minister that she/he is not satisfied that an investment is likely to be of net benefit to Canada cannot be appealed under the ICA. While an investor can always resubmit his application, this would not normally be done unless there were significant new factors or undertakings to be offered for consideration. Contact details follow.

Agency	Address/Telephone/Fax
Investment Review Directorate Industry Canada	C.D. Howe Building 235 Queen Street, Room 301 B East Tower Ottawa, Ontario K1A 0H5 Telephone: (1 613) 954 1887 Fax: (1 613) 996 2515
Cultural Sector Investment Review, Department of Canadian Heritage	275 Slater Street, 7 <sup>th</sup> Floor, Suite 705 Ottawa, Ontario K1A 0M5 Telephone: 613-998-9266 Facsimile: 613-998-9200

Foreign investment in Canada is subject to multilateral obligations (e.g. through the OECD and WTO and, more recently, to obligations in regional and bilateral agreements: the North American Free Trade Agreement (NAFTA), Canada-Chile Free Trade Agreement (CCFTA) and 22 FIPAs. If required, existing domestic legislation is amended to bring it into conformity with international obligations. Examining Canadian foreign investment obligations as represented by Chapter 11 of the NAFTA, will provide a clear picture of commitments on foreign investment access and protection. More information on Canada's FTAs can be found at <http://www.international.gc.ca/tna-nac/menu-en.asp>.

The only domestic law of general application with respect to foreign investment is the ICA (the Act). Under the Act, the establishment of a new business in Canada by an investor making its first investment in Canada or the establishment of a new business by an existing investor where the new business is unrelated to any existing business in Canada is subject to a straightforward notification

procedure, but is not generally subject to review. There are some exceptions to this, outlined in this section and the section on restricted sectors. In addition to the ICA, there are a number of federal and provincial laws applying to specific industry sectors. At the federal level, for example, there are the *Bank Act*, the *National Transportation Act*, and the *Broadcasting Act*. The *Canada Business Corporations Act* also has provisions related to management and equity in federally incorporated businesses.

## SECTOR-SPECIFIC LAWS AND POLICIES

Foreign investments are accorded national treatment and MFN status in accordance with international agreements signed by Canada that cover investment (e.g. WTO, the NAFTA, the Chile-Canada FTA, and bilateral protection agreements). These international agreements contain some derogations from these principles, which are clearly laid out in those agreements.

Sectoral Restrictions	Guidelines and Conditions
Telecommunications	<p>The legislation (the <i>Telecommunication Act</i>, <i>Radiocommunications Act</i>, <i>Canadian Telecommunications Common Carrier Ownership and Control Regulations</i>) governing the establishment and operation of Canadian telecommunications common carriers restricts foreign ownership to 20% of voting shares (33.3% of voting shares in the case of holding companies). There are no ownership restrictions for the operation of international submarine cables, satellite earth stations or companies which provide telecommunications services on a resale basis, i.e. Resale of leased common carrier facilities for the purpose of providing basic or value-added services.</p> <p>For further information on the <i>telecommunications act</i> and related legislation see:  <a href="http://laws.justice.gc.ca/en/t-3.4/index.html">http://laws.justice.gc.ca/en/t-3.4/index.html</a>.</p>
Transport	<p>(A) <i>Air</i></p> <p>Canadian legislation governing air transportation (<i>Canada Transportation Act</i>) allows only Canadian owned and controlled airlines to provide domestic scheduled air service and to be designated under Canada's bilateral air agreements to provide scheduled international services. Currently, the limit on voting interests in Canadian airlines that may be held by foreign investors is 25%.</p> <p>For further information see:  <a href="http://www.cta-otc.gc.ca/air-aerien/index_e.html">http://www.cta-otc.gc.ca/air-aerien/index_e.html</a>  <a href="http://www.cta-otc.gc.ca/air-aerien/index_f.html">http://www.cta-otc.gc.ca/air-aerien/index_f.html</a>.</p>

Sectoral Restrictions	Guidelines and Conditions
	<p data-bbox="544 226 692 259"><i>(B) Marine</i></p> <p data-bbox="544 277 1422 752">The <i>Coasting Trade Act</i> reserves the transportation of cargo and passengers, along with all commercial marine activities in the territory of Canada, to duty-paid, Canadian-registered ships; in the waters above the continental shelf, activities relating to exploration, exploitation and transportation of mineral and non-living natural resources are likewise reserved to duty-paid, Canadian-registered ships. These ships do not have to be Canadian-built. Further, the <i>Canada Shipping Act</i> allows a Canadian-registered ship to be owned by a foreign corporation so long as one of the following is acting with respect to all matters relating to the ship: i) a subsidiary of the foreign corporation that is incorporated in Canada, ii) an employee or director of any branch operating in Canada, or iii) a ship management company incorporated in Canada.</p> <p data-bbox="544 786 1430 1223">The <i>Coasting Trade Act</i> provides for the temporary use of a foreign-flag or non duty-paid ship in the coasting trade of Canada in cases where there is no suitable Canadian ship available to perform a specific activity. Application for the use of such a ship must be filed with revenue Canada, customs and excise and reviewed by the Canadian transportation agency to confirm that a suitable Canadian ship is not available. Upon such confirmation, the foreign or non duty-paid ship can be granted a temporary coasting trade licence following i) payment of duty (which is assessed at a monthly rate of 1/120 of 25% of fair market value), and ii) the ship meeting all safety and pollution- prevention requirements imposed by Canadian law applicable to that ship.</p> <p data-bbox="544 1256 903 1290">For further information see:</p> <p data-bbox="544 1312 1233 1379"><i>Canada Transportation Act</i> <a href="http://www.tc.gc.ca/acts-regulations/general/c/ct/act/ct_a.htm">http://www.tc.gc.ca/acts-regulations/general/c/ct/act/ct_a.htm</a>.</p> <p data-bbox="544 1413 943 1447"><i>Canadian Aviation Regulation</i></p> <p data-bbox="544 1480 1270 1514"><a href="http://laws.justice.gc.ca/en/a-2/sor-2000-111/4525.html">http://laws.justice.gc.ca/en/a-2/sor-2000-111/4525.html</a>.</p> <p data-bbox="544 1547 1082 1615"><i>Aeronautics Act</i> <a href="http://www.tc.gc.ca/acts-regulations/general/a/aa/act/menu.html">http://www.tc.gc.ca/acts-regulations/general/a/aa/act/menu.html</a>.</p> <p data-bbox="544 1648 1190 1715"><i>Canada Shipping Act</i> <a href="http://www.tc.gc.ca/acts-regulations/general/c/csa2001/act/csa2001_a.htm">http://www.tc.gc.ca/acts-regulations/general/c/csa2001/act/csa2001_a.htm</a>.</p> <p data-bbox="544 1749 1129 1816"><i>Coasting Trade Act</i> <a href="http://www.tc.gc.ca/acts-regulations/general/c/cta/act/cta.htm">http://www.tc.gc.ca/acts-regulations/general/c/cta/act/cta.htm</a>.</p>
Agriculture	None
Business Service Industries	Residency requirements exist for a number of professional business service providers:

Sectoral Restrictions	Guidelines and Conditions
	<ul style="list-style-type: none"> <li>• Customs broker/brokerage;</li> <li>• Duty free shop operator;</li> <li>• Examiner of cultural property; and</li> <li>• Some professions, i.e. lawyers.</li> </ul>
Culture	<p>The department of Canadian heritage may review both new businesses and acquisitions of any size in areas involving cultural heritage or national identity, with the purpose of ensuring that they are of net benefit to Canada, including compatibility with Canadian cultural policies.” The following sectors are included:</p> <p><i>Book Publishing and Distribution</i>  Direct acquisition by non-residents of Canadian-controlled businesses is not normally allowed. Foreign investment in new businesses is considered favourably provided the investment is through a joint venture with Canadian control. Indirect acquisitions are allowed, subject to net benefit.</p> <p><i>Newspaper and Magazine Publishing, Distribution and Sale</i>  Publishing: acquisition of existing Canadian magazine and newspaper publishing businesses are not normally allowed. Establishment of new Canadian magazines are subject to net benefit and, in particular, majority original content in the publication. Establishment of new Canadian newspapers is not normally allowed.</p> <p><i>Sale and Distribution</i>  Acquisition or establishment of businesses engaged in distribution or sale of magazines and newspapers subject to net benefit.</p> <p><i>Film Distribution</i>  Acquisition of Canadian-controlled distribution companies by non-Canadians is not permitted. However, foreign investment is permitted if it is through a joint venture with Canadian control. Foreign investment in a new business is allowed if it is directly linked to the importation and distribution of proprietary product.</p> <p><i>Sound Recording Industry</i>  The net benefit test is applicable.</p> <p><i>Music Publishing</i>  The net benefit test is applicable.</p>

Sectoral Restrictions	Guidelines and Conditions
Energy	<p data-bbox="544 241 663 275"><i>Uranium</i></p> <p data-bbox="544 286 1426 539">A minimum level of resident ownership in individual uranium mining properties of 51% at the stage of first production is required. Exceptions to this limit may be permitted if it can be established that the property is in fact ‘Canadian-controlled’ (as defined in the <i>Investment Canada Act</i>). While these limits apply to the control of production facilities, there are no limits applied to foreign investment in exploration and development.</p> <p data-bbox="544 573 695 607"><i>Oil and gas</i></p> <p data-bbox="544 618 1406 763">(1) under the <i>Canada Oil and Gas Operations Act</i>, the approval of the minister of natural resources of a “benefits plan” is required to receive authorization to proceed with any oil and gas development project.</p> <p data-bbox="544 797 1430 1160">A “benefits plan” is a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan. The act permits the minister to impose an additional requirement on the applicant, as part of the benefits plan, to ensure that disadvantaged individuals or groups have access to training and employment opportunities or can participate in the supply of goods and services used in any proposed work referred to in the benefits plan.</p> <p data-bbox="544 1193 1410 1339">(2) the <i>Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act</i> and the <i>Canada – Newfoundland Atlantic Accord Implementation Act</i> have the same requirement for a benefits plan but also require that the benefits plan ensure that:</p> <ul data-bbox="544 1373 1417 1832" style="list-style-type: none"> <li data-bbox="544 1373 1417 1518">• Prior to carrying out any work or activity in the offshore area, the corporation or other body submitting the plan establish in the applicable province an office where appropriate levels of decision-making are to take place;</li> <li data-bbox="544 1541 1417 1641">• Expenditures be made for r&amp;d to be carried out in the province, and for education and training to be provided in the province; and</li> <li data-bbox="544 1664 1417 1832">• First consideration be given to goods produced or services provided from within the province, where those goods or services are competitive in terms of fair market price, quality and delivery.</li> </ul>

Sectoral Restrictions	Guidelines and Conditions
	<p>The boards administering the benefits plan under these acts may also require that the plan include provisions to ensure that disadvantaged individuals or groups, or corporations owned or cooperatives operated by them, participate in the supply of goods and services used in any proposed work or activity referred to in the plan.</p> <p>In addition, Canada may impose any requirement or enforce any commitment or undertaking for the transfer of technology, a production process or other proprietary knowledge to a person of Canada in connection with the approval of development projects under the applicable Acts.</p> <p>Provisions similar to those set out above are included in laws and regulations implementing the <i>Yukon Oil And Gas Accord</i>.</p> <p>Provisions similar to those set out above also will be included in laws and regulations to implement the <i>Northwest Territories Oil And Gas Accord</i>. Once this <i>Accord</i> is concluded, these provisions will be considered existing measures.</p>
Financial Services	<p>In Canada there are three classes of banks, based on size of equity small (less than CAN\$1 billion), medium (CAN\$1 billion — CAN\$5 billion) and large (greater than CAN\$5 billion). Large banks must remain widely held (investor, whether Canadian or foreign, may own up to 20% any class of voting shares and 30% any class non-voting shares). Medium-size banks are allowed to be closely held, but must have a public float of 35% of voting shares. Small banks have no ownership restrictions other than “fit and proper” tests.</p> <p>The foreign bank entry framework offers foreign banks considerable flexibility to provide financial services in Canada. They may choose to do so through Canadian subsidiary financial institutions and/or regulated foreign bank branches. They are allowed to own both wholesale and retail banks and full-service and lending bank branches. As well, foreign banks are permitted to own the same range of investments as Canadian banks.</p> <p>For further information see the Department of Finance, Canada website: <a href="http://www.fin.gc.ca">www.fin.gc.ca</a>.</p>
Fisheries	<p>Fish processing companies which have more than 49% foreign ownership are not permitted to hold Canadian commercial fishing licenses. There is no limit on foreign ownership of fish processing companies that do not hold fishing licences.</p> <p>Foreign fishing vessels are prohibited from entering Canada’s exclusive economic zone except under authority of a licence or under treaty. Foreign vessels are those which are not ‘Canadian’ as</p>

Sectoral Restrictions	Guidelines and Conditions
	<p>defined in legislation. The Minister of Fisheries and Oceans has discretionary authority with respect to the issuance of licenses.</p> <p>For further information see Canada fisheries and oceans:  <a href="http://www.dfo-mpo.gc.ca/home-accueil_e.htm">http://www.dfo-mpo.gc.ca/home-accueil_e.htm</a>.</p>
Broadcasting	<p>Broadcasting in Canada includes both broadcasting programming (e.g. ‘over the air’ broadcasting, pay and specialty services, video on demand) and broadcasting distribution (e.g. cable, direct-to-home satellite and wireless).</p> <p>Legislation (the <i>Broadcasting Act</i>) requires that the Canadian broadcasting system be effectively owned and controlled by Canadians. A directive by the Governor-in-Council limits foreign ownership to 20% of voting shares in a licensee and 33.3 % of voting shares in the case of holding companies. Therefore, foreign ownership can comprise 46.7% of a Canadian broadcasting licensee both directly and indirectly (20% directly, plus 33% of the Canadian holding company which owns the remaining 80% of the licensee). There are no restrictions on foreign ownership of non-voting shares in a holding company or licensee. In addition, the chief executive officer plus 80% of the board of directors of a company, which directly holds a broadcasting license, must be Canadian.</p> <p>For further information see <i>Broadcasting Act</i> at:  <a href="http://laws.justice.gc.ca/en/b-9.01/index.html">http://laws.justice.gc.ca/en/b-9.01/index.html</a>.</p> <p>And the <i>Direction to the CRTC (Ineligibility of Non-Canadians)</i> at:  <a href="http://www.crtc.gc.ca/eng/legal/noncanad.htm">http://www.crtc.gc.ca/eng/legal/noncanad.htm</a>.</p>

## INVESTMENT PROTECTION

### (i) Conversion, Repatriation and Transfers (including any Balance of Payments Safeguards)

There are no restrictions which limit the repatriation of funds related to foreign investment, such as profits, dividends and royalties, loan payments and liquidation.

There are also no restrictions on the convertibility of currencies for the overseas transfer of funds.

There are no restrictions to the foreign exchange regime. Exchange rates are determined on the basis of supply and demand conditions in the exchange market.

Canada’s FIPA model allows for Transfer of Funds under Article 14. It states that each Party shall permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory. This is also included in Canada’s FTA Investment Chapters.

(ii) Expropriation and Compensation

Both at the federal and provincial levels, there exists legislation giving authority to expropriate for the public purpose in accordance with the rule of law, subject to compensation. In all circumstances, a fair and equitable legal process is available to the expropriated party for the determination of compensation. Expropriation is included in Canada's FIPA Model under chapter 13.

Authorities first attempt to reach agreement on appropriate compensation, failing which the action is subject to the judicial process. Compensation is based on fair market value. Valuation criteria are determined by the courts and can include such things as asset value, going concern value, and other criteria.

(iii) IPR

Intellectual property is protected in Canada principally by six federal statutes governing rights to inventions (*Patent Act*); trade-marks (*Trade-marks Act*); literary, dramatic, musical or artistic works, and related rights (*Copyright Act*); industrial design (*Industrial Design Act*); plant breeding (*Plant Breeders' Rights Act*); and integrated circuits (*Integrated Circuit Topography Act*). These Acts are administered by the Canadian Intellectual Property Office (CIPO) of the Department of Industry except for the *Plant Breeders Rights Act*, which is administered by the Canadian Food Inspection Agency. Undisclosed information of commercial value is protected by federal and provincial statute and jurisprudence.

Canada supports effective intellectual property protection, that provides certainty and transparency to encourage marketing of goods, services, technology and entertainment; investment in R&D and innovation; and licensing arrangements (transfer of technology) to establish or expand existing business investment. Canada continues to improve intellectual property laws and their administration, to ensure adequate protection for owners of intellectual property, including effective mechanisms for enforcement of rights.

Canada recognizes the importance of intellectual property to the Canadian economy and is committed to developing effective intellectual property laws throughout the world. This is reflected in Canada's active participation in the work of the WTO, Council for Trade-Related Aspects of Intellectual Property (TRIPs), and the WIPO. Canada has adhered to the following international treaties with IP obligations:

- Paris Convention for the Protection of Industrial Property;
- Berne Convention for the Protection of Literary and Artistic Works;
- Universal Copyright Convention;
- Patent Cooperation Treaty;
- North American Free Trade Agreement;
- World Trade Organization Agreements, including TRIPs;
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure; and

- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

(iv) Dispute Settlement

Foreign and national investors have equal access to legal procedures in Canada. In addition, under the NAFTA and a number of bilateral investment agreements, foreign investors can appeal to international arbitration mechanisms.

Canada is a party to the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards (the “New York Convention”) signed in New York, 10 June 1958. It entered into force for Canada on 12 May 1986.

The British Columbia International Arbitration Centre (Vancouver, B.C.) and the Quebec National and International Commercial Arbitration Centre (Montreal, Quebec) offer services that may be accessed by foreign investors.

While Canada has not signed or acceded to the International Convention on the Settlement of Investment Disputes (ICSID) Convention, Canada provides for use of the ICSID Additional Facility Rules and the Arbitration Rules of UNCITRAL in its bilateral investment protection agreements and in the NAFTA.

## **INVESTMENT AND DEVELOPMENT**

Canada adheres to the obligations of the WTO Agreement on Trade Related Investment Measures. Canada has made additional and more rigorous commitments on performance requirements within the NAFTA and the CCFTA. Canada also has made performance requirements commitments in each of its bilateral FIPAs.

## **INVESTMENT PROMOTION AND INCENTIVES**

For background information see Investment Partnerships Canada <http://investincanada.gc.ca>

In June 1996, the Canadian government approved a new Investment Strategy. This new strategy committed it to increase efforts to attract foreign investment to Canada, and to facilitate the growth of Canadian-based, globally competitive companies. The strategy focuses on a number of priorities:

(a) Marketing Canada as an investment site to international business executives

To increase international awareness of the advantages of Canada as an investment site, the Government is actively promoting specific opportunities and our positive economic policies to potential investors.

(b) Targeting sectors and companies and offering customized servicing

The government is targeting decision-makers in specific multinational companies with strategic campaigns to influence their new investment decisions. Through, the Investment Promotion Branch

the Department of Foreign Affairs and International Trade is working to develop and manage investment campaigns directed at leading international investment prospects.

(c) Addressing investor concerns: making further improvements in Canada's investment climate

Many factors determine the attractiveness of the business environment. Some of these include access to sizable markets, labour force quality and productivity, costs of capital, taxation levels, the business infrastructure and government economic policies. The Canadian government is working to improve the investment climate by addressing the concerns of both existing and potential investors.

(d) Building Partnerships with other levels of government and the private sector to attract and retain investment

In Canada, provincial and municipal authorities compete among themselves for international investment capital. Investors consider this healthy, but it means that cooperation on investment initiatives is more difficult to achieve unless mutual interests and opportunities for complementary efforts are identified.

The federal government continues to build partnerships with provinces and municipalities to attract investment to various industry sectors.

In 2006, the Government of Canada announced funding to support Canadian communities in efforts to attract foreign investment. The Community Investment Support Program (CISP) program provides marketing, data and training funds to assist municipalities attract international investment.

CISP, which is the evolution of PEMD-I (Program for Export Market Development — Investment), is a \$4.5 million program (annually), which assists municipalities and community economic development organizations in attracting, retaining and expanding FDI into their regions. On a project basis, CISP provides up to \$300,000 per year in 50% matching funds towards eligible activities.

The program supports communities in two ways. CISP funding for communities in the early stages of investment attraction readiness is often devoted to research, training, and community profile development activities. For communities already engaged in investment promotion, CISP funding can help further efforts to identify targets, develop contacts, refine investment strategies, and develop and upgrade websites.

All applications are evaluated by regional adjudication committees chaired by a Senior Trade Commissioner and include representatives from the public and private sector, and provincial/territorial officials. On average, the amount of funding approved in each province and territory is proportional to the provincial/territorial population (based on *Statistics Canada 2001 Census Data*).

Since the program's inception in 1998, more than 290 communities across Canada have received support through 1,271 projects, valued at nearly \$42 million. Several municipalities have attributed CISP as having helped with the attraction of more than \$510 million in investment and the creation of 2,000 jobs.

A number of federal government incentive programs are available to Canadian and non-Canadian businesses. There are no specific federal incentives provided to foreign investors.

Information on government programs and services, (including incentive programs) can be obtained by contacting any Canadian Embassy/High Commission or by contacting the International FaxLink System, an automated fax delivery system used to order publications from outside of Canada. Call

from a [touchtone] fax machine at (1 613) 944-6500. A master index of documents available via FaxLink International may be ordered from the system.

The Government of Canada Primary Internet Site (Canada Site) is the Internet electronic access point through which interested parties from around the world can obtain information about Canada, its government and its programs and services. Direct links are also provided from this site to government departments and agencies that have Internet facilities. This website may be accessed at [http://Canada.gc.ca/main\\_e.html](http://Canada.gc.ca/main_e.html).

Information on investment policies, Canada's participation in international investment discussions and Canada's investment agreements; and access to an extensive collection of studies on the impact of FDI is available on the Government of Canada International Investment Policy Website at: <http://www.international.gc.ca/tna-nac/other/invest-en.asp> and on the Department of Foreign Affairs and International Trade — Trade Negotiations and Agreements Website at: <http://www.international.gc.ca/tna-nac/menu-en.asp>.

Also, users can read about Canada's Investment Promotion Strategy and find detailed provincial and federal information on investing in Canada may be accessed at the following addresses at: [http://www.investincanada.gc.ca/en/1792/What\\_CISP\\_supports.html](http://www.investincanada.gc.ca/en/1792/What_CISP_supports.html) or [http://www.investincanada.gc.ca/en/984/Supporting\\_Canadas\\_Municipalities.html](http://www.investincanada.gc.ca/en/984/Supporting_Canadas_Municipalities.html).

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

There are no regulations/institutional measures that limit capital or technology exports or the outflow of foreign investment.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

### **(i) Labour Laws and Regulations**

In Canada, responsibility for the regulation of labour relations is divided between the federal government and the governments of the 10 provinces and three territories, with the majority of employees and employers subject to the labour laws of the province or territory in which they work or operate. All companies operating in Canada, and all employees working in Canada, including temporary foreign workers, are subject to Canadian labour laws.

Canadian labour laws are generally divided into four areas: industrial relations, employment standards, occupational safety and health, and workers' compensation.

Industrial relations legislation in each Canadian jurisdiction provides a framework for organizing and collective bargaining. The rights of workers and employers to join organizations and to participate in their lawful activities are recognized and protected. Legislation encourages collective bargaining and the voluntary resolution of disputes with the assistance of conciliation and mediation services.

Employment standards legislation covers such topics as minimum age for employment, hours of work and overtime pay, minimum wages, equal pay, weekly rest-day, general holidays with pay, annual vacations with pay, maternity and parental leave and individual and group terminations of employment. Minimum wages vary between the provinces and territories.

Occupational health and safety legislation sets out the general duties of employers and workers with respect to safe workplaces. Regulations specify technical requirements that must be complied with, set standards that must be met, and prescribe procedures that must be followed to reduce the risk of occupational accidents and diseases.

Workers' compensation systems provide appropriate compensation for work-related disabilities and assist injured workers and their employers by providing timely health care and rehabilitative support to facilitate the efforts of injured workers to return to work.

Information on labour legislation in Canada is available on the Internet at:

<http://www.hrsdc.gc.ca/en/home.shtml>

Information on workers' compensation systems is available on the Internet at:

[http://www.awcbc.org/english/wcb\\_links.asp](http://www.awcbc.org/english/wcb_links.asp)

## (ii) Permits/Visa Requirements

Canada's Immigration legislation stipulates that only Canadian citizens and permanent residents have a right to work in Canada without being subject to regulation, and that with some exceptions, no foreign persons shall engage or continue in employment in Canada without a valid and subsisting work permit. It further recognizes that there is a need to admit foreign workers to complement the labour market or to benefit Canada, while ensuring that Canadians continue to have employment opportunities.

In order to work in Canada in an employee-employer relationship or under contract to a Canadian enterprise, a foreign worker will require a work permit. Generally an application for a work permit should be made at a visa office abroad before leaving for Canada. Application for extension can be made from within Canada.

There are many mechanisms to permit temporary foreign workers to be issued with a work permit. These are based on labour market assessment; to honour international commitments (i.e. NAFTA, GATS, CCFTA); where significant benefits exist for Canada; where reciprocal employment opportunities exist for Canadians; and to fulfil social, cultural or humanitarian objectives.

The principal categories which apply to "business" can be summarized as follows:

- Confirmation of offer of employment supported by a labour market assessment provided by Human Resources Development Canada (HRDC).
- Intra-company transferees for managers, executives and persons with specialized knowledge transferred within the same company.
- Traders and Investors for NAFTA and CCFTA business persons seeking to conduct trade or establish services to operate an investment.
- Professionals for NAFTA and CCFTA business persons.
- Self-employed for persons establishing a business which may result in direct employment.
- Workers generating significant benefits to Canada — including training personnel providing instruction in Canadian subsidiaries or headquarters.

Individuals may also be admitted to Canada to carry out business or trade related activities without the need for a work permit. They may work for or represent foreign companies or organizations and are not considered to seek to enter the domestic labour market to compete with Canadian workers. For instance, GATS business visitors are permitted entry to market their services, including establishing a business. They are considered visitors and will not be documented on a work permit but are still subject to the requirement for a temporary resident visa if applicable. Entry is usually for short durations of stay.

Canada has a business program for immigrants designed to attract experienced business people who will create jobs and contribute to economic development. There are three categories of business immigrants – entrepreneurs, investors and self-employed persons.

General provisions of the *Immigration and Refugee Protection Act* and Regulations apply to all temporary foreign workers. The most obvious is the general requirement for proof of identity and citizenship (passport). Citizens of some countries need to obtain a Canadian temporary resident visa before coming to Canada. Provisions of Immigration legislation also exist to bar the entry of persons with a criminal record, persons who are likely to be a danger to public health or to public safety or whose admission may cause excessive demands on health or social services.

Dependents may accompany the foreign worker to Canada, provided they meet the entry provisions which apply to all visitors to Canada. Spouses/common-law partners may apply for their own work permit and in certain cases are exempt from HRDC labour market assessment.

For more information on working in Canada, please see <http://www.cic.gc.ca/english/work/>

(iii) Guidelines and conditions that restrict appointments by foreign investors to senior management positions or the board of directors.

General Restrictions	Guidelines and Conditions
Board of Directors	The <i>Canada Business Corporations Act</i> requires, for most federally-incorporated corporations, that 25% of directors be resident Canadians. A simple majority of resident Canadian directors is required for corporations in prescribed sectors. These sectors include: uranium mining; book publishing or distribution; book sales, where the sale of books is the primary part of the corporation's business; and film or video distribution. Similarly, corporations that, by an Act of Parliament or Regulation, are individually subject to minimum Canadian ownership requirements are required to have a majority of resident Canadian directors.
Board of Directors	For purposes of the Act, "resident Canadian" means an individual who is a Canadian citizen ordinarily resident in Canada, a citizen who is a member of a class set out in the <i>Canada Business Corporations Act Regulations</i> , or a permanent resident as defined in the <i>Immigration and Refugee Protection Act</i> other than one who has been ordinarily resident in Canada for more than one year after he or she became eligible to apply for Canadian citizenship.  In the case of a holding corporation, not more than one-third of the

General Restrictions	Guidelines and Conditions
Issues, transfer, ownership of shares	<p>directors need be resident Canadians if the earnings in Canada of the holding corporation and its subsidiaries are less than 5% of the gross earnings of the holding corporation and its subsidiaries.</p> <p>The <i>Canada Business Corporations Act</i> permits corporations to 'constrain' the issue, transfer and ownership of shares in federally incorporated corporations.</p> <p>The object is to permit corporations to meet Canadian ownership requirements, under certain laws set out in the <i>Canada Business Corporations Act Regulations</i>, in sectors where such ownership is required as a condition to operate or to receive licenses, permits, grants, payments or other benefits.</p> <p>For more information please see <a href="http://competition.ic.gc.ca">http://competition.ic.gc.ca</a>.</p>

## GOVERNMENT PROCUREMENT

The Treasury Board Contracting Policy states that the method of procurement used for a particular acquisition must, within the limits of practicality, give all qualified firms an equal opportunity for access to government business.

Canada's contracting policies, procedures, Notices and Circulars, Statistics (& links to other sites) can be found at: <http://www.tbs-sct.gc.ca/cmp/home-accueil.asp?Language=EN>.

The Department of Public Works and Government Services (PWGSC) *Supply Manual* applies the Treasury Board Contracting Policy to PWGSC supply activities: <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>.

Canada is an active participant in the APEC Government Procurement Experts Group: [http://www.apec.org/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.html](http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement.html).

More information is also available in Canada's 2006 APEC Individual Action Plan: <http://www.apec-iap.org/>.

## COMPETITION POLICY

Competition is essential for an efficient market economy. It encourages healthy rivalry, innovation and productivity. With competitive forces at work, consumers are provided with quality products, choice and best possible price. A competitive economy at home enhances a nation's competitiveness abroad.

Canada's principal laws aimed at the protection of competition is the federal *Competition Act*, R.S.C., 1985, c. C-34, as amended, which came into force on June 19, 1986, replacing the *Combines Investigation Act* which has antecedents dating from 1889. The *Competition Act* (the

“Act”) is a law of general application which establishes basic principles for the conduct of business in Canada. The purpose of the Act is to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;
- expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

Canada’s competition legislation applies to all sectors of the economy. All business is subject to the Act, with the exception of selected activities specifically exempted such as collective bargaining, amateur sport and some regulated industries subject to other legislation. Section 2.1 of the Act expressly provides that the Act is binding on Crown corporations in respect of commercial activities engaged in by such corporations in competition with other persons.

The Competition Bureau (the “Bureau”) is an agency of Industry Canada and is responsible for the enforcement and administration of the Act under the supervision and authority of the Commissioner of Competition (the “Commissioner”). The Commissioner is an independent law enforcement official responsible for the Act, as well as three statutes involving the labelling of consumer products, textiles and precious metals. The Commissioner is appointed by, and serves at the pleasure of, Cabinet with a mandate to promote competition in Canada.

Competition law in Canada consists of both criminal offences and civil reviewable matters. Criminal charges are prosecuted before the various courts of criminal jurisdiction in each province. The Federal Court of Canada, Trial Division, also has jurisdiction with regard to indictable offences. The Commissioner initiates legal proceedings in non-criminal reviewable matters by filing an application with the Competition Tribunal. The Commissioner is also responsible for providing competition policy advice to federal and provincial governments, and for statutory representations before regulatory boards.

The Bureau has four enforcement branches organized along functional lines: mergers, civil matters, criminal matters, and fair business practices. The enforcement branches are primarily responsible for investigative work and litigation support for cases that proceed before the Tribunal or the courts. The Bureau also has an economics branch that provides economic analysis and , support for enforcement and policy matters. The International Affairs Division of the External Relations and Public Affairs Branch (ERPA) coordinates relations, in both policy and transactional matters, with competition enforcement authorities in other countries and at international *fora* such as the OECD and International Competition Network. ERPA also includes a Communications Division. In addition, the Bureau has a Compliance and Operations Branch that is responsible for the coordination of compliance initiatives with the business and legal communities and the public at large, as well as for coordinating management functions within the Bureau. Finally, the Bureau has a Legislative and Parliamentary Affairs Branch whose role is to ensure that the legislation is kept up-to-date.

The Competition Tribunal is a quasi-judicial tribunal, which operates at arms’ length from the Commissioner. Whereas the Commissioner's role is investigatory, the Tribunal's is exclusively adjudicative. It was created in 1986 with a view to developing special expertise in competition matters. The Tribunal consists of judges from the Federal Court, Trial Division, as well as lay members. It sits in panels comprised of both judicial and lay members, with only judicial members

deciding questions of law. The Tribunal's structure has been upheld as respecting the Constitutional right to a hearing by an independent and impartial tribunal.

The Tribunal may issue orders designed to remedy the effects of the reviewable conduct in question. The Tribunal also registers consent agreements with the consent of the Commissioner and persons under inquiry.

The *Competition Tribunal Act* provides that any affected person may apply for leave to intervene in proceedings before the Tribunal to make representations relevant to those proceedings, except in respect of fair business practices matters. This Act also provides rights of intervention before the Tribunal to provincial attorneys general. Leave may be sought to appeal to the Federal Court of Appeal. Private litigants may also apply to the Tribunal for leave to make an application under section 75 and 77 of the *Competition Act*, or may sue in Court for actual damages resulting from conduct contrary to the criminal provisions of the Act or a breach of a Tribunal or Court order made pursuant to the Act.

As mentioned above, the Competition Bureau is responsible for reviewing M&As in Canada to ensure that they are not anti-competitive. To do this, the Bureau applies the merger provisions of the Act. However, there are no specific merger provisions that favour domestic over foreign firms. If the Commissioner believes that a merger may be anti-competitive, she can make an application to the Tribunal. However, parties to a proposed merger are encouraged to approach the Commissioner early in the process to determine if there are potential competition concerns, and if there are, to determine whether they could be resolved without resorting to litigation.

This section only provides a general description of competition policy in Canada. For further information on this or specific merger notification requirements, please visit the Competition Bureau Canada's website at <http://www.competitionbureau.gc.ca>.

# CHILE

## Acronyms

CORFO	Chilean Economic Development Agency
FIC	Foreign Investment Committee
FCIFs	Foreign Capital Investment Funds
FONTEC	Technological Development Fund
Parenazone	Sociedad Administradora Zona Franca Punta Arenas Free Trade Zone
SENCE	Servicio Nacional de Capacitación y Empleo (Chile's Labor Training Agency)
SVS	Chilean Securities and Insurance Supervisor "Superintendencia de Valores y Seguros"
TEBP	Temporary Entry of Business Persons
ZOFRI	Iquique Free Trade Zone

## INTRODUCTION

Chilean investment has displayed remarkable dynamism against the backdrop of a policy that seeks to ease the regulatory burden on business and to accommodate Chile's increasing international economic engagement. Direct Foreign Investment in Chile shows, just like the foreign trade record, a relatively high volume in relation to the size of Chile's economy. Chile is among the 10 non-OECD countries with the highest level of foreign investment in recent years, while Chilean companies have become important investors abroad, mainly within the Latin American region, since the early 1990s.

Chilean economic policy has reflected the importance given to foreign investment, which, once established in the country, receives a treatment equally favorable than the one accorded to comparable Chilean companies. Chile's Constitution guarantees to all individuals, Chilean and aliens, the right to develop any economic activity, provided applicable legislation is observed and such activities are not contrary to public morals and order, or to national security interests. There are no economic activities reserved for the State, notwithstanding the special property, exploration and exploitation regime established under constitutional provisions regarding mineral substances. Private property rights are fully protected under the Constitution. Property may only be expropriated pursuant to specific constitutional provisions: expropriations may only be affected by law on grounds of public use or national interest, require the approval of the Congress and the expropriated parties have the right to indemnification for patrimonial harm caused.

Accordingly, one of the main objectives of Chile has been to ensure the establishment of clear investment rules, with a view to creating a wider and safer market. Furthermore, it has completed international negotiation processes in order to gradually liberalize the markets for investors, as well

as to strengthen integration processes that may contribute to trade expansion and the creation of strategic alliances to tackle global markets.

## **FOREIGN INVESTMENT REGIME**

In Chile, there is a free entrance of capital. Thus, subject to domestic regulations, investors can materialize their investment freely.

The Chapter XIV of the Central Bank's Compendium of Foreign Exchange Regulations establishes rules for investment, capital contributions, and foreign credit. Under Chapter XIV, the Central Bank is not allowed to reject foreign investments, although it may impose conditions based on its monetary policy on the transfer of funds into and out of Chile, such as a one-year retention requirement. Once the investments are materialized, investors should provide information to the Central Bank under Chapter XIV.

In addition, there is a special and voluntary regime known as *Decree Law No. 600*.

Any foreign individual or legal entity, as well as Chileans with residence abroad, can invest through D.L. 600. Under this mechanism, investors enter into a legally binding contract with the Chilean State, which cannot be modified unilaterally by the State or by subsequent changes in the law. However, investors may, at any time, request the amendment of the contract to increase the amount of the investment, change its purpose or assign its rights to another foreign investor.

D.L. 600 guarantees investors the right to repatriate capital one year after its entry and to remit profits at any time. In practice, the one-year capital lock-in has not represented a restraint since most productive projects -in areas such as mining, forestry, fishing and infrastructure- require more than a one-year start-up period. Once all relevant taxes have been paid, investors are assured access to freely convertible foreign currency without any limits on the amount, for both capital and profit remittances. In addition, they are guaranteed the right of access to the formal exchange market. The repatriation of all capital invested is devoid of any tax, duty or charge up to the amount of the originally materialized investment. Only capital gains over that amount are subject to the general regulations contained in the tax code.

It should be noted that although there are no foreign exchange restrictions currently in place, the Central Bank has the authority to impose restrictions to foreign exchange transactions, in order to preserve the stability of the currency and the normal functioning of external and internal payments. However, D.L. 600 investors are exempt from these restrictions and their right to access the market in order to repatriate profits or capital is not affected.

The D.L. 600 contract acknowledges as foreign investment:

- Freely convertible currency that can be exchanged at the most favorable rate that foreign investors can obtain from an entity authorized to operate in the Formal Exchange Market.
- Tangible assets, in any form or condition brought into the country according to general import regulations, without exchange coverage. The value of these goods will be determined using general procedures applied to imports. These tangible assets include, among others, machinery or equipment used in productive processes.
- Technology, in any form susceptible to be capitalized, which will be appraised by the Foreign Investment Committee according to its real international market value, within 120 days after the foreign investment application is submitted. If the appraisal is not carried out, the value assigned shall be that estimated by the investor in an affidavit. In previous cases, independent

consultants have performed this task.

- Credits associated to foreign investment: The general regulations, terms, interest and other modalities of foreign credit contracts, as well as surcharges related to total costs to be paid by the debtor, including commissions, taxes and expenses, shall be those authorized by the Central Bank of Chile.
- Capitalization of foreign loans and debts, in freely convertible currency, whose contract has been duly authorized by the Central Bank Under D.L. 600: Investors can increase the capital of the company which received the investment through both the capitalization of credits made under Chapter XIV and the credits derived from current imports and pending payments.
- Capitalization of profits transferable abroad: D.L. 600 allows capital increases of the company receiving the investment through the capitalization of transferable profits.

Foreign investors may request a maximum time-limit of three years to materialize their contributions. Under article 11 bis of DL 600, investments of not less than US\$ 50 million for industrial or non-mining extractive projects can request a time-limit of up to eight years. In the case of mining projects, the time-limit is eight years but, if previous exploration is required, the Foreign Investment Committee may extend it to up to twelve years.

**Special Advantages for Foreign Investors:** Although Chile's Constitution is based on the principle of non-discrimination, D.L. 600 offers some tax advantages for foreign investors. These are not "tax breaks" or "tax holidays", but are intended to provide a stable tax horizon, acting as a form of "tax insurance". D.L. 600 offers several different tax options, but basically allows the investor to lock into the tax regime prevailing at the time an investment is made.

**Invariability of Income Tax Regime:** All Chilean companies have to pay a First-Category Tax (or Corporate tax) equivalent to 17% Under Chile's Common Tax Regime, a 35% tax is currently levied on distributed or remitted profits. Interest paid to non-residents is also subject to a 35% additional withholding tax, however, interest on loans granted by foreign banking or other financial institutions is subject to a 4% tax, provided that excess indebtedness provisions do not apply. Under DL 600, a foreign investor can opt to lock into an effective fixed overall tax rate of 42% on taxable income for up to ten years, or -under article 11 bis- for up to twenty years in the case of industrial and extractive investments of US\$ 50 million or more. The investor, thereby, acquires immunity from any tax increases in the Common Tax Regime that may occur during that period. The lock-in can be waived at any time, but an investor cannot subsequently revert to the guaranteed 42% rate. The First-Category payment of 17% can be set against tax returns under both the Common Tax and Invariable Tax Regimes.

**Invariability of Indirect Taxes:** D.L. 600 states that foreign investments brought into the country in the form of tangible assets are subject to the general VAT taxation regime and customs regulations. However, foreign investors are entitled to include a clause in their contracts giving them access to a regime that freezes Value Added Tax (currently at 19%), as well as import tariffs on capital goods for the project, at their rate at the date of the investment. This special regime applies throughout the period authorized for carrying out the investment. Additionally, imports of some of these capital goods such as machinery or equipment are exempt from VAT in the case they are not produced in Chile and are on a list compiled, prepared and published by the Ministry of Economy's Foreign Trade Department. The current list was approved by Decree 204 of the Ministry of Economy, published in the Official Gazette ("Diario Oficial") on December 12, 2002, and is available at the [Ministry of Economy's website](#).

Foreign investors who sign a D.L. 600 contract are exempted from VAT on other technology imports, providing they appear on this list compiled by the Foreign Trade Department. The products currently listed include accounting and data processing machines, TV cameras, lasers and magnetic resonance imaging diagnostic equipment (MRI), among several others.

**Special Regime for Large Projects:** Under article 11 bis of D.L. 600, investments in new industrial or extractive activities, including mining, are entitled to additional tax benefits, providing they have a value of at least US\$ 50 million. Currently, the Foreign Investment Committee is revising its policy regarding article 11 bis, and new contracts under this regime are not being approved at this time. This policy is subject to change in the future.

**New Legislation for mining projects:** On 16 June, 2005, Law 20.026 was published in the Official Gazette. It establishes a specific tax on mining activities, which will come into force on 1 January, 2006. The Law amends Decree Law 600 by adding a new Article 11 ter. That article establishes a regime of invariability for the aforementioned tax, for those investors that sign a new foreign investment contract related to projects with a value of no less than US\$ 50 million. In order to opt into this special regime, investors with existing foreign investment contracts must not have made use of the special invariability regimes set out in articles 7 and 11 bis of DL 600, or they must renounce those regimes at the time of opting into the rights under article 11 ter. The deadline for submitting a request to opt into the regime under 11 ter for investors with existing foreign investment contracts was November 30, 2005. More information may be found at [http://www.cinver.cl/index/plantilla2.asp?id\\_seccion=1&id\\_subsecciones=140](http://www.cinver.cl/index/plantilla2.asp?id_seccion=1&id_subsecciones=140)

**Foreign Investment Procedures:** A foreign investor who wishes to invest through the [D.L. 600 must submit an application](#) to the Executive Vice-Presidency of the Foreign Investment Committee. Applications forms are available through our website ([www.cinver.cl](http://www.cinver.cl)). Since June 6 of 2003, the minimum investment amount for a new project is US\$ 5,000,000 (five million dollars) when investments consist of foreign currency and associated credits. The minimum amount is US\$ 2,500,000 (two and a half million dollars) when the investment is in the form of tangible assets, technology, and capitalization of profits or capitalization of credits. The Foreign Investment Committee retains the right to modify both figures. Projects submitted to the Committee's consideration must involve a ratio between equity and associated credits of up to 25/75.

In the case of foreign currency, investors can execute their foreign exchange operation only when the contract has been duly signed. However, when submitting the application, they can request a special authorization to exchange their currency immediately. Any other type of capital contribution requires the Foreign Investment Contract to be duly signed.

It is important to note, that the Foreign capital investment funds law (FCIFs), (*Law N° 18.657*) establishes a preferential tax treatment for Foreign capital investment funds.. FCIFs are required to obtain a favorable report issued by the Chilean Securities and Insurance Supervisor [“Superintendencia de Valores y Seguros” (SVS)] in order to conduct business in Chile. FCIFs may not remit capital for five years following the investment of such capital, although earnings maybe remitted at any time. A FCIF may hold a maximum of 5% of a given company’s shares, although this can be increased to a maximum of 10% if the company issues new shares. Furthermore, no more than 10% of a FCIF’s assets may be invested in a given company’s stock, unless the security is used or guaranteed by the Republic of Chile or the Central Bank. All together, no more than 25% of the outstanding shares of any listed company may be owned by FCIFs.

Finally, it is worth mentioning that the Central Bank of Chile, pursuant to its Basic Constitutional Act and in order to provide for stability of the currency and the normal functioning of the internal and external payment system, is entitled to issue regulations on foreign exchange transactions. At the present time, there are no restrictions to perform foreign exchange transactions.

A summary of all general relevant laws/regulations and policies pertaining to investment (i.e. that may impact before or after entry) including website references for up-to-date information follows:

- (i) *Central Bank* [www.bcentral.cl](http://www.bcentral.cl)
- (ii) *Decree Law No. 600* [www.cinver.cl](http://www.cinver.cl)
- (iii) *Law 18.657* [www.svs.cl](http://www.svs.cl)

## SECTOR-SPECIFIC LAWS AND POLICIES

Foreign investors in Chile can own up to 100% of a Chilean-based company, and there is no time limit on property rights. They also have access to all productive activities and sectors of the economy, except for a few restrictions in areas that include coastal trade, air transport and the mass media. In the case of fishing, restrictions are subject to the rules of international reciprocity.

The State has a very minor productive role in Chile. Only a few strategic activities --such as exploration and exploitation of lithium, liquid and gaseous hydrocarbons deposits in coastal waters under national jurisdiction or located in areas classified as important to national security, and the production of nuclear energy-- are restricted to the State. However, under certain circumstances, foreign companies can invest even in these sectors.

Local and sector-specific legislation exists at the national, regional and municipal levels.

For more detailed information on sector-specific policies see <http://www.cinver.cl/index/links.asp>

For inquiries please contact the FIC at:

Teatinos 120, 10th floor  
Santiago, Chile  
Tel: (562) 698 4254 Fax (562) 698 9476  
[chileinvestment@cinver.cl](mailto:chileinvestment@cinver.cl)

## INVESTMENT PROTECTION

### (i) Overview

The repatriation of all capital invested is devoid of any tax, duty or charge up to the amount of the originally materialized investment. Only capital gains over that amount are subject to the general regulations contained in the tax code.

There are no restrictions on the convertibility of currency

Chile has 51 bilateral investment agreements to promote and protect investment, in accordance with the applicable domestic legislation in force, 37 are in force, with countries such as Argentina, Australia, Austria, Belgium, Bolivia, China, Costa Rica, Croatia, Cuba, the Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Italy, Indonesia, Lebanon, Malaysia, Nicaragua, Norway, Panama, Paraguay, the Philippines, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Ukraine, the United

Kingdom, Uruguay, and Venezuela. A complete list of the above mentioned Agreements can be found at [www.direcon.cl](http://www.direcon.cl)

In those agreements the provision that rules transfers sets out that any investor may send the benefits derived from his investment to his country of origin, and also repatriate invested capital in the event of termination of activities or liquidation of the investment freely and without delays, considering the due application of relevant domestic provisions governing this issue. Likewise, in the Chapters of the FTAs negotiated by Chile investors are guaranteed the right to effect transfers freely and without delays.

Notwithstanding, such FTAs explicitly declare that the Central Bank of Chile in accordance with its Constitutional Organic Act, in order to ensure currency stability and the normal operation of domestic and foreign payments, has the right to maintain or adopt measures on foreign exchange operations, including the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile. These measures cannot be applied on a discriminatory basis.

(ii) Expropriation and Compensation

Expropriation is not defined directly under Chilean law. The Chilean Constitution makes reference to expropriation in article 19.24, which states:

In no case may anyone be deprived of his property, of the assets affected or any of the essential faculties or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator. The expropriated party may protest the legality of the expropriation action before the ordinary courts of justice and shall, at all times, have the right to indemnification for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said courts in accordance with the law.

General expropriation procedures are established by Decree Law No. 2186. All Chilean regulations relating to expropriation, including the Constitution, refer only to direct expropriation. No mention is found under Chilean law or jurisprudence to indirect expropriation. However, the term is used in international agreements signed by Chile. One significant recent example is the FTA with the United States, which contains specific regulation on indirect expropriation. Article 10.9 sets out as a general rule that “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization”, subject to a series of exceptions and terms. Annex 10-D regulates expropriation, and particularly indirect expropriation. Its text is transcribed below:

National jurisprudence has established that expropriation is an administrative act undertaken by virtue of the powers given directly by the legislation to the competent authorities, which must comply with a series of conditions, as set out in the Constitution.

Further, Article 19, N° 24, paragraph 1 of the Constitution guarantees to all persons: “The right of ownership in its diverse aspects over all classes of corporeal and incorporeal property. Only the law may establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations derived from its social function. Said function includes all the requirements of the Nation's general interests, the national security, public use and health, and the conservation of the environmental patrimony.”

Therefore, limitations to property that can be established by means of an expropriation act can only be carried out by virtue of their social function. The Constitution has not defined this social function, but has rather described in detail its components: the Nation's general interests, national security, public welfare and health, and the conservation of the environment.

The Constitution further mandates that all expropriation acts must be compensated: “The expropriated party... shall, at all times, have the right to indemnification for patrimonial harm actually caused...”

(iii) IPR

The Chilean legal and institutional framework on IPR confers protection to all categories of intellectual property included in the TRIPS Agreement: copyright and related rights, trademarks, geographical indications, patents, industrial designs, layout designs of integrated circuits and protection of undisclosed information.

The Chilean intellectual property regime has significantly evolved in recent times as a result of the incorporation of TRIPS commitments into national law. In addition, several modifications have been driven to meet international standards reached in bilateral commercial agreements. Even while the implementation of IPR standards is an ongoing process, Chile has one of the highest levels of IPR protection in the region.

Chile has been a member of WIPO since June 1975, and has signed a number of IPR conventions (see table below). The TRIPS Agreement was incorporated into Chilean law as a result of the ratification of the Marrakech Agreement, and came into force nationally in 2000.

*Chile's participation in IPR treaties administered by WIPO*

<b>Agreement, convention or treaty (latest Act in which Chile participates)</b>	<b>Date on which Chile became party (date it became party to an Act)</b>
Berne Convention for the Protection of Literary and Artistic Works (Paris Act)	June 1970 (July 1975)
Convention Establishing the WIPO	June 1975
WIPO Copyright Treaty	March 2002
WIPO Performances and Phonograms Treaty	May 2002
Paris Convention for the Protection of Industrial Property (Stockholm Act)	June 1991
Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations	September 1974
International Convention for the Protection of New Varieties of Plants (UPOV 1978)	January 1996

The main domestic statutes for the protection of IPR in Chile are the *Intellectual Property Law (Copyright Law)*, No. 17.336 of 2 October 1970, with its Regulations (*Supreme Decree No. 4.764*, of 8 January 1985), and the *Industrial Property Law*, No. 19.039, of 25 January 1991 (with amendments introduced by *Law 19.996* of 1 December 2005, and *Law N° 20.160* of January 26<sup>th</sup> 2007). The protection of new plant varieties is regulated through *Law No. 19.342*.

### *Industrial Property*

In Chile, the term industrial property refers to trademarks, patents, utility models, industrial designs, geographical indications, appellation of origin, layout designs of integrated circuits and protection of undisclosed information.

In late 2003, through *Law N° 19.912* special border measures were implemented for enforcement of IPR as established in TRIPS and in the Chile-US FTA. In December 2005, one of the largest reforms to the Chilean Industrial property system came into force, through amendments introduced by *Law 19.996*. Its consequence is that nowadays Chile has special registries and grants protection for patents/utility models, industrial designs, geographical indications/appellation of origin, trademarks, layout designs of integrated circuits and provides for the protection of undisclosed information of regulated products. This system establishes international exhaustion of industrial property rights as a general rule.

The Department of Industrial Property of the Ministry of Economy is in charge of granting industrial property rights.

### *Trademarks*

Trademarks are granted for 10 years, and they may be indefinitely renewed. There are no requirements of use for the registration or renewal of trademarks. Rights' holders have both civil and criminal remedies. They can collect costs and damages and courts have, among others, the power to order the destruction of tools and implements used to produce the falsification or copy. The Customs Service may also enforce some industrial property rights at the border.

### *Patents and Utility Models*

Patents are protected for 20 years following their filing, and may be granted to products or to procedures. The patent system establishes for international exhaustion of rights. Economic models and business plans, discoveries, scientific theories and mathematical methods, surgical, therapeutic or diagnostic methods, plant varieties, animals and software are excluded from patent or utility models protection. The patent system includes the possibility of granting compulsory licences in cases of (i) monopoly abuse, (ii) national security, public health, and national emergencies, (iii) non-commercial public use, or (iv) cross-licensing in relation with patented subject matters.

Rights' holders have both civil and criminal remedies. They can collect costs and damages and courts have, among others, the power to order the destruction of tools and implements used to produce the falsification or copy.

### *Industrial Designs*

Novel industrial designs are protected for 10 years from the date of filing and they include textile designs and stampings. This period is non-extendable. Industrial designs can be protected at the same time under copyright law as copyrights goods.

### *Copyrights and Related Rights*

*For copyrights and related rights the term of protection is 70 years. Protection is automatically recognized once works are created, so the register is just a publicity measure; it also constitutes a legal presumption in favour of the person who registered it.*

Rights' holders have both civil and criminal remedies. Infringers, once convicted, may be forced to pay damages, fines and also be imprisoned. The Customs Service may also enforce some IPR at the border.

A bill was introduced in Congress in May 2007 to improve enforcement regulation for both civil and criminal procedures of copyright and related rights, and to introduce a new regime for exceptions and limitations to copyright and related rights. This bill is currently at the Chamber of Deputies.

The Copyright Department of the Library, Archives and Museums Directorate is in charge of the Copyright Registry.

### *Geographical Indications*

Chilean geographical indications for wines and spirits are regulated through *Law No. 18.455*. As mentioned earlier, since 2005 a general registry for both Chilean and foreign geographical indications is available.

Most of Chile's preferential agreements contain provisions on geographical indications' protection. For instance, the Chilean geographical indication "Pisco" has been recognized in agreements with Brunei, China, Canada, the European Union, Mexico, Japan, New Zealand, Singapore; South Korea and the United States. This denomination identifies spirits coming from Regions III and IV regions in Chile, where "Pisco" has been produced since the sixteenth century.

At the international level, in 2005 Chile, together with Argentina, Australia, Canada, Chinese Taipei, Ecuador, Mexico, New Zealand and the United States submitted to the Council of TRIPS a proposed Draft on the Establishment of a Multilateral System of Notification and registration of Geographical Indications for Wines and Spirits (TN/IP/W/10) that facilitates the protection of Geographical Indications for wines and spirits through a system that is voluntary, that preserves the existing balance of rights and obligations in the TRIPS Agreement, the territoriality of IPR for geographical indications, and that allows WTO Members to determine for themselves the appropriate method of implementing the provisions of TRIPS Agreement within their own legal system and practices.

### *Undisclosed Information*

A whole chapter on undisclosed information was introduced in 2005 to the *Industrial Property Law*, both for trade secrets and for data that must be submitted to government agencies for granting sanitary approval of pharmaceutical and agrochemical products. Protection is granted for 5 years to pharmaceutical products, and 10 years to agrochemical products, from the registry.

Authorities in charge of granting protection are the National Health Institute (ISP), to pharmaceutical products, and the Agriculture and Livestock Service for agrochemical products.

### *Enforcement of IPR*

There are specific procedures for the suspension of release by Customs authorities of goods that infringe upon rights established in the *Industrial Property Law (Law 19.039)* and the *Copyright Law (Law 17.336)* at the request of the rights' holder. It also allows in certain cases for ex-officio action for suspending the release of counterfeit merchandise and pirated goods.

The Department of Industrial Property, the Arbitration Court for Industrial Property and the Agriculture and Livestock Service, for issues related to plant varieties, are responsible for preventive and protective administrative actions.

Industrial Property and Intellectual Property provide for both criminal and civil remedies. But nullity cases related to industrial property must be filled before the Department of Industrial Property.

Persons convicted for offences against right holders of intellectual or industrial property rights are required to pay costs and damages to right holders and also fines.

Finally, the modification of the Chilean criminal system, whose implementation process finished in 2005, has shown increasing efficacy in the pursuit of IPR infractions.

### *Other Issues*

Chile is committed to adhere to UPOV by 2009. Rights related to New Varieties of Plants must be pursued before the Civil Courts. The Seeds Department of the Agriculture and Cattle Service administers applications for the protection of new plant varieties, while the Qualifying Committee of Plant Varieties grants plant-breeder rights.

#### (iv) Dispute Settlement

A fully regulated dispute resolution mechanism, to settle controversies arising between the contracting Parties or between one Party and investors from the other Party are included in all of the Agreements signed by Chile. In this latter case, the investor is entitled to choose whether to submit to the jurisdiction of national courts or to initiate an international arbitration proceeding before ICSID—which Chile signed up to with effect from 24 October 1991—or before an ad-hoc tribunal constituted according to UNCITRAL rules. The decision of the arbitrator is final.

Therefore, if an investor of a country which doesn't have a treaty with Chile wants to sue the State, avenues for appeal are available.

Chile has been sued in three cases:

- Víctor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)
- MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (Case No. ARB/01/7)
- Sociedad Anónima Eduardo Vieira v. Republic of Chile (Case No. ARB/04/7)

## **INVESTMENT AND DEVELOPMENT**

Chile applies a limited number of performance requirements in its legislations. However, none of them are imposed as a condition for the approval of the foreign investment in the country.

Chile does not have any kind of specific policy that might fall under this premise.

## **INVESTMENT PROMOTION AND INCENTIVES**

### **(i) Investment Promotion Agencies**

#### *Incentives*

The *Investment Platform Law (Law No. 19.840)* of 23 November 2002 is aimed at permitting multinational companies to use Chile as a regional base under a special regime granting tax-free status on earnings from international operations. At the same time, the Law contains various provisions designed to prevent the use of Chile as a tax haven or the misuse of the regime by domestic entrepreneurs to avoid paying domestic taxes. The Chilean operations of these companies are taxed under the regime that normally applies to foreign investment.

Aware of the vital role that workplace training plays in improving productivity and in sustaining Chile's competitiveness in international markets, Chile offers a tax rebate for staff training programs. Administered by Chile's labor training agency, the Servicio Nacional de Capacitación y Empleo (SENCE), the scheme allows companies to set training costs, up to 1% of annual payroll, against corporate tax payments. A company can also use 10% of the rebate to finance a diagnosis of its training needs, and 15% to run a training department. In addition, firms with annual sales of less than approximately US\$8 million are also eligible to apply for training grants from a fund operated by SENCE.

Chile has two tax-free zones — one in the northern port of Iquique (Region I) and the other in Punta Arenas (Region XII).

Merchants and manufacturers in these zones are exempt from first-category corporate tax and from VAT and customs duties on imports. Goods can be re-exported without paying taxes, but goods sold within Chile must pay import duties and VAT upon leaving the zone unless, in the case of import duties, they are from a country with which Chile has a FTA.

In addition, goods that are moved to the area surrounding a tax-free zone (defined legally as the “extension area”) are liable only for a tax of 1.7%. This can be set against import duties and VAT, if the goods are subsequently transferred to the rest of the country, or be reclaimed, if they are subsequently exported.

The same exemptions also apply to manufacturers, but not to merchants, in the city of Arica (Region I). Under a law approved in May 2004, Regions XI and XII and the Palena province of Region X were declared an “extension area” of the Punta Arenas tax-free zone. Under this law, which is expected to come into force in mid-2004, manufacturers and research centers in this area will be exempt from VAT and customs duties, and liable only for a tax of 1.7%, on imports of capital goods and inputs.

For further information see the websites of the Iquique Free Trade Zone (ZOFRI) [http://www.kishtpc.com/Free-En/free\\_chile.htm](http://www.kishtpc.com/Free-En/free_chile.htm) and the Sociedad Administradora Zona Franca Punta Arenas Free Trade Zone (Parenazone) <http://www.parenazon.com/>

## (ii) Area-specific Incentives

### *Grants and Tax Incentives*

Schemes of this type include principally:

#### **a) D.F.L. 15**

- Geographical coverage: Regions I, XI, and XII, and the Chiloe and Palena provinces of Region X
- Investor eligibility: Firms with annual sales of up to US\$1 million(\*); large copper and iron mining companies and industrial fishing companies are not eligible
- Project eligibility: Projects with a maximum value of US\$ 1.4 million
- Incentive: Grants equivalent to 20% of investment in fixed assets, excluding land (a limited number of grants are available)
- Additional information: Chilean Economic Development Agency, CORFO

(\* *Grants and qualification limits are often set in Unidades de Fomento (UF), an inflation-linked currency unit, or in Unidades Tributarias Mensuales (UTM), a currency unit used for tax purposes, and their exact value is subject to variations in dollar terms. As a result, the figures mentioned here are only approximate.*

#### **b) D.L. 889**

- Geographical coverage: Regions I, II, III, XI, and XII, and the Chiloe province of Region X
- Investor eligibility: All firms, except large mining, financial services, and industrial fishing companies
- Incentive: Reimbursement of 17% of wage bill, up to a monthly maximum of approximately US\$38 per employee

- Additional information: Internal Revenue Service, SII ([www.sii.cl](http://www.sii.cl))

#### **c) Arica Plan**

- Geographical coverage: Arica and Parinacota provinces of Region I
- Duration: Until 2007
- Project eligibility: Projects with a minimum value of US\$100,000 in the Arica province and of US\$50,000 in the Parinacota province
- Incentive: Corporate tax rebate equivalent to 30% of investment outlay on fixed assets, excluding land, in the Arica province (40% for tourist projects), and 40% of outlay in the Parinacota province
- Additional information: Internal Revenue Service, SII ([www.sii.cl](http://www.sii.cl)) or CORFO

#### **d) Austral Plan**

- Geographical coverage: Regions XI and XII and the Palena province of Region X
- Duration: Until 2008
- Investor eligibility: Available to companies in Transport industries, Agriculture, Fish farming, Manufacturing, Energy, Real Estate, Tourism, and R&D
- Project eligibility: Projects with a minimum value of approximately US\$50,000
- Incentive: Corporate tax rebate equivalent to a maximum of 32% of investment outlay on fixed assets, excluding land
- Additional information: Internal Revenue Service, SII ([www.sii.cl](http://www.sii.cl)) or CORFO

#### **e) Navarino and Tierra del Fuego Laws**

- Geographical coverage: Chilean territory of Tierra del Fuego Island and Chilean Antarctic
- Duration: Until 2035 (or 2036 in some areas)
- Investor eligibility: Available to companies in Mining, Manufacturing, Transport, Fishing and tourist industries, providing products or services contain at least a 25% local value-added component
- Incentive: Tax incentives that include exemption from 17% first-category corporate tax, VAT sales tax, and import duties; in addition, a monthly grant, equivalent to 20% of value of sales to mainland Chile
- Additional information: Internal Revenue Service, SII ([www.sii.cl](http://www.sii.cl)) or CORFO

## f) Tocopilla Law

- Geographical coverage: Tocopilla port in Region II
- Duration: Until 2027
- Investor eligibility: Companies that manufacture, or repair, mining equipment and other inputs for the Mining industry
- Incentive: Tax incentives that include exemption from 17% first-category corporate tax, VAT, and import duties
- Additional information: Internal Revenue Service, SII ([www.sii.cl](http://www.sii.cl)) or CORFO

The CORFO also provides a number of additional incentives not only for the areas covered by the Arica and Austral Plans, but also for the Arauco province and parts of the Concepcion province in southern Chile's Region VIII, and for the Valparaiso province of Region V in central Chile. In general, investment projects with a minimum value of US\$100,000 are eligible for these incentives, which include:

- Co-funding of pre-investment studies: this is available for a maximum of 50% of the cost of pre-investment studies with an upper limit of US\$8,400 in the area of the Austral Plan and in the province of Valparaiso, and of 60% with an upper limit of US\$10,000 in the area of the Arica Plan and in the province of Arauco.
- Co-funding of investment costs: co-funding is available for the acquisition of land, for construction and equipment costs and, in some cases, for the installation of basic utilities. The terms of this co-funding vary significantly depending on a project's location; details can be obtained from CORFO in Santiago or regional capitals.
- Grants towards staff training: this incentive, which is available the area of the Arica Plan and in some parts of the Arauco province, varies from US\$850 to US\$2,100 per employee, depending on the specific area; details can be obtained from CORFO in Santiago or the corresponding regional capital.
- Credit guarantees: to help investors raise finance, CORFO provides loan guarantees under a scheme described in the Countrywide Investment Incentives section (below).

### (iii) High-technology Projects

In 2000, CORFO introduced a program of special incentives for investments in high-technology projects. As well as information technology and biotechnology projects, firms that introduce new methods in traditional processes also qualify for this program, which is available for investments with a minimum value of US\$1 million.

The incentives provided under this program include:

- **Co-funding of pre-investment studies**, including pre-feasibility and feasibility studies, environmental impact studies, analysis of soils, and architectural and engineering design. These studies may be carried out by external consultants or by the companies themselves.
- **Co-funding of start-up expenses**, including the completion of a project's business plan.

- **Co-funding of investments in fixed assets**, such as the acquisition or long-term rental of land and buildings, as well as the installation of basic services, infrastructure and technological equipment.
- **Grants for the development of human resources**, covering workforce training for up to one year.
- **Co-funding of R&D**, for which high-tech projects may apply to the Technological Development Fund (FONTEC), administered by CORFO.

The program supports and facilitates the installation of businesses in the following areas: shared services, call and technical support centers, IT, back offices, and software development.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

The *Labour Code of Chile (DFL N° 1)* governs personnel management of foreign firms and provides the domestic labour law which applies to foreign firms in the context of labour disputes/relations.

### (i) Movement of People

The general “Entry” regime can be considered as highly convenient for foreigners. Chilean migration laws are contained in *Decree Law No. 1,094* of 1975, on foreign citizens and in *Supreme Decree N° 597* of 1984 which specifies how to make applicable the Decree Law.

Chile has included a specific Chapter on Temporary Entry of Business Persons (TEBP) in FTAs with the U.S., Canada, Mexico, Peru, Colombia and Korea. With the E.U., the TEBP commitments are reflected on the positive list as Mode four concessions.

These legal texts vest the power to issue visas and resident permits for foreigners in the Ministries of Interior and Foreign Affairs.

The Ministry of Interior exercises these powers through the Department of Migration and Alien Affairs at central level, and through interior government offices at regional and provincial levels. In turn, the Department of Consular Affairs and Immigration of the Ministry of Foreign Affairs is responsible for matters affecting foreign citizens and issues consular authorizations and residence visas through Chilean Consulates abroad.

The relevant legislation contains the following migration categories:

- *Tourists*

A tourist is any individual entering the country for a period not exceeding 90 days, for recreation, sports, health, study, business, family, religious and other similar reasons, but not for purposes of immigration, residence or development of remunerated activities.

In some cases, for reasons of national interest or based on the principle of international reciprocity, individuals should obtain a consular authorization (visa) from the relevant Chilean Consulate abroad prior to their entry to Chile. However, holders of the APEC Business Travel Card do not require consular authorization.

- *Residence*

Residence Subject to a Labour Contract: this permit is granted to foreigners who enter the country with a work contract. This type of residence visa is conditioned to the performance of the activities agreed with the employer (who must be domiciled in Chile) and is issued for a maximum period of two years, and may be extended for similar periods while the contract duration.

Student Residence permits are granted to foreigners who enter the country in the capacity of registered students in State or State-recognized educational institutions or a private institution recognized by a latter, or in a higher or specialized educational centres or institutions provided they can substantiate their corresponding enrollment. This permit only allows doing the relevant studies and is issued for a maximum period of one year, and may be renewed until completion of the relevant study program. In the case of scholarships, the permit is issued for one year but it may be renewed until the completion of the scholarship.

Temporary Residence permits are granted to foreigners with proven family ties or interests in the country whose residence is deemed useful or convenient. Generally, this type of visa allows its holder to carry out any activity in Chile, to the extent that the laws permit such activities. It is issued for a maximum period of one year, and may be renewed for a like period only once again. If the person wants to be renewed a third time, it is obligatory that he ask for definitive residence.

Permanent Residence Permits (granted for an indefinite time) are granted to aliens to live indefinitely in the country and undertake all kinds of activities, without any restrictions other than those established in all legal and regulatory bodies.

(ii) Other Issues

- *Communications*

- *Law 18,838*, published in the Official Gazette on September 30, 1989, National Television Council, Titles I, II and III
- *Law 18,168*, published in the Official Gazette on October 2, 1982, General Telecommunications Law, Titles I, II and III
- *Law 19,733*, published in the Official Gazette on June 4, 2001, on Freedom of Speech and Freedom of Information, and the Practice of Journalism, Titles I and III.

*The owner of a social communication medium such as sound and image transmissions or a national news agency, shall in the case of a natural person, have a duly established domicile in Chile and in the case of juridical persons be constituted and be domiciled in Chile or have an agency authorized to operate within the national territory. Only Chilean nationals may be President, administrators or legal representatives of the juridical person. In the case of public radio broadcasting services, the board of Directors may be integrated by foreigners only if they do not represent the majority. The legally responsible Director and the person who subrogates him/her must be Chilean with domicile and residence in Chile.*

Only juridical persons duly constituted in Chile and having domicile in the country may be the titleholders or make use of permits for limited radio broadcasting telecommunications, cable television or microwave television services. Only Chilean nationals may be president, directors, managers, administrators or legal representatives of that juridical person.

- *Printing, Publishing, and Other Related Industries*

- *Law N° 19733*, Official Gazette, 4 June 2001, Law on Liberties of Opinion and Information and the Exercise of Journalism, Titles I & III

The owner of a social communication medium such as newspapers, magazines, or regularly published texts whose publishing address is located in Chile, or a national news agency, shall in the case of a natural person have a duly established domicile in Chile and, in the case of juridical person, be constituted and be domiciled in Chile or have an agency authorized to operate within the national territory. Only Chilean nationals may be president, administrators, or legal representatives of the juridical person. The director legally responsible and the person who replaces him or her must be Chilean with domicile and residence in Chile.

- *Air Transportation*

- *Law N° 18.916*, Official Gazette, 8 February 1990, *Code of Aeronautics*, Preliminary Title & Titles II & III
- *Decree Law N° 2.564*, Official Gazette, 22 June 1979, *Commercial Aviation Norms*
- *Supreme Decree N° 624* Ministry of Defence, Official Gazette, 5 January 1995
- *Law N° 16.752*, Official Gazette, 17 February 1968, Title II Ley 16.752,
- *Decree N° 34* Ministry of Defence, Official Gazette, 10 February 1968
- *Supreme Decree N° 102* Ministry of Transportation and Telecommunications, Official Gazette, 17 June 1981
- *Supreme Decree N° 172* Ministry of Defence, Official Gazette, 5 March 1974
- *Supreme Decree N° 37* Ministry of Defence, Official Gazette, 10 December 1991
- *Decree N° 234* Ministry of Defence, Official Gazette, 19 June 1971

Only a Chilean natural or juridical person may register an aircraft in Chile. A juridical person must be constituted in Chile with principal domicile and real effective seat in Chile. In addition, a majority of its ownership must be held by Chilean natural or juridical persons, which in turn must comply with the aforementioned requisites.

The president, manager, majority of directors, and/or administrators of the juridical person must be Chilean natural persons.

- *Water Transport Services and Shipping*

- Decree Law N° 3.059, Official Gazette, 22 December 1979, Merchant Fleet Supreme
- Decree N° 24, Official Gazette, 10 March 1986, Act of Decree Law N° 3.059, Titles I & II Promotion Law, Titles I & II
- Decree Law N° 2.222, Official Gazette, 31 May 1978, Navigation Law, Titles I, II, III, IV, & V

- Supreme Decree N° 153, Official Gazette, 11 March 1966, Approves the Sea People, Fluvial and Lacustrine Personnel Registration General Act
- Code of Commerce, Book III, Titles I, IV, & V
- Law N° 19.420, Official Gazette, 23 October 1995, Establishes incentives for the economic developments of the Provinces of Arica and Parinacota, and modifies the legal bodies indicated therein,, Title, Various Provisions.

Only a Chilean natural or juridical person may register a vessel in Chile. A juridical person must be constituted with principal domicile and real and effective seat in Chile. Its president, manager, and majority of the directors or administrators must be Chilean natural persons. In addition, more than 50% of its capital must be held by Chilean natural or juridical persons. For these purposes, a juridical person with ownership participation in another juridical person that owns a vessel has to comply with all the aforementioned requisites.

A joint ownership (*comunidad*) may register a vessel if (1) the majority of the joint ownership is Chilean with domicile and residency in Chile; (2) the administrators are Chileans; and (3) the majority of the rights of the joint ownership belong to a Chilean natural or juridical person. For these purposes, a juridical person with ownership participation in a joint ownership (*comunidad*) that owns a vessel has to comply with all the aforementioned requisites to be considered Chilean.

## COMPETITION POLICY

The Chilean government regards the principal goal of its competition law as being to promote economic efficiency with the expectation that in the long run this will maximize consumer welfare. Moreover, the Chilean Competition law explicitly states that its purpose is to promote and defend free market competition.

The legal basis of Chilean competition law is the Chilean Competition Act (*Decree Law N° 211* of 1973 of the Ministry of Economy, as amended by *D.F.L. N° 1*, 2004, published in the Chilean Official Gazette on 7 March 2005).

On 14 November 2003, *Law N° 19.911* introduced important reforms to the original *Decree Law N°211*. Among others, it created an independent Competition Tribunal who's role is to prevent, correct and punish any anti-competitive conduct.

Chile's *Competition Law* describes anti-competitive practices as any act that tends to hinder, or is aimed at eliminating, restricting and obstructing competition. The competition regulations apply to nationals and foreigners, private and public entities, and goods and services sectors. It does not prescribe mandatory premerger reviews.

A new amendment to the Competition Law, aiming to improve the institutional framework (more independence for the members of the Competition Tribunal, establishment of leniency programs to improve the detection and prosecution of hard core cartels, among others), and to raise the maximum of fines, is currently being discussed in the Parliament.

Recently, the enforcement agency, the National Economic Prosecutor's Office, published "the horizontal mergers guidelines" (the first guideline it has ever produced). Even though the guidelines are not mandatory, they intend to increase predictability regarding policy and enforcement activities of the National Economic Prosecutor's Office.

# PEOPLE’S REPUBLIC OF CHINA

## Acronyms

MOFCOM	Ministry of Finance and Commerce
RMB	Renminbi

## INTRODUCTION

To absorb foreign investment is an important part of China’s basic state policy of opening up to the outside. China has consistently implemented the fundamental strategy of utilizing foreign investment actively and effectively in the past 27 years of reforms and open-door experience which has proven that foreign investment has made great contributions to China’s economic growth. Major liberalisations which have been undertaken in the last five years include the following.

- A. Decentralization of approval competence at provincial level: threshold for encouraged and permitted sectors is total investment US\$50 million. The threshold for restricted sectors is total investment US\$100 million. In the cases of some newly opened service sectors, regulations or provisions on screening procedures would apply. Approval power on projects with foreign investment in some service sectors has also been delegated to the 15 national economic and technological development zones. (See the “Industrial Catalogue for Guiding Foreign Investment”, reproduced within this contribution by China, for further detail.)
- B. China strictly honors WTO commitments and adheres to time schedules (in its post-WTO transition period) on market access for foreign investment. There has been a relaxation on geographical restrictions, ownership restrictions, restrictions on scope of business and other restrictions accordingly. Great progress has been made on further opening up service sectors including financial services (banking, securities, insurance, funds management, etc.), distribution, direct selling, investment by strategic investors in listed companies, education, travel agencies, cinemas, etc.
- C. On the area of legislative build-up, over 40 regulations and provisions have been promulgated to guide foreign investment on newly opened sectors covering financial services, insurance, distribution, logistics, commercial services, communication, civil aviation, architecture, tourist, transportation.
- D. To further improve transparency and legal administrative performances of government agencies, the “Administrative Licensing Law” was promulgated in 2004, with a view to regulate the administrative conduct of government agencies.
- E. To further strengthen work on protection on IPR, an IPR protection office — a special body consisting of 12 administrative departments — was established to coordinate and intensify work on a crackdown of IPR infringement cases and other matters related to IPR protection.
- F. To improve the investment environment, China offers more protection for the legitimate rights of foreign investors, and provides guidance to dispute centres all across the country.

A national dispute centre for foreign investment and its coordinating office have been set up under the the Ministry of Commerce and Finance (MOFCOM).

## SCREENING OF FOREIGN INVESTMENT

### (i) Overview

At present, screening mechanisms apply to all cases of establishment of foreign investment and operate at different levels of government depending on specifics: including total investment, category of industries according to “Industrial Catalogue for Guiding Foreign Investment”, and any other requirement indicated by relevant regulations or provisions.

The relevant documentation concerning orientation or guidance on foreign investment including the above mentioned documents are available at:

<http://www.fdi.gov.cn> and

<http://www.mofcom.gov.cn>

For information or consultation on application and screening, MOFCOM’s Department of Foreign Investment Administration and all of MOFCOM’s local branches are able to assist. Also, consulting agencies, law firms, and accounting offices are able to provide advice.

The following is a description of the different treatment that China applies in cases involving foreign takeovers or mergers as distinct from new business/greenfield investment. The main difference concerning screening in cases of foreign takeovers and mergers, and greenfield foreign investment is in the cases of the former, examining authorities can review and examine any impact of M&As on national economic security, or whether such M&A cases would lead to substantive control of domestic industries or of some of China’s traditional brand names.

The time taken for approval of each case of foreign investment varies depending on whether the specific conditions of each project meet all the criteria and requirements according to the relevant laws and regulations. However, MOFCOM and its authorised agencies should be able to make a decision within three months after application.

Investors should have a good understanding on the related laws and regulation concerning the investment they are going to make, and keep all documents for submission in line with all the legal requirements accordingly.

The following government agencies provide avenues for consultation for investors on policy decisions projects applications. The National Development and Reform Commission and its authorised agencies are responsible for project examination and approval. MOFCOM and its authorised agencies are responsible for the screening and approval of contracts and articles of association. The Industrial and Business Administration Bureau and its authorised agencies are responsible for registration.

Avenues for appeal include administrative government agencies according to *Administrative Reconsideration Law* and *Administrative Procedures Law*. There are no published statistics on the outcomes of investment screening.

(ii) Major Laws and Regulations Governing Foreign Investment

*Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* and its Implementation Regulations;

*Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures* and its Implementation Rules;

*Law of the People's Republic of China on Wholly Foreign-owned Enterprises* and its Implementation Regulations;

“Regulations Guiding Foreign Investment”;

“The Industrial Catalogue for Guiding Foreign Investment”;

*Company Law of People's Republic of China* (revised in 2005);

*Contract Law of the People's Republic of China*; and

*Income Tax Law of the People's Republic of China Concerning Foreign investment Enterprises and Foreign Enterprises* and its Implementation Regulations

For further information see: <http://www.fdi.gov.cn> and <http://www.mofcom.gov.cn>

(iii) Summary

China's legislative framework concerning FDI has basically taken shape since the *Law of The People's Republic of China on Chinese-Foreign Equity Joint Ventures* was enacted and implemented in 1979. According to the existing laws, foreign investment enterprises in China fall into three categories: Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign-owned enterprises.

Chinese-foreign equity joint ventures, which are jointly established within China by foreign individuals, enterprises or other economic organizations on one side, and enterprises or other economic organizations in China on the other. According to the provisions of the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, joint ventures shall take the form of a limited liability company and the proportion of investment contributed by the foreign participants to the registered capital of a venture shall not be less than 25%. All parties to a joint venture shall share the profits, risks and losses of that joint venture in proportion to their contributions to the registered capital. Each party to a joint venture may contribute cash, capital goods and other materials, as well as industrial properties, know-how and land use rights as its investment in the venture. The highest authority in a joint venture is the board of directors. Members of the board shall be appointed by the parties concerned while the chairman and vice chairman of the board shall be selected through consultation or be elected by the board members.

Chinese-foreign contractual joint ventures, mean that parties to such a venture shall agree in their cooperative venture contract on the conditions for investment, the ratio of the distribution, the sharing of risks, the form of operations and management and the ownership of the assets at the time of the termination of the venture. A contractual joint venture may take the form of a limited liability company or an economic entity without having legal person status. Parties to the contractual venture may not share risks and profits in proportion to their contribution to the total investment. The form of contribution, the amount of investment and the rights and responsibilities of all parties

to the cooperative venture shall be specifically laid out in the contract. The profits as well as the rights and liabilities of the parties shall be treated in accordance with the provisions of the contract. Contractual joint ventures are more flexible than equity joint ventures.

Wholly foreign-owned enterprises are established within the territory of China and involve capital investment solely made by foreign investors. The term “wholly foreign-owned enterprise” does not cover branches of foreign enterprises established within the territory of China. The establishment of a wholly foreign-owned enterprise must be beneficial to the development of China’s national economy. It shall meet one of the following requirements: using advanced technologies and equipment, or a large proportion of its production being for export.

In case of a company limited by shares, its entire capital is divided into shares of equal value and shareholders shall be liable to the company to the extent of their shareholdings. A company limited by shares is liable to the debts of the company with all its assets. The Chinese and foreign shareholders should jointly hold the company’s stock, with the shares subscribed to and held by foreign investors being more than 25% of the company’s registered capital. The company may be established by means of promotion or offer.

## **“CATALOGUE FOR THE GUIDANCE OF FOREIGN INVESTMENT INDUSTRIES” (SECTOR-SPECIFIC GUIDANCE FOR INVESTORS)**

Just like most countries which have imposed regulations on foreign investment in line with national development priorities, China also gives guidance to foreign investment according to its national economic development planning.

The “Catalogue for the Guidance of Foreign Investment Industries” (last amended in 2004) covers:

- A. “encouraged industries”,
- B. “restricted industries”; and
- C. “prohibited industries”.

Industries beyond the scope of the Catalogue are permitted without qualification as sectors for foreign investment.

### **A. Catalogue of Encouraged Foreign Investment Industries**

#### **1. Farming, Forestry, Animal Husbandry and Fishery Industries**

- 1.1. Improvement of low and medium yielding field
- 1.2. Planting technology of vegetables without pollution, (including edible fungus and melon-watermelon), fruits, teas and serial development and production of these products
- 1.3. Development and production of new breed varieties (excluding those gene-modified varieties) of fine quality, high-yielding crops such as sugar-yielding crops, fruit trees, flowers and plants, forage grass and related new technology.
- 1.4. Production of flowers, construction and operation of nursery base

- 1.5. Reusing in fields and comprehensive utilization of straws and stalks of crop, development and production of organic fertilizers
- 1.6. Cultivation of traditional Chinese medicines (equity joint ventures or contractual joint ventures only)
- 1.7. Planting of trees (including bamboo) and cultivation of fine strains of trees
- 1.8. Planting of caoutchoucs, sisals and coffees
- 1.9. Breeding of quality varieties of breeder animals, breeder birds and aquatic offspring (excluding precious quality varieties peculiar to China)
- 1.10. Breeding of famous, special and fine aquatic products, as well as cage culture in deep water
- 1.11. Construction and operation of ecological environment protection projects preventing and treating desertification and soil erosion, such as planting trees and grasses, etc.

## **2. Mining and Quarrying Industries**

- 2.1. Venture prospecting and exploitation of petroleum, natural gas
- 2.2. Exploitation of oil field and gas deposits (fields) with low osmosis
- 2.3. Development and application of new techniques that can increase the recovery factor of crude oil
- 2.4. Development and application of new techniques for prospecting and exploitation of petroleum, such as geophysical prospecting, well drilling, and well logging and down hole operation, etc.
- 2.5. Prospecting and exploitation of coal and associated resources
- 2.6. Prospecting and exploitation of coal-bed gas
- 2.7. Exploitation and beneficiation of gold mines with low quality or difficult to beneficiate (equity joint ventures or contractual joint ventures only)
- 2.8. Prospecting, exploitation, and beneficiation of iron ores and manganese ores
- 2.9. Prospecting and exploitation of copper ores, plumbum ores and zinc ores (equity joint ventures or contractual joint ventures only, wholly foreign-owned enterprises are permitted in west regions)
- 2.10. Prospecting and mining of aluminium ores (equity joint ventures or contractual joint ventures only, wholly foreign-owned enterprises are permitted in west regions)
- 2.11. Mining and beneficiation of chemical mines including sulfur ores, phosphate ores, kalium ores, etc.

## **3. Manufacturing Industries**

- 1). Food Processing Industries

- 1.1 Storage and processing of food, vegetables, fruits, fowl and livestock products
  - 1.2 Aquatic products processing, seashell products cleansing and processing, and development of function food made from seaweed
  - 1.3 Development and production of drinks of fruits, vegetables, albumen, teas and coffees
  - 1.4 Development and production of food for babies and agedness, as well as function food
  - 1.5 Production of dairy products
  - 1.6 Development and production of biology feeds and albumen feeds
- 2). Tobacco Processing Industry
- 2.1 Production of secondary cellulose acetate and processing of tows
  - 2.2 Production of tobacco slices in the way of papermaking
- 3). Textile Industry
- 3.1 Production of special textiles for engineering use
  - 3.2 Weaving and dyeing as well as post dressing of high-grade loomage face fabric
- 4). Leather, Coat Products Industry
- 4.1 Processing of wet blue skin of pig, cow and sheep with new technology
  - 4.2 Post ornament and processing of leather with new technology
- 5). Lumber Processing Industry and Bamboo, Bine, Palm, Grass Products Industry
- 5.1 Development and production of new technology and products for the comprehensive utilization of “sub-quality, small wood and fuel wood” and bamboo in the forest area
- 6). Paper Making and Paper Products Industry
- 6.1 Construction and operation of integrated engineering of raw material base with an annual production capacity of over 300 thousand tons of chemical wood pulp of an annual production capacity of over 100 thousand tons of chemical mechanical wood pulp (equity joint ventures or contractual joint ventures only)
  - 6.2 Production of high-quality paper and cardboard (equity joint ventures or contractual joint ventures only)
- 7). Petroleum Refining and Coking Industry
- 7.1 Deep processing of needle coke and coal tar
  - 7.2 Production of asphalt for heavy traffic road asphalt

## 8). Chemical Raw Material and Products Manufacturing Industry

- 8.1 Production of alkene through catalyzing and cracking of heavy oil
- 8.2 Production of ethylene with an annual production capacity of 600 thousand tons or over (the Chinese partners shall hold relative majority of shares)
- 8.3 Comprehensive utilization of ethylene side-products such as C5-C9
- 8.4 Mass Production of corvic (in the way of ethylene)
- 8.5 Production of organochlorine serial chemical industrial products (excluding high-residual organochlorine products)
- 8.6 Production of basic organic chemical industrial raw materials such as benzene, methylbenzene, dimethylbenzene, etc. and its derivatives
- 8.7 Production of supporting raw materials for synthesized materials (bisphenol-A, 4,4'-diphenylmethane, diiso-cyan ester, and vulcabone toluene)
- 8.8 Production of synthetic fibre raw materials: precision terephthalic acid, vinyl cyanide, caprolactam and nylon 66 salt
- 8.9 Production of synthetic rubber (liquid butadiene styrene rubber by butadiene method, butyl rubber, isoamyl rubber, butadiene neoprene rubber, butadiene rubber, acrylic rubber, chlorophydrin rubber)
- 8.10 Production of engineering plastics and plastic alloys
- 8.11 Fine chemistry industry: new products and technology for catalytic agent, auxiliary and pigment; processing technology for the commercialization of dye (pigment); production of high-tech chemicals for electronics and paper-making, food additives, feed additives, leather chemical products, oil-well auxiliaries, surface active agent, water treatment agent, adhesives, inorganic fibre, inorganic powder stuffing and equipment
- 8.12 Production of auxiliary agent, preparation agent, and dye-stuff for textile and chemical fibre ladder
- 8.13 Production of depurant of automobile exhaust, catalyzer and other assistant agents
- 8.14 Production of nature spices, synthetic spices and single ion spices
- 8.15 Production of high capability dope
- 8.16 Production of chloridized titanium white
- 8.17 Production of chlorofluorocarbon substitution
- 8.18 Production of mass coal chemical industrial products
- 8.19 Development and production of new technology and products for the forestry chemicals
- 8.20 Production of ion film for caustic soda

- 8.21 Production of biologic fertilizers, high-density fertilizers (potash fertilizer, phosphate fertilizer) and compound fertilizers
- 8.22 Development and production of new varieties of effective, low poisonous and low residual agriculture chemicals and pesticides
- 8.23 Development and production of biology agriculture chemicals and pesticides
- 8.24 Development and production of inorganic, organic and biologic films for environment protection
- 8.25 Comprehensive utilization and disposal of exhaust gas, discharge liquid, and waste residue

## 9) Medicine Industry

- 9.1 Production of material medicines under patent and administrative protection in our country or chemical material medicines that we have to import
- 9.2 Vitamins: production of niacin
- 9.3 Amino acid: production of serine, tryptophan, histidine, etc.
- 9.4 Production of analgesic-antipyretic medicines with new technique and new equipment
- 9.5 Production of new variety of anticarcinogen medicines, as well as cardiovascular and cerebrovascular medicines
- 9.6 Production of new, effective and economical contraceptive medicines and devices
- 9.7 Production of new variety of medicines, which are produced by means of biological engineering technology
- 9.8 Production of vaccine through genic engineering technology (vaccine against AIDS, vaccine against type-C hepatitis, contraceptive vaccine, etc.)
- 9.9 Development and production of medicines made from oceans.
- 9.10 Production of diagnostic reagent for AIDS and radio-immunity diseases
- 9.11 Medicines and pharmaceuticals: production of products and new dosage forms adopting new techniques such as slow release, control release, target preparation and absorbed through skins
- 9.12 Development and application of new variety of adjuvant medicines
- 9.13 Processing and production of traditional Chinese herb medicines, products which distill from traditional Chinese herb medicines and Chinese patent medicines (excluding preparing technique of traditional Chinese medicines in small pieces ready for decoction)
- 9.14 Production of biological medical materials and products

- 9.15 Production of antibiotic material medicines used for animals (including antibiotics and chemical synthesis medicines)
- 9.16 Development and production of new products and new dosage forms of antibiotic medical, anthelmintic, insecticide, anti-coccidiosis medicines used for animals

#### 10). Chemical Fibre Manufacturing Industry

- 10.1 Production with high and new technological fibre of differential chemical fibre and aromatic synthetic fibre, of function environmental friendly aromatic synthetic fibre, amino synthetic fibre and carbon fibre with annual production capacity of 5000 tons and over
- 10.2 Production of chemical fibre of environmental protection variety such as direct viscose and asepsis spinning, etc.
- 10.3 Production of polyester used for non-fibre with a daily production capacity of 500 tons or over, production of new polyester (poly terephthalic acid propylene glycol ester, poly sebacic acid glycol ester, polybutylene terephthalate(PBT), etc.) used for fibre and non-fibre

#### 11). Plastic Products Industry

- 11.1 Production of polyimide film which can keep fresh
- 11.2 Development and production of new products and new technologies for agricultural films (photolysis film, multifunctional film and raw materials, etc.)
- 11.3 Reutilization and counteraction of waste and old plastic

#### 12). Non-metal Mineral Products Processing Industry

- 12.1 Production of fine-quality floating glass with a daily melting capacity of 500 tons or over (only in central and west region of China)
- 12.2 Production of new type process cement of clinker with a daily output capacity of 2,000 tons or over (only in central and west region of China)
- 12.3 Production of glass fibre (product line with technology of wire drawing in tank furnace) and glass fibre reinforced plastic products with an annual capacity of 10,000 tons or more
- 12.4 Production of high-level sanitation porcelain with an annual production of 500,000 pieces or over
- 12.5 Standardization refine of ceramic material and production of high-level decorative materials used for ceramics
- 12.6 Production of high-level refractory material used in furnaces for glass, ceramics and glass fibre
- 12.7 Production of inorganic, non-metal materials and products (artificial crystal, high-capacity complex materials, special kind of glass, special kind of ceramics, special kind of airproof materials and special kinds of cementation materials)

- 12.8 Production of new type of building materials (light-weight, high-intensity and multi-function materials for wall, high-level environment protecting decorating and finishing materials, high quality water-proof and airproof materials, and effective thermal insulation materials)
- 12.9 Deep processing of non-metal mineral products (super-thin comminuting, high level pure, fine production, modification)
- 13). Ferrous Metallurgical Smelting and Rolling Processing Industry
  - 13.1 Production of direct and fusion-reduced iron
- 14). Non-Ferrous Metallurgical Smelting and Rolling Processing Industry
  - 14.1 Smelting of gold mines with low quality or difficult to beneficiate (equity joint ventures or contractual joint ventures only, wholly foreign-owned enterprises are permitted in west regions)
  - 14.2 Production of hard alloy, tin compound and antimony compound
  - 14.3 Production of non-ferrous composite materials, new type of alloy materials
  - 14.4 Utilization of rare-earth
- 15). Metal Products Industry
  - 15.1 Design and manufacturing of non-metal products molds
  - 15.2 Design and manufacturing of car and motorcycle molds (including plunger die, injection mold, molding die, etc.) and chunking appliances (chucking appliances for welding, inspection jig, etc.)
  - 15.3 Development and production of high-grade hardware for building, water supply and heating equipment and hardware
- 16). General Machinery-building Industry
  - 16.1 Manufacturing of numerically controlled machine tools, digital control system and servomechanism installations which exceed triaxiality linkage
  - 16.2 Manufacturing of high performance welding robot and effective welding and assembling production equipment
  - 16.3 Production of high temperature resistant and insulation material (with F, H insulation class), as well as insulation shaped parts
  - 16.4 Production with techniques of proportional, servohydraulic pressure, low-power pneumatic control valve and stuffing static seal
  - 16.5 Production of precision plunger dies, precision cavity molds and standard components of molds
  - 16.6 Manufacturing of precision bearings and all kinds of bearings used specially for principal machines

16.7 Manufacturing of casting and forging stocks for cars and motorcycles

17). Special Equipment Manufacturing

17.1 Development and manufacturing of new technology and equipment for the storage, preservation, classifying, packing, drying, transporting and processing of food, cotton, oil, vegetables, fruits, flowers, pasture plants, meat and aquatic products

17.2 Manufacturing of facility agriculture equipment

17.3 Manufacturing of new technical agriculture and forestry equipment

17.4 Design and manufacturing of engines for tractors, combine harvesters, etc.

17.5 Manufacturing of equipment for reusing in fields and comprehensive utilization of straws and stalks of crop

17.6 Manufacturing of equipment for comprehensive utilization of waste agriculture products and waste fowl and livestock products which are bred in scale

17.7 Manufacturing of water-saving irrigation equipment with new technique

17.8 Manufacturing of earthwork for wet land and desilting machines

17.9 Technology of hydrophily ecological system for protecting environment and equipment and equipment manufacturing

17.10 Manufacturing of equipment for scheduling system, which is used in long-distance transmitting, water engineering

17.11 Manufacturing of special machines and equipment for flood prevention and emergency rescue

17.12 Manufacturing of key equipment in food industry such as high-speed asepsis canning equipment and brander equipment, etc.

17.13 Production technology and key equipment manufacturing of aminophenol, zymin, food additive, etc.

17.14 Manufacturing of complete set equipment with an hourly feed processing capacity of 10 tons or more and key spare parts

17.15 Manufacturing of multi-color offset press for web and folio of paper of larger size

17.16 Manufacturing of equipment with new technique for post ornament and processing of leather

17.17 Manufacturing of high-tech involved special industrial sewing machines

17.18 Manufacturing of complete set of equipment of new type of knitting machines, new type of paper (including pulp) making machines

17.19 Design and manufacturing of new type of mechanical equipment for highways and ports

- 17.20 Manufacturing of equipment for highways and bridges maintenance, automatic detection
- 17.21 Manufacturing of equipment for operation supervisory control, ventilation, disaster prevention and rescue system of highway and tunnels
- 17.22 Design and manufacturing of large equipment for railway construction and maintenance
- 17.23 Manufacturing of equipment for garden machines and tools with new technology
- 17.24 Manufacturing of special equipment for cities' sanitation and environment work
- 17.25 Manufacturing of machines for road milling and overhauling
- 17.26 Manufacturing of tunneling digger, equipment of covered digging for city metro
- 17.27 Manufacturing of city sewage-disposal equipment with capacity of 80,000 tons/day or more, industrial sewage film treatment equipment, up-flow anaerobic fluidized bed equipment, and other biological sewage disposal equipment, recycling equipment for waste plastics, desulphurization and denitration equipment for industrial boiler, larger high-temperature resistant, acid resistant bag dust remover, incinerating equipment for rubbish treatment
- 17.28 Manufacturing of turbine compressors and combined comminutes of the complete set equipment with an annual production of 300,000 tons or over of synthetic ammonia, 480,000 tons or over of urea, 450,000 tons or over ethylene
- 17.29 Technique for desulfurization of thermal power station and equipment manufacturing
- 17.30 Manufacturing of sheet conticasters
- 17.31 Deep processing technique and equipment manufacturing of plate glass
- 17.32 Manufacturing of equipment for down hole trackless mining, loading and transporting, mechanical power-driven dump trucks for mining of 100 tons or over, mobile crushers, 3,000 m<sup>3</sup>/h or over bucket excavator, 5 m<sup>3</sup> or larger mining loader, full-section tunneling machines
- 17.33 Design and manufacturing of new instruments and equipment for prospecting and exploitation of petroleum
- 17.34 Manufacturing of cleaning equipment for electromechanical wells and production and medicine
- 17.35 Manufacturing of electronic endoscopes
- 17.36 Manufacturing of medical X-ray machines set with high-frequency technique, direct digital imagery processing technology and low radiation (80kW or over)
- 17.37 Manufacturing of equipment for high magnetic field intensity Magnetic Resonance Imagery (MRI)

- 17.38 Manufacturing of machines for collecting blood plasm only
  - 17.39 Manufacturing of equipment for auto enzyme immunity system (including the functions of application of sample, microplate, wash plate, incubation, data, post treatment, etc.)
  - 17.40 New techniques of quality control for medicine products and new equipment manufacturing
  - 17.41 New analytical technology and extraction technologies, and equipment development and manufacturing for the effective parts of traditional Chinese medicines
  - 17.42 Producing and manufacturing of new packing materials, new containers for machine, and advanced medicine producing equipment
- 18). Communication and Transportation Equipment Industries
- 18.1 Manufacture of complete automobiles (including R&D)
  - 18.2 Manufacture of engines for automobiles (including R&D)
  - 18.3 Manufacture of key spare parts for automobiles: complete disc brakes, complete driving rods, automatic gearboxes, fuel pumps of diesel engine, air supercharger of motor, discharging control equipment of motor, electric steering knuckles system, adhesive axial organ (used for four-wheel drive, puffing shock absorber, air hanging stand,hydraulic jib,compound meters
  - 18.4 Automobile electronic equipment manufacture (including motor control system, underpan control system, electronic control system for car body)
  - 18.5 Manufacture of vehicles for special-purpose in petroleum industry, vehicles for deserts, etc.
  - 18.6 Technology and equipment for railway transportation: design and production of locomotives and main parts, design and production of equipment for railways and bridges, related technology and equipment production for rapid transit railway, equipment production for communicational signals and transportation safety monitoring, production of electric railway equipment and instrument
  - 18.7 Equipment for urban rapid transit track transportation: design and manufacture of set of powered car and main parts for metro, city light rail
  - 18.8 Design and manufacture of civil planes (Chinese partner shall hold the majority of shares)
  - 18.9 Production of spare parts for civil planes
  - 18.10 Design and manufacture of civil helicopters (Chinese partner shall hold the majority of shares)
  - 18.11 Design and manufacture of aeroplane engines (Chinese partner shall hold the majority of shares)

18.12 Design and manufacture of civil air-borne equipment (Chinese partner shall hold the majority of shares)

18.13 Manufacture of light gas-turbine engine

18.14 Design and manufacture of crankshafts of low-speed diesel engine for vessel

18.15 Repairing, design and manufacture of special vessels, high-performance vessels (Chinese partner shall hold the majority of shares)

18.16 Design and manufacture of the equipment and accessories of high-speed diesel engines, auxiliary engines, radio communication and navigation for vessels (Chinese partner shall hold the majority of shares)

18.17 Manufacture of fishing boats and yachts made of glass fibre reinforced plastic

#### 19). Electric Machinery and Equipment Industries

19.1 Thermal power plant equipment: manufacture of super critical units of 600,000 kW or over, large gas-turbine, gas-steam combined cycle power equipment of over 100,000KW, coal gasification combined cyclic (IGCC) technique and equipment, pressure boost fluidized bed (PFBC), large air-cooling power units of 600,000kw or over, large circling fluidized (CFB)boiler (equity joint ventures or contractual joint ventures only)

19.2 Hydropower plant equipment: manufacture of large pump-storage power units of 150,000 kW and over, large tubular turbine units of 150,000 kW or over (equity joint ventures or contractual joint ventures only)

19.3 Nuclear-power plant equipment: manufacture of power units of 600,000 kW or over (equity joint ventures or contractual joint ventures only)

19.4 Power transmitting and transforming equipment: manufacture of super high-voltage DC power transmitting and transforming equipment of 500 kilovolts or over (equity joint ventures or contractual joint ventures only)

#### 20). Electronic and Telecommunications Industries

20.1 Manufacture of digital television, digital video camera, digital record player, digital sound-playing equipment

20.2 Manufacture of new type plate displays, medium and high-resolution color kinescope and glass shielding

20.3 Key components manufacture of optic engine, lamp-house, projection screen, high-definition projection tube and LCOS models used for colorful projective display for large screen

20.4 Manufacture of digital audio and visual coding or decoding equipment, digital broadcasting TV studio equipment, digital cable TV system equipment, digital audio broadcast transmission equipment

20.5 Design of integrated circuit and production of large-scale integrated circuit with a line width of 0.35 micron or smaller

- 20.6 Manufacture of medium- and large-sized computers, portable microcomputers, high-grade server
- 20.7 Development and manufacture of drivers of high capacity compact disk and disk and related parts
- 20.8 Manufacture of 3-dimension CAD, CAT, CAM, CAE and other computer application system
- 20.9 Development and manufacture of software
- 20.10 Development and production of materials specific for semi-conductor and components
- 20.11 Manufacture of electronic equipment, testing equipment, tools and moulds
- 20.12 Manufacture of new type electronic components and parts (slice components, sensitive components, sensors, frequency monitoring and selecting components, hybrid integrated circuit, electrical and electronic components, photoelectric components, new type components for machinery and electronics)
- 20.13 Manufacture of hi-tech green batteries: non-mercury alkali-manganese batteries, powered nickel-hydrogen batteries, lithium-ion batteries, high-capacity wholly sealed maintenance-proof lead-acid accumulators, fuel batteries, pillar-shaped zinc-air batteries, etc.
- 20.14 Development and manufacture of key components for high-density digital compact disk driver
- 20.15 Manufacture of read-only and recordable compact disk.
- 20.16 Design and manufacture of civil satellites (Chinese partner shall hold the majority of shares)
- 20.17 Manufacture of civil satellites effective payload (Chinese partner shall hold the majority of shares)
- 20.18 Manufacture of spare parts for civil satellites
- 20.19 Design and manufacture of civil carrier rockets (Chinese partner shall hold the majority of shares)
- 20.20 Manufacture of telecommunication system equipment for satellites
- 20.21 Manufacture of receiving equipment of satellite navigation and key components (equity joint ventures or contractual joint ventures only)
- 20.22 Manufacture of optical fiber preformed
- 20.23 Manufacture of serial transmission equipment of digital microwave synchronization of 622 MB/S
- 20.24 Manufacture of serial transmission equipment of photo-timing synchronization of 10 GB/S

- 20.25 Manufacture of equipment for cut-in communication network with broad band
- 20.26 Manufacture of optical cross connection equipment (OXC)
- 20.27 Manufacture of ATM and IP data communication system
- 20.28 Manufacture of mobile communication systems (GSM, CDMA, DCS1800, PHS, DECT, IMT2000): mobile telephone, base station, switching equipment and digital colonization system equipment
- 20.29 Development and manufacture of high-end router, network switchboard of gigabit per second or over
- 20.30 Manufacture of equipment for air traffic control system (equity joint ventures or contractual joint ventures only)

21). Machinery Industries for Instrument and Meter, Culture and Office

- 21.1 Development and production of digital cameras and key components
- 21.2 Development and manufacture of precision on-line measuring instrument
- 21.3 Manufacture of new technical equipment for safe production and environment protection detecting instrument
- 21.4 Manufacture of new-tech equipment of water quality and fume on-line detecting instrument
- 21.5 Manufacture of instrument and equipment for hydrological data collecting, processing, transmitting and flood warning
- 21.6 Production of new type of meters' spare parts and materials (mainly new switches and function materials for meters such as intelligent sensors, socket connector, flexible circuit board, photoelectric switches and proximity switches.)
- 21.7 Manufacture of new type printing devices (laser printers, ink-jet printers)
- 21.8 Maintenance and post-sale services of precision instrument and equipment

22). Other Manufacture Industries

- 22.1 Development and utilization of clean-coal technical product (coal gasification, coal liquefaction, water-coal, industrial lump-coal)
- 22.2 Coal ore dressing by washing and comprehensive utilization of powered coal (including desulphurized plaster), coal gangue

**4. Production and Supply of Power, Gas and Water**

1. Construction and management of thermal-power plants with a single unit installed capacity of 300,000kw or above
2. Construction and management of power plants with the technology of clean coal burning
3. Construction and management of heat power plants

4. Construction and management of power plants with natural gas
5. Construction and management of hydropower stations with the main purpose of power generating
6. Construction and management of nuclear-power plants (Chinese partner shall hold the majority of shares)
7. Construction and management of new energy power plants (solar energy, wind energy, magnetic energy, geothermal energy, tide energy and biological mass energy, etc)
8. Construction and management of urban water plants

#### **5. Water Resources Management Industry**

1. Construction and management of key water control projects for comprehensive utilization (the Chinese party shall hold the relative majority of shares)

#### **6. Communication and Transportation, Storage, Post and Telecommunication Services**

1. Construction and management of grid of national trunk railways (Chinese partner shall hold the majority of shares)
2. Construction and management of feeder railways, local railways and related bridges, tunnels and ferry facilities (equity joint ventures or contractual joint ventures only)
3. Construction and management of highways, independent bridges and tunnels
4. Construction and management of public dock facilities of ports
5. Construction and management of civil airports (the Chinese party shall hold the relative majority of shares)
6. Air transportation companies (Chinese partner shall hold the majority of shares)
7. General aviation companies for agriculture, forest and fishery (equity joint ventures or contractual joint ventures only)
8. Regular or irregular international liner and tramp maritime transportation business
9. International containers inter-model transportation
10. Road freight transportation companies
11. Construction and management of oil (gas) pipelines, oil (gas) depots and petroleum wharf
12. Construction and management of the facilities of coal delivery pipelines
13. Construction and management of storage facilities relating to transportation services

#### **7. Wholesale and Retail Trade Industry**

1. Wholesale, retail and logistic distribution of general goods

## **8. Real Estate Industry**

1. Development and construction of ordinary residential houses

## **9. Social Service Industry**

1. Public Facility Service Industry

- 1.1 Construction and management of urban access-controlled roads

- 1.2 Construction and management of metro and city light rail (Chinese partner shall hold the majority of shares)

- 1.3 Construction and management of treatment plants for sewage, garbage, the dangerous wastes (incineration and landfill), and the facilities of environment pollution treatment

2. Information, Consultation Service Industry

- 2.1 Information consulting agencies of international economy, science and technology, environmental protection

- \* 2.2 Accounting and auditing

## **10. Public Health, Sports and Social Welfare Industries**

1. Service agencies for the elderly and the handicapped

## **11. Education, Culture and Arts, Broadcasting, Film and TV Industries**

1. Higher education institutes (equity joint ventures or contractual joint ventures only)

## **12. Scientific Research and Poly-technical Services Industries**

1. Biological engineering technique and bio-medical engineering technique

2. Isotope, irradiation and laser technique

3. Ocean and ocean energy development technology

4. Seawater desalting and seawater utilization technology

5. Oceanic monitoring technology

6. Development of energy-saving technology

7. Technology for recycling and comprehensive utilization of resources

8. Technology for environment pollution treatment and monitoring

9. Technology for preventing from desertification and desert improvement

10. Application technique of civil satellite

11. R&D centers

12. Centers for hi-tech, new products developing, and incubation of enterprises

**13. Permitted foreign investment projects whose products are to be wholly exported directly**

**B. Catalogue of Restricted Foreign Investment Industries**

**1. Farming, Forestry, Animal Husbandry and Fishery Industries**

1. Development and production of grain (including potatoes), cotton and oil-seed (Chinese partner shall hold the majority of shares)
2. Processing of the logs of precious varieties of trees (equity joint ventures or contractual joint ventures only)

**2. Mining and Quarrying Industries**

1. Exploring and mining of minerals such as wolfram, tin, antimony, molybdenum, barite, fluorite (equity joint ventures or contractual joint ventures only)
2. Exploring and mining of precious metals (gold, silver, platinum families)
3. Exploring and mining of precious non-metals such as diamond
4. Exploring and mining of special and rare kinds of coal (Chinese partner shall hold the majority shares)
5. Mining of saibelyite and saibelyite iron ores
6. Mining of celestite

**3. Manufacturing Industries**

1. Food Processing Industry
  - 1.1 Production of millet wine and spirits of famous brands
  - 1.2 Production of soda beverage of foreign brand
  - 1.3 Production of synthetic sweet agent such as saccharin
  - 1.4 Processing of fat or oil
2. Tobacco Processing Industry
  - 2.1 Production of cigarettes and filter tips
3. Textile Industry
  - 3.1 Wool spinning, cotton spinning
  - 3.2 Silk reeling
4. Printing and Record Medium Reproduction Industry

- 4.1 Printing of publications (Chinese partner shall hold the majority of shares except printing of package decoration)
- 5. Petroleum Processing and Coking Industries
  - 5.1 Construction and management of refineries
- 6. Chemical Raw Material and Products Manufacturing Industry
  - 6.1 Production of ionic membrane caustic soda
  - 6.2 Production of sensitive materials
  - 6.3 Production of benzidine
  - 6.4 Production of chemical products from which narcotics are easily made (ephedrine, 3, 4-idene dihydro phenyl-2-acetone, phenylacetic acid, 1-phenyl-2-acetone, heliotropin, safrole, isosafrole, acetic oxide)
  - 6.5 Production of sulphuric acid basic titanium white
  - 6.6 Processing of baron, magnesium, iron ores
  - 6.7 Barium salt production
- 7. Medical and pharmaceutical Products Industry
  - 7.1 Production of chloramphenicol, penicillin G, lincomycin, gentamicin, dihydrostreptomycin, amikacin, tetracycline hydrochloride, oxytetracycline, medemycin, kitasamycin, kitasamycin, ilotylin, ciprofloxacin and ofloxacin
  - 7.2 Production of analgin, paracetamol, Vitamin B1, Vitamin B2, Vitamin C, Vitamin E
  - 7.3 Production of immunity vaccines, bacterins, antitoxins and anatoxin (BCG vaccine, poliomyelitis, DPT vaccine, measles vaccine, Type-B encephalitis, epidemic cerebrospinal meningitis vaccine) which are included in the State's Plan
  - 7.4 Production of material medicines for addiction narcotic and psychoactive drug (Chinese partner shall hold the majority of shares)
  - 7.5 Production of blood products
  - 7.6 Production of non-self-destructible expendable injectors, transfusion systems, blood transfusion systems, blood bags
- 8. Chemical Fiber Production Industry
  - 8.1 Production of chemical fiber drawnwork of conventional chipper
  - 8.2 Production of viscose staple fiber with an annual single thread output capacity of less than 20,000 tons
  - 8.3 Production of polyester and spandex used for fiber and non-fiber with a daily production capacity of less than 400tons

## 9. Rubber Products

- 9.1 Cross-ply and old tire recondition (not including radial tire), and production of industrial rubber fittings of low-performance

## 10. Non-Ferrous Metal Smelting and Rolling Processing Industry

- 10.1 Smelting and separating of rare earth metal (equity joint ventures and contractual joint ventures only)

## 11. Ordinary Machinery Manufacturing Industry

- 11.1 Manufacture of containers
- 11.2 Manufacture of small and medium type ordinary bearings
- 11.3 Manufacture of truck cranes of less than 50 tons (equity joint ventures or contractual joint ventures only)

## 12. Special Purpose Equipment Manufacturing Industry

- 12.1 Production of low or middle class type-B ultrasonic displays
- 12.2 Manufacture of equipment for producing long dacron thread and short fiber
- 12.3 Manufacture of crawler dozers of less than 320 horsepower, wheeled mechanical loaders of less than 3 cubic meters (equity joint ventures or contractual joint ventures only)

## 13. Electronic and Telecommunication Equipment Manufacturing Industry

- 13.1 Production of satellite television receivers and key parts

## **4. Production and Supply of Power, Gas and Water**

- 4.1 Construction and operation of thermal-power plants with a single unit installed capacity of less than 300,000kw (excluding small power network)

## **5. Communication and Transportation, Storage, Post and Telecommunication Services**

1. Road passenger transportation companies
2. Cross-border automobile transportation companies
3. Water transportation companies
4. Railway freight transportation companies
5. Railway passenger transportation companies (Chinese partner shall hold the majority of shares)
6. General aviation companies engaging in photographing, prospecting and industry (Chinese partner shall hold the majority of shares)
7. Telecommunication companies

## **6. Wholesale and Retail Trade Industries**

1. Commercial companies of commodity trading, direct selling, mail order selling, Internet selling, franchising, commissioned operation, sales agent, commercial management companies, and wholesale, retail and logistic distribution of grain, cotton, vegetable oil, sugar, medicines, tobaccos, automobiles, crude oil, capital goods for agricultural production
2. Wholesale or retail business of books, newspaper and periodicals
3. Distributing and selling of audiovisual products (excluding movies)
4. Commodity auctions
5. Goods leasing companies
6. Agencies (ship, freight forwarding, tally for foreign vessels, advertising)
7. Wholesaling product oil, and construction and operation of gasoline stations
8. Foreign trade companies

## **7. Banking and Insurance Industries**

1. Banks, finance companies, trust investment companies
2. Insurance companies
3. Security companies, security investment fund management companies
4. Financial leasing companies
5. Foreign exchange brokage
6. Insurance brokage companies

## **8. Real Estate Industry**

1. Development of pieces of land (equity joint ventures or contractual joint ventures only)
2. Construction and operation of high-ranking hotels, villas, high-class office buildings and international exhibition centers

## **9. Social Service Industry**

1. Public Facility Service Industries
  - 1.1 Construction and operation of networks of gas, heat, water supply and water drainage in large and medium sized cities (Chinese partner shall hold the majority of shares)
2. Information, Consultation Service Industries
  - 2.1 legal consulting
  - 2.2 Market Research (equity joint ventures and contractual joint ventures only)

## **10. Public Health, Sports and Social Welfare Industries**

1. Medical treatment establishments (equity joint ventures or contractual joint ventures only)
2. Construction and operation of golf courts

## **11. Education, Culture and Arts, Broadcasting, Film and TV Industries**

1. Education establishments for senior high school students (equity joint ventures or contractual joint ventures only)
2. Construction and operation of cinemas (Chinese partner shall hold the majority of shares)
3. Making and issuing of broadcast and TV programs, movie making (Chinese partner shall hold the majority of shares)

## **12. Scientific Research and Poly-technical Services Industries**

1. Mapping companies (Chinese partner shall hold the majority of shares)
2. Inspection, verification and attestation companies for imported and exported goods

## **13. Other industries restricted by the State or international treaties that China has concluded or taken part in**

### **C. Catalogue of Prohibited Foreign Investment Industries**

#### **1. Farming, Forestry, Animal Husbandry and Fishery industries**

1. Cultivation of China's rare precious breeds (including fine genes in plants industry, husbandry and aquatic products industry)
2. Production and development of genetically modified plants' seeds
3. Fishing in the sea area within the Government jurisdiction and in-land water

#### **2. Mining and Quarrying Industries**

1. Exploring, mining and dressing of radioactive mineral products
2. Exploring, mining and dressing of terrae rare metal

#### **3. Manufacturing Industry**

1. Food Processing Industry
  - 1.1 Processing of green tea and special tea with China's traditional crafts (famous tea, black tea, etc.)

2. Medical and Pharmaceutical Products Industry
  - 2.1 Processing of traditional Chinese medicines that have been listed as the State Protection resources (musk, licorice, jute, etc.)
  - 2.2 Application of preparing technique of traditional Chinese medicines in small pieces ready for decoction, and production of the products of secret recipe of traditional Chinese patent medicines
3. Non-Ferrous Metal Smelting and Rolling Processing Industry
  - 3.1 Smelting and processing of radioactive mineral products
4. Manufacture of Weapons and Ammunition
5. Other Manufacturing Industries
  - 5.1 Ivory carving
  - 5.2 Tiger-bone processing
  - 5.3 Production of bodiless lacquerware
  - 5.4 Production of enamel products
  - 5.5 Production of Xuan-paper (rice paper) and ingot-shaped tablets of Chinese ink
  - 5.6 Production of carcinogenic, teratogenic, mutagenesis and persistent organic pollutant products

#### **4. Production and Supply of Power, Gas and Water**

1. Construction and operation of power network

#### **5. Communication and Transportation, Storage, Post and Telecommunication Services**

1. Companies of air traffic control
2. Companies of postal services

#### **6. Finance, Insurance Industries**

1. Futures companies

#### **7. Social Service Industry**

1. Development of wild animal and plant resources protected by the State
2. Construction and operation of animal and plant natural reserves
3. Social investigations
4. Gambling (including the racecourse for gambling)
5. Pornographic services

## **8. Education, Culture and Arts, Broadcasting, Film and TV Industries**

1. Educational institutes for basic education (compulsory education)
2. Business of publishing, producing, master issuing, and importing of books, newspaper and periodical
3. Business of publishing, producing, master issuing and importing of audio and visual products and electronic publications
4. News agencies
5. Radio stations, TV stations, radio and TV transmission networks at various levels (transmission stations, relaying stations, radio and TV satellites, satellite up-linking stations, satellite receiving stations, microwave stations, monitoring stations, cable broadcasting and TV transmission networks)
6. Companies of producing, publishing, issuing and playing of broadcast and TV programs
7. Companies of films producing and issuing
8. Companies of video tape showing

## **9. Other Industries**

1. Projects that endanger the safety and performance of military facilities

## **10. Other industries restricted by the State or international treaties that China has concluded or taken part in**

Note:

- (1) In the case that “the Mainland and Hong Kong Closer Economic Partnership Arrangement” and its complementary agreements or “the Mainland and Macao Closer Economic Partnership Arrangement” and its complementary agreements have prescribed specific rules, those regulations shall be observed.
- (2) The items marked “\*” are related to the commitment of China’s accession to WTO. Please see the Appendix for details.

## **Appendix of “Catalogue for the Guidance of Foreign Investment Industries”**

### **1. Notes for Catalogue of Encouraged Industries:**

1. Prospecting an exploitation of oil and natural gas: in cooperation with Chinese partner only.
2. Exploitation of oil deposits (fields) with low osmosis: in cooperation with Chinese partner only.
3. Development and application of new technologies that can increase recovery factor of crude oil: in cooperation with Chinese partner only.

4. Development and application of new technologies for prospecting and exploitation of petroleum, such as geophysical prospecting, well-drilling, well-logging and downhole operation, etc.: in cooperation with Chinese partner only.
5. Manufacturing of automobile and motorcycle: the proportion of foreign investments shall not exceed 50%
6. International liner and tramp maritime transportation business: the proportion of foreign investments shall not exceed 49%.
7. International container multi-modal transportation: the proportion of foreign investments shall not exceed 50%. Foreign majority ownership will be permitted no later than 11 December 2002. Wholly foreign ownership will be permitted no later than 11 December 2005.
8. Road freight transportation companies: foreign majority ownership will be permitted no later than 11 December 2002. Wholly foreign ownership will be permitted no later than 11 December 2004.
9. Wholesale, retail and logistic distribution of general goods: As described in No. 5 of Notes for Catalogue of Restricted Industries of the Appendix.
10. Accounting and auditing: in cooperation with Chinese partner and in the form of partnership only.

## **2. Notes for Catalogue of Restricted Industries:**

1. Cross-border automobile transportation companies: foreign majority ownership will be permitted no later than 11 December 2002. Wholly foreign owned enterprises will be permitted no later than 11 December 2004.
2. Water transportation companies: the proportion of foreign investment shall not exceed 49%.
3. Rail freight transportation companies: the proportion of foreign investment shall not exceed 49%. Foreign majority ownership will be permitted no later than 11 December 2004. Wholly foreign owned enterprises will be permitted no later than 11 December 2007.
4. Telecommunication Companies
  - 4.1 Value-added services and paging services in basic telecommunication services: foreign investments are permitted no later than 11 December 2001 with the proportion of foreign investment not exceeding 30%. The proportion of foreign investment in joint venture shall not exceed 49% no later than 11 December 2002, and shall be allowed to reach 50% no later than 11 December 2003.
  - 4.2 Mobile voice and data services in basic telecommunication services: foreign investments are permitted no later than 11 December 2001 with the proportion of foreign investment not exceeding 25%. The proportion of foreign investment in joint venture shall not exceed 35% no later than 11 December 2002, and shall be allowed to reach 49% no later than 11 December 2004.

- 4.3 Domestic and international services in basic telecommunication services: foreign investments will be permitted no later than 11 December 2004 with the proportion of foreign investment not exceeding 25%. The proportion of foreign investment in joint venture shall not exceed 35% no later than 11 December 2006 and shall be allowed to reach 49% no later than 11 December 2007.
- 5 Commodities trade, direct selling, mail-order selling, Internet selling, sales agents, franchising, commercial management; whole sale, retail and logistic distribution of grain, cotton, vegetable oil, sugar, pharmaceutical products, tobacco, automobile, crude oil, capital goods for agricultural production; whole sale and retail of books, newspapers, periodicals; whole sale of product oil, construction and operation of gasoline station.
- 5.1 Commission agents' services and wholesale trade services (excluding salt, tobacco): foreign investment enterprises are permitted no later than 11 December 2002 with foreign investment not exceeding 50%, but can not engage in the distribution of books, newspapers, magazines, pharmaceutical products, pesticides, mulching films, chemical fertilizers, processed oil and crude oil. Foreign majority ownership will be permitted no later than 11 December 2003. And wholly foreign-owned enterprises will be permitted no later than 11 December 2004, and can engage in the distribution of books, newspapers, magazines, pharmaceutical products, pesticides, mulching films. The distribution of Chemical fertilizers, processed oil and crude oil are permitted no later than 11 December 2006.
- 5.2 Retailing services (excluding tobacco): foreign investment enterprises are permitted but can not engage in the distribution of books, newspapers, magazines, pharmaceutical products, pesticides, mulching films, chemical fertilizers, processed oil. The proportion of foreign investment can reach 50% no later than 11 December 2002, and can engage in the distribution of books, newspapers and magazines. Foreign majority ownership will be permitted no later than 11 December 2003. And wholly foreign-owned enterprises will be permitted no later than 11 December 2004, and can engage in the distribution of pharmaceutical products, pesticides, mulching films, and processed oil. The distribution of chemical fertilizers is permitted no later than 11 December 2006. Foreign investors can not take majority ownership of a Chain-store that has over 30 branch stores and engages in the distribution of automobiles (the limitation will be lifted no later than 11 December 2006), books, newspapers, magazines, pharmaceutical products, pesticides, mulching films, processed oil, chemical fertilizers, grain, vegetable oil, sugar, tobacco, cotton.
- 5.3 Franchising and wholesale or retail trade services away from a fixed location: foreign investment enterprises are permitted no later than 11 December 2004.
6. The distribution of audiovisual products (excluding movies): in cooperation with Chinese partner only, and Chinese partner dominates.
7. Goods leasing companies: foreign majority ownership shall be permitted no later than 11 December 2002. Wholly foreign owned enterprises shall be permitted no later than 11 December 2004.

8. Agencies
  - 8.1 Ship agencies: the proportion of foreign investment shall not exceed 49%.
  - 8.2 Freight forwarding agencies (excluding those services specially reserved for Chinese postal authorities): the proportion of foreign investment shall not exceed 50% (not exceed 49% in the case of courier services). Foreign majority ownership shall be permitted no later than 11 December 2002. Wholly foreign owned enterprises shall be permitted no later than 11 December 2005.
  - 8.3 Cargo handling for foreign vessels: in forms of equity joint ventures or contractual joint ventures only
  - 8.4 Advertising agencies: the proportion of foreign investment shall not exceed 49%. Foreign majority ownership shall be permitted no later than 11 December 2003. Wholly foreign owned enterprises shall be permitted no later than 11 December 2005.
9. Insurance
  - 9.1 Non-life insurance companies; the proportion of foreign investments shall not exceed 51%. Wholly foreign owned enterprises shall be permitted no later than 11 December 2003.
  - 9.2 Life insurance companies: the proportion of foreign investments shall not exceed 50%.
10. Securities companies, securities investment funds management companies.
  - 10.1 Securities companies: foreign investment shall be permitted no later than 11 December 2004 with the proportion of foreign investment not exceeding 1/3.
  - 10.2 Securities investment fund management companies: the proportion of foreign investment shall not exceed 33%. The proportion of foreign investment shall be allowed to reach 49% no later than 11 December 2004.
11. Insurance brokage companies: the proportion of foreign investment shall not exceed 50%. The proportion shall be allowed to reach 51% no later than Dec 11, 2004. Wholly foreign owned enterprises shall be permitted no later than 11 December 2006.
12. Companies of inspection, verification, attestation for imported and exported goods: foreign majority ownership shall be permitted no later than 11 December 2003. Wholly foreign owned enterprises shall be permitted no later than 11 December 2005.

## **INVESTMENT PROTECTION**

### **(i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)**

China has been undertaking reforms in its foreign exchange administration system since 1994. As a result of China's official commitment to Article No. 8 of the IMF Agreement in 1996, China allows realized free convertibility of the RMB under its current account, while still maintaining control of its foreign exchange under its capital account.

China's foreign exchange administrative system has made significant progress over the last decade. It successfully avoided any damage from the Asian financial crisis. It has maintained its balance of international payments and the stability of the RMB exchange rate. China will continue to carry out foreign exchange reforms. The long-term goal is to achieve full convertibility of the RMB while the short-term goals are to create a more elastic RMB exchange and a formation mechanism for the RMB exchange rate. Measures have been taken to foster and develop foreign exchange and capital markets.

Foreign investment enterprises are required to provide the authorized banks with the following documents upon repatriation of distributed profits or dividends of foreign partners:

- tax-paid certificate and tax declaration forms
- audit report provided by accounting firms on profit and dividend of the year
- foreign exchange registration certificate for foreign-funded enterprises
- resolution of board of directors on distribution of profit and dividend
- capital verification report provided by accounting firms
- other documents required by the foreign exchange administration

Apart from providing the above-mentioned information, foreign investment enterprises intending to repatriate profits or dividends from previous years should also entrust accounting firms to conduct an "authenticity audit" on the year after profits and dividends occurs, and provide banks with audit reports.

Any foreign investment enterprise which has not fully paid in registered capital according to the terms of their contract, is not allowed to repatriate profit or dividend in foreign exchange.

Organizations within China (including foreign investment enterprises) should, before paying royalties for intangible assets, submit a series of certificates or receipts to authorized foreign exchange banks for screening. Only when these certificates and receipts have been checked and found correct can enterprises make payments or purchase foreign exchange for payment from their foreign exchange accounts.

Repayment of interest and fees related to foreign currency loans lent by Chinese financial institutions can be handled directly by authorized foreign exchange banks, while repayment of the principal of such loans requires screening by the foreign exchange administration, and should be handled with approval documents issued by foreign exchange administration. According to regulations on administration of foreign debt, on repaying principal, interest and related fees of foreign debt, and borrowers should apply to the foreign exchange administration with their "Foreign Debt Registration Certificates", loan contracts and repayment notice issued by creditors, and make the payment through foreign exchange accounts or by purchasing foreign exchange at designated banks with approval documents issued by the foreign exchange administration.

In the case of expiration of foreign investment enterprises by law, the after-tax income in RMB earned by foreign partners after liquidation according to the law, can be remitted abroad or taken abroad by purchasing foreign exchange from designated banks.

The following is an outline of restrictions on the convertibility of currencies for the overseas transfer of funds.

- (1) According to the present regulations on foreign debt, organizations within China should, when repaying the principal and interest on foreign debt, apply to the foreign exchange administration with their “Foreign Debt Registration Certificates”, loan arrangement contracts and notices of repayment of loan from creditors. Then with review and approval documents issued by the foreign exchange administration, they can repay the loan from their foreign exchange account or by purchasing foreign exchange from designated banks. Except for the repayment of interest, repayment of the principal of foreign exchange loans lent by financial institutions within China needs to be approved by the foreign exchange administration.

In the case where there is no stipulation on the anticipated payment in the contract, such anticipation cannot be unallowed. When there are articles on anticipation in a loan contract, relevant parties can, upon approval by the foreign exchange administration, repay the loan with their foreign exchange equities.

Borrowers are not permitted to purchase foreign exchange with RMB for the anticipation of foreign debt, or the re-granting of loans or dealer loans in foreign exchange. Repaying loans by purchasing foreign exchange in a different place is not permitted.

- (2) Organizations within China needing foreign exchange as a guarantee to others should apply to the foreign exchange administration with guarantee agreements, guarantee registration certificates, balance sheets of debtors and notice of payment from creditors. Then they can repay the loans from their foreign exchange accounts or by purchasing foreign exchange at designated banks.
- (3) In case of increase or transfer (or by other means) of capital (in foreign exchange) in an enterprise with foreign investment, the enterprise should apply for approval to the foreign exchange administration with a resolution of the board of directors and other documents required, before it can make the payment from its foreign exchange account or honor at a designated foreign exchange bank with a notice of sale of foreign exchange issued by the foreign exchange administration.

Foreign investment holding companies which invest with their foreign exchange capital or increase or reinvest with the profits of foreign counterparts in China should go through approval procedures at the foreign exchange administration.

China has negotiated BITs in which the repatriation of funds’ guarantee’ shall be subject to laws and regulations of each party.

(ii) Expropriation and Compensation

Governing laws, regulations and policies include:

*The Constitution* (Article 13);

*Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures* and its implementing regulations;

*Law of the People’s Republic of China on Wholly Foreign-owned Enterprises* and its implementing regulations;

*The Law of the People’s Republic of China on State Compensation*

National treatment is applied under the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, the *Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures* and the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises*. They stipulate that the State will not nationalize or expropriate any foreign investment enterprises; except in special circumstances, i.e. for the requirement of social and public interests (and then only in accordance with legal procedures.) Appropriate compensation shall be provided.

China has signed IPPAs with 116 economies. All the IPPAs contain provisions concerning expropriation and stipulate that investments of nationals or companies of either contracting party shall not be expropriated, nationalized or subjected to measures having effect equivalent to expropriation, or nationalization, in the territory of the other contracting party (except for the sake of a public interest), under legal procedure, on the bases of non- discrimination and against reasonable compensation.

No statistics are available for the number of expropriations involving foreign investors under domestic law over the last three years.

(ii) IPR

With a view to keep the legislative system fully in line with WTO rules ( TRIPS specifically), China has modified the *Patent Law*, *Trademark Law*, *Copyright Law*, Regulations to Protect Computer Software and other related laws and regulations in recent years. China is a member of 15 international IPR conventions, treaties or organizations including: WIPO, Paris Convention for the Protection of Industrial Property, Berne Convention, Madrid Trademark Convention, Universal Copyright Convention, the Patent Cooperation Treaty, Budapest Treaty, the International Patent Classification Agreement, Geneva Phonogram Convention, the International Union for the Protection of New Varieties of Plants, etc.

The Chinese government has taken effective measures to strengthen IPR law enforcement. There have been special IPR courts established in all provinces and major cities. A special taskforce composed of 12 government judicial and administrative agencies has been set up to coordinate and intensify combating IPR violation activities. IPR education has also been fostered to raise awareness of ordinary Chinese citizens. Recently China has launched another IPR protection campaign — the “Blue Sky Trade Show” — to strengthen surveillance on IPR infringement on exhibitions and trade shows.

(iii) Dispute Settlement

Existing channels for dispute settlement and processing of grievances include the following:

- Administrative review process according to Law on Administration Reconsideration;
- Judicial review under various laws and regulations; and
- International arbitration process under BITs.

China has signed the ICSID Convention. Statistics for the last three years on disputes are not available.

## INVESTMENT AND DEVELOPMENT

China has no performance requirements for the granting of approval for foreign investment.

Upon entering to the WTO, China undertook a thorough review and revision over 2,500 laws and regulations related to China's foreign economic relations and trade policies. With regard to its administrative regime on foreign investment, basic laws and regulations on FDI (*Law on Chinese-Foreign Equity Joint Ventures*, *Law on Chinese-Foreign Contractual Joint Ventures* and the *Law on Wholly Foreign-owned Enterprises*) were revised and provisions which require the balance of foreign exchange, export and localization of supplies were removed. No laws and regulations or policies that do not conform to TRIMs exist.

According to the "Provisions on Guiding the Orientation of Foreign Investment", projects involving foreign investment that have adverse effects to saving energy and improving environment belong to the category of restricted sectors.

Projects which are energy-consuming or produce high levels of pollution, whether with domestic investment or with foreign investment, are severely restricted.

## INVESTMENT PROMOTION AND INCENTIVES

- (i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

MOFCOM's Department of Foreign Investment Administration is responsible for providing guidance on national investment promotion and work on attracting foreign investment. MOFCOM's Investment Promotion Agency oversees the implementation of investment promotion strategies and guidelines. At the provincial level, investment promotion agencies also operate.

Ministry of Commerce and Finance (MOFCOM) of the People's Republic of China  
2 Dong Chang An Jie, Beijing, 100731  
PEOPLE'S REPUBLIC OF CHINA  
Tel: +86-10-65197886  
Fax: +86-10-65197839  
Website: <http://english.mofcom.gov.cn/>  
Email: [caohy@mofcom.gov.cn](mailto:caohy@mofcom.gov.cn)

Investment Promotion Agency  
82, Dong Chang An Jie, Beijing, 10074  
PEOPLE'S REPUBLIC OF CHINA  
Tel: +86-10-85226556  
Fax: +86-10-85226558  
Website: <http://www.fdi.gov.cn>  
Email: [Service@fdi.gov.cn](mailto:Service@fdi.gov.cn)

For more information on investment promotion agencies, please see <http://www.fdi.gov.cn>

With a view to facilitate foreign investment and to streamlining screening procedures, provincial, municipal and other local governments have set up one-stop-shop facilities according to their specific conditions. No model measures have been adopted.

(ii) Incentives

Favourable tax treatment is provided to foreign-investment enterprises as follows:

(iii) Preferential corporate income tax rate

The new “Corporate Income Tax Law” was passed at the fifth session of the 10<sup>th</sup> National People’s Congress on 16 March 2007. The new unified income law will apply to both domestic and foreign investment enterprises.

The new tax law will be implemented on 1 January 2008. Productive foreign investment enterprises which enjoy 15% and 24% favorable income tax rates based on the present income tax law, will pay income tax on 10% and 1% higher rates. Income tax incentives of “2 years exemption and 3 years deduction” will be abolished. Income tax rate for companies in service trade will go down from 33% to 25%, indicating a greatly reduced tax. Small-sized and tiny-profit companies will enjoy a 20% preferential tax rate.

The new income tax law will adopt a new mechanism with incentive orientations “focusing on priority industries and supplemented by priority regions.” Foreign investment enterprises engaged in development of high-tech\new-tech, infrastructure, agriculture, forestry, animal husbandry, environment protection sectors will be granted new tax incentives. The new income tax law will provide incentives to the western region and special economic areas.

Taking into account the interests of already established foreign investment enterprises, the new law will offer transition period to existing foreign investment enterprises.

(iv) Income Tax Holidays

Production-oriented enterprises with foreign investment that have an operation period exceeding 10 years, shall from the first profit-making year, be exempted from income tax the first and the second years and be allowed a 50% reduction in the third to the fifth years.

Technology-oriented enterprises with foreign investment shall be exempted from income tax for the first two years and allowed a 50% reduction for the following six years.

Export-oriented enterprises with foreign investment shall be exempted from income tax for the first two years and allowed a 50% reduction for the following three years. In addition, this type of enterprise shall be allowed a reduced income tax rate of 50% as long as their annual export accounts for 70% or more of their sales (the minimum tax rate shall be 10% if the enterprise enjoys double preferential tax treatment).

The income tax on foreign investment enterprises located in Central and Western China that are engaged in projects encouraged by the government shall be levied at a reduced rate of 15% for a period of another three years following the expiration of the five-year period of tax exemption and reduction.

(v) Reinvestment and tax refunds

Foreign investors who reinvest in its share of profit obtained from the established enterprise with an operation period of no less than 5 years shall, upon approval by the taxation authority, be refunded 40% of the income tax already paid on the reinvested amount. Foreign reinvested export-oriented enterprises shall be refunded 100% of the income tax already paid on the reinvestment amount.

(vi) Deduction of local tax

The exemption and deduction of local income tax on foreign investment enterprises that are engaged in encouraged industries shall be decided by the local governments of the relevant province, autonomous region or municipality.

(vii) Tariff exemption for imported machinery and equipment

Machinery and equipment imported for foreign investment or domestic investment projects that are encouraged and supported by the state shall, enjoy tariff and import-stage VAT exemption if the commodities are not listed in the “Catalogue of Imported Commodities not Entitled for Tariff Exemption for Foreign investment Projects”.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

According to relevant laws and regulations, Chinese enterprises are allowed to invest overseas subject to verification by relevant authorities.

Export of technology by a Chinese company is permitted except for some traditional and peculiar technologies and technologies for military purpose.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

Labor laws, regulations and rules that apply to foreign investment enterprises mainly include the *Labor Law of the People’s Republic of China* and its related rules and regulations; Regulations for Labor Management in Foreign-funded Enterprises, Regulations of the People’s Republic of China on the Settlement of Labor Disputes in Enterprises.

(i) Laws and Regulations on the Minimum Wage

The government implements the minimum wage security system. The detailed standards of the minimum wage are determined by provincial level governments which are required to file the standards with the State Council. The wage paid to the employee should not be lower than the local minimum wage standards. Excerpts from the relevant law and regulations follow.

(Article 48 of the *Labor Law of the People’s Republic of China*)

The minimum wage of an employee for a legal working hour shall not be less than the local minimum wage level. Allocation of remuneration in enterprises shall follow the principle of equal pay for equal work. The wage level of the enterprise shall increase gradually on the basis of its profit growth. The enterprise shall determine the wage level of the employees through collective negotiations, in line with the guidance of the local government or the labor authority.

(Article 14 of the *Regulations for Labor Management in Foreign investment Enterprises*)

If the wage of an employee is below the minimum wage level, the local labor authority shall order the Enterprise to make corrections within a limited time period. Apart from making up the difference between the actually paid wage and the minimum wage, the Enterprise shall also pay compensation to the employee worth 20% to 100% of the difference. If the Enterprise refuses to pay the difference and the compensation, it can receive a fine worth one to three times the sum of the difference and the compensation.

(Article 29 of the *Regulations for Labor Management in Foreign-funded Enterprises*)

(ii) Laws and Regulations on Minimum Requirement for Training and Employment of Local Staff

*Summary: foreign-investment enterprises shall establish a system for professional training. Staff to be employed for their technical ability with special requirements must receive training and shall take up their posts with qualification certificates.*

Foreign investment enterprises can determine the organization establishment, payroll and decide the time, quality and means of hiring staff by themselves according to their production and management characteristics. When foreign-funded enterprises employ staff and workers, they may apply to job introduction centers (or institutions) permitted by the local labor department. With the approval of the labor administrative department, they can employ staff members trans-regionally, including employing personnel with special technical abilities, senior technicians and senior administrators from abroad who are not available in China. Foreign-funded enterprises shall not employ staff who have not yet revoked their existing labor relationship. Employment of children under 16 years of age is strictly prohibited.

Foreign investment enterprises should sign labor contracts with their employees subject to the principles of equality and voluntarism, and shall reach consensus through consultation. Signed labor contracts shall be ratified by labor administration departments. In case a labor dispute occurs, parties concerned can make an application for arbitration to local labor arbitration departments. If any party refuses to accept the award, a legal proceeding may be taken to court. Foreign-funded enterprises can fire, without interference by any unit or individual, staff members who are proved not qualified after the probation and training period, or have seriously infringed rules and regulations of the enterprise, or have caused great losses to the enterprise because of serious dereliction of duty, or have infringed state laws and have to take relevant criminal responsibilities. Enterprises can fire redundant personnel according to the law after changes of production technology. However, employees should not be fired by enterprises in the following cases:

- In time of receiving treatment, recuperating from injury at work or suffering from occupational diseases; in time of receiving treatment in hospital for illness or injury out of work; in time of pregnancy, giving birth or nursing for female employees.

- Under normal conditions: if an enterprise fires any employee due to internal reasons it must pay a certain amount of compensation according to the working time of the employee in the enterprise.

Foreign investment enterprises must make social insurance of endowment, medical treatment, unemployment, injury at work, bearing and so on for their employees. Enterprises and employees must pay a full basic endowment insurance fee to designated social insurance organizations in time according to rules issued by local governments. Enterprises should pay an unemployment insurance fee to unemployment insurance organizations of the labour administration departments according to the proportion stipulated by the local governments. Also, Enterprises must set aside a housing subsidiary fund according to stipulations.

If an Enterprise recruits any employee in violation of these Regulations, the local administrative department can impose fines on the Enterprise worth 5 to 10 times of the average monthly wage of the recruited employee and order the Enterprise to send back the recruited employee.

If the Enterprise or the employee violates the labour contract, infringes upon the interests of the other party and brings losses thereto, the Enterprise or the employee shall be held possible for compensation according to their responsibility.

Working conditions in foreign-funded enterprises must meet the China's working safety and health standards. The Enterprise's production equipment and facilities must be fitted out with protective outfits and facilities for safety and health.

Foreign-funded enterprises should carry out the state working system of 8 hours a day and less than 40 hours a week and should not prolong working time. Higher payments shall be made for work conducted in prolonged working time or on holidays or vacations according to the relevant state stipulations.

Workers in foreign-funded enterprises have entitlements to rest days, holidays, home-visiting leave, wedding days, mourning days and female workers' nursing days, as stipulated by the State. Workers who have worked continuously over one year have an entitlement to annual leave with salary.

The following laws and regulations apply to labor disputes:

*Labor Law of the People's Republic of China* (Chapter 10);

Regulations on Settlement of Labor Disputes in Enterprises;

Regulations on Labor Management of Foreign-funded Enterprises;

Opinions on Some Issues on Implementation of the *Labor Law of the People's Republic of China*.

### (iii) Summary

Where disputes arise between an employer and employee, the parties may seek settlement through negotiation or apply for mediation, arbitration, or bring a lawsuit. After labor disputes arise, the parties may apply to a labor dispute mediation committee within their own work unit for mediation. If mediation fails and one party asks for arbitration, the party may apply to a labor dispute

arbitration committee for arbitration. If a party does not agree with the arbitration decision it may bring a lawsuit to court.

Where disputes arise from signing a collective labor contract and the parties fail to settle them through negotiation, the local government may coordinate the parties concerned to seek a settlement.

Where the parties fail to settle a dispute arising from the implementation of a collective labor contract by way of coordination, they may apply to a labor dispute arbitration committee. If they do not accept the arbitrator's decision, they may bring a lawsuit to the court.

Foreigners entering, passing through or residing in China, must go through procedures for entry, transit, and residence according to the *Law of the People's Republic of China on Administration over Foreigners' Entry and Departure*. In accordance with reasons for the foreigner's application for entry, the relevant department of the Chinese government will issue the corresponding visa of F, L, G, C or X type.

#### (iv) Restrictions

If foreign technical or administrative personnel want to enter China and get a job, or if an enterprise wants to employ a foreigner, they must submit applications for employment approval for the foreigner according to "Administrative Provisions on Foreigner's Employment in China".

Non-resident staff of foreign firms, together with their accompanying family members, must obtain occupation visas from the Chinese embassies located in their country, with employment credentials supplied by their employers on their behalf before entering China (except for visa exemptions agreed upon through bilateral agreements), and go through formalities to obtain employment certificate from labor administrative departments within 15 days upon entry, and to receive residence certificate from public security departments within 30 days.

There are no laws or policies that restrict appointments by foreign investors to senior management positions or the board of directors.

## **COMPETITION POLICY**

There is no single administrative agency in charge of competition policy particularly in China, but many agencies are involved in competition matters, such as the State Reform and Development Commission, MOFCOM, and the State Administration for Industry and Commerce.

In September 1993, the *Law for Countering Unfair Competition* was adopted and promulgated by the Standing Committee of the National People's Congress. The aim of the Law is to promote the healthy development of the socialist market economy, to encourage and protect fair competition, and to defend the rights and interests of operators and consumers. The Law has one chapter which lists all acts of unfair competition, one chapter concerning the control and inspection of unfair competition acts by concerned authorities, and one chapter concerning the legal responsibility of operators who violate laws and regulations.

The Department of Fair Trade and the Department of Industry Investigation have been set up after China's accession to the WTO. In addition, regulations cover anti-monopoly issues.



## HONG KONG, CHINA

### Acronyms

C&ED	Customs and Excise Department
COMPAG	Competition Policy Advisory Group
CPRC	Competition Policy Review Committee
HKC	Hong Kong, China
HKD	Hong Kong Dollar
HKMA	Hong Kong Monetary Authority
HKSAR	Hong Kong Special Administrative Region
InvestHK	Invest Hong Kong

### INTRODUCTION

The Government of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China firmly believes in, and supports, a free market economy and a liberal investment regime. In general, there are no special legislative, regulatory or administrative guidelines governing the admission and establishment of foreign investment in Hong Kong, China (HKC). There are also no restrictions on foreign exchange transactions, capital movement, or repatriation of capital and returns related to foreign investments.

HKC offers a level playing field to all investors. We have not sought any exemption to the most favoured nation treatment under the WTO General Agreement on Trade in Services. Other than a few minor exceptions primarily in terms of residency requirements which are common practices in the relevant sectors, no discrimination is applied in treatment as between "foreign services and service providers" and "domestic services and service providers" on either a de jure or de facto basis.

As a corollary of this free market policy, there has been sustained growth in both outward and inward investment attributed to HKC during 2002-04. The stock of outward direct investment at market value amounted to US\$403.1 billion as of end-2004 and the corresponding inward direct investment was US\$453.0 billion. The *World Investment Report 2005* published by United Nations Conference on Trade and Development (UNCTAD) ranked HKC as the second largest foreign direct investment (FDI) recipient in Asia, after the People's Republic of China. On a global scale, HKC ranked 7<sup>th</sup> in FDI inflows in 2004. HKC has been ranked the freest economy in the world for 12 consecutive years since 1995. (See the Heritage Foundation and Wall Street Journal, *2005 Index of Economic Freedom*.)

Given HKC's free market economy and liberal investment regime, no major liberalisations have been undertaken in the last five years.

## SCREENING OF FOREIGN INVESTMENT

There are no screening requirements for foreign investment proposals.

## SECTOR-SPECIFIC LAWS AND POLICIES

### (i) Banking

Banks incorporated locally/overseas intending to set up an operation in HKSAR must fulfill standard prudential requirements. An overseas-incorporated applicant seeking authorization as a licensed bank must also satisfy certain market entry criteria. More information can be found at the “Information Centre – Guidelines and Circulars” at the website of the Hong Kong Monetary Authority (HKMA) <http://www.hkma.gov.hk> Once an overseas-incorporated applicant is authorized as a licensed bank, it can conduct the full range of banking business.

Full banking licences are granted to banks incorporated outside HKSAR on the basis of reciprocity. However, the reciprocity requirement does not apply to applicants incorporated in a place which is, or is part of the territory of, a member of the WTO.

There is no additional regulatory requirement for operation which discriminate between domestic and foreign service suppliers.

The contact point for further information is:

Banking Development Department  
Hong Kong Monetary Authority  
Tel: (852) 2878 1846  
Fax: (852) 2290 5168  
Email: [raymond\\_kw\\_chan@hkma.gov.hk](mailto:raymond_kw_chan@hkma.gov.hk)  
Website: <http://www.info.gov.hk/hkma/eng/bank/index.htm>

### (ii) Insurance

An applicant for authorized insurer which is a company incorporated outside HKSAR must satisfy the Insurance Authority that it is:

- a company incorporated in a country where there is a comprehensive companies law and insurance law;
- an insurer under effective supervision by the authority or authorities of its home country responsible for the proper conduct of insurance business; and
- a well established insurer with international experience and of sound financial standing.

However, an overseas applicant may, if it so chooses, incorporate a subsidiary company in HKSAR for the purpose of the application, in which event the above requirements will not apply.

There is no additional regulatory requirement for operation which discriminate between domestic and foreign service suppliers.

The contact point for further information is:

Office of the Commissioner of Insurance

Tel: (852) 2867 2565

Fax: (852) 2869 0252

Email: [iamail@oci.gov.hk](mailto:iamail@oci.gov.hk)

Website: <http://www.oci.gov.hk>

(iii) Trading in Securities and Futures

The Stock Exchange of Hong Kong Limited and the Hong Kong Futures Exchange Limited have established admission criteria which are equally applicable to local and foreign companies.

Exchange participant of the Stock Exchange of Hong Kong Limited or the Hong Kong Futures Exchange Limited, however, must be a company incorporated in HKSAR. This requirement is to provide legal backing to operations of the clearing houses for the purpose of enhancing market integrity.

The contact point for further information is:

Corporate Communications

Hong Kong Exchanges and Clearing Limited

Tel: (852) 2522 1122

Fax: (852) 2295 3106

Email: [info@hkex.com.hk](mailto:info@hkex.com.hk)

Website: <http://www.hkex.com.hk>

There is no additional regulatory requirement for operation which discriminates between domestic and foreign service suppliers.

The contact point for further information is:

Licensing Department

Securities and Futures Commission

Tel: (852) 2840 9393

Fax: (852) 2501 0375

Email: [enquiry@sfc.hk](mailto:enquiry@sfc.hk)

Website : <http://www.sfc.hk>

(iv) Broadcasting

*Television Services*

For domestic free television program services, there are restrictions on voting control held by unqualified voting controllers as follows:

- the Broadcasting Authority's approval is required before an unqualified voting controller can hold, acquire or exercise equal to or greater than 2% of the total voting control of a licensee company; and

- where the aggregate voting control exercised by unqualified voting controllers on a poll, if any, at a general meeting of a licensee company exceeds 49% of the total voting control exercised on that poll, the votes cast by the unqualified voting controllers shall be scaled down to 49%.

The above restrictions do not apply to other television program service licensees.

An “unqualified voting controller” means a voting controller who is not a qualified voting controller. A “qualified voting controller” means a voting controller who in the case of an individual, is ordinarily resident in HKSAR and has been so resident for at least one continuous period of not less than 7 years; or in the case of a corporation, is ordinarily resident in HKSAR;<sup>18</sup>

- (a) the trustee or manager of any unit trust or mutual fund corporation authorized under the *Securities and Futures Ordinance* (Cap. 571);
- (b) the trustee of a charitable scheme made by order of a court of a competent jurisdiction;
- (c) a judicial officer on whom the estate of a deceased is vested between the time of death and the grant of letters of administration;
- (d) the Registrar of the High Court; or
- (e) such other person as may be prescribed.

### *Radio Services*

A sound broadcasting licence may be granted to or held by a corporation that is formed and registered in HKSAR. The management and control of the licensee shall be bona fide exercised in HKSAR.

As a condition of licence, unless otherwise approved by the Broadcasting Authority, the chairman and the managing director and the majority of the directors who take an active part in the control of a licensee shall each be ordinarily resident in HKSAR and has been so resident for at least one continuous period of not less than 7 years.

The aggregate of the voting shares in a licensee to or in which unqualified persons have, directly or indirectly, any right, title or interest, shall not at any time exceed 49% of the total number of voting shares in the licensee. This applies to voting shares in a licensee where the voting rights carried by such shares are for the time being exercisable as regards any question or other matter whatsoever which may be determined by a poll at general meetings of the licensee.

A person shall be deemed as an “unqualified person” unless he is ordinarily resident in HKSAR and has been so resident for at least one continuous period of not less than 7 years.

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<sup>18</sup> “Ordinary resident in HKSAR” means, for an individual, resident in HKSAR for not less than 180 days in any calendar year or 300 days in any 2 consecutive calendar years; for a corporation, the majority of directors who actively participate in its direction are each ordinarily resident in HKSAR and have been so resident for at least one continuous period of not less than 7 years, and the control and management of the corporation is bona fide exercised in HKSAR.

More details about the licensing requirements are contained in Sections 13F to 13I of the *Telecommunications Ordinance* (Cap. 106) (available at [http://www.legislation.gov.hk/blis\\_export.nsf/CurAllEngDocAgent?OpenAgent&Chapter=106](http://www.legislation.gov.hk/blis_export.nsf/CurAllEngDocAgent?OpenAgent&Chapter=106)).

There is no additional regulatory requirement for operation which discriminate between domestic and foreign service suppliers.

The contact point for further information on television and radio services is:

A Division  
Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
Tel: (852) 2189 2226  
Fax: (852) 2511 1458  
Email: [wwchong@citb.gov.hk](mailto:wwchong@citb.gov.hk)  
Website : <http://www.citb.gov.hk/ctb/eng/broad/content.htm>

(v) Legal Services

Overseas law firms registered in HKSAR as foreign law firms are subject to the following restrictions:

- a law firm registered as a foreign firm is not permitted to practise Hong Kong law or employ and/or enter into partnership with Hong Kong solicitors; and
- a registered foreign firm may enter into an association with a local law firm provided that the number of foreign lawyers to local lawyers in the association does not exceed the ratio of 1:1. (This requirement may be waived by the Law Society under exceptional circumstances).

The contact point for further information is:

Legal Policy Division  
Department of Justice  
Tel: (852) 2867 4898  
Fax: (852) 2180 9928  
Email: [lpd@doj.gov.hk](mailto:lpd@doj.gov.hk)  
Website : <http://www.doj.gov.hk/eng/new/index.htm>

(vi) Supporting Services for Air Transport

There is no additional regulatory requirement for foreign entry into this sector, except that the agreements with the aviation fuel supply system and the air cargo terminal franchises prohibit the acquisition of a controlling stake in the franchises by any government other than the HKSAR Government.

The contact point for further information is:

Aviation Division, Economic Development Branch  
Economic Development and Labour Bureau  
Tel: (852) 2810 3161  
Fax: (852) 2524 9397  
Email: [samhui@edlb.gov.hk](mailto:samhui@edlb.gov.hk)  
Website : <http://www.edlb.gov.hk/edb/eng/resp/airport.htm>

(vii) Land

The HKSAR Government only grants land on a leasehold basis and there is no restriction on foreign ownership of land for commercial purposes or residential uses.

## INVESTMENT PROTECTION

(i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

The linked exchange rate system has been implemented since October 1983. This is basically a currency board system which requires the monetary base to be fully backed by foreign reserves at the fixed exchange rate. In HKSAR, the monetary base comprises the Certificates of Indebtedness against which banknotes are issued, notes and coins issued by the HKSAR Government, the sum of clearing account balances held by banks with the HKMA for settlement purposes (i.e. the Aggregate Balance) and outstanding Exchange Fund Bills and Notes. Certificates of Indebtedness are issued and redeemed against US dollars at the fixed exchange rate of HK\$7.80 to US\$1.

Exchange Fund Bills and Notes are issued only when there are inflows of funds. At present, additional exchange paper is issued to absorb interest payments on existing stock of Exchange Fund papers.

The HKMA conducts foreign exchange operations to maintain exchange rate stability. Their impact on the monetary base is effected through the Aggregate Balance. Under the present arrangement, the Hong Kong Dollar (HKD) market exchange rate is allowed to move within a band of 7.75-7.85. When there is a decrease in demand for HKD assets and the market exchange rate weakens to HK\$7.85/US\$1, the HKMA is committed to buying HKD from licensed banks, leading to a contraction of the Aggregate Balance. Interest rates then rise, creating the monetary conditions conducive to capital inflows to maintain exchange rate stability. When there is an increase in demand for HKD assets and the HKD market exchange rate strengthens to HK\$7.75/US\$1, the HKMA is committed to selling HKD to licensed banks, leading to an expansion of the Aggregate Balance and exerting downward pressure on interest rates to discourage continued capital inflows.

There is no restriction regarding the repatriation of funds related to foreign investment.

There is no restriction regarding the convertibility of currencies for the overseas transfer of funds.

The HKSAR Government has entered into bilateral Investment Promotion and Protection Agreements with 15 economies, namely, Australia, Austria, the Belgo-Luxembourg Economic Union, Denmark, France, Germany, Italy, Japan, the Republic of Korea, the Netherlands, New Zealand, Sweden, Switzerland, Thailand and the United Kingdom. These agreements provide for the unrestricted right to transfer investments and returns by investors of one contracting party out of

the area of the other contracting party. In the agreements entered into with Australia, Denmark and New Zealand, it is stipulated that the transfer shall be subject to the laws, regulations and/or policies of each contracting party.

(ii) Expropriation and Compensation

Some of the HKSAR laws provide for the deprivation of property and resultant compensation (e.g. the *Lands Resumption Ordinance* (Cap. 124), the *Roads (Works, Use and Compensation) Ordinance* (Cap. 370), and the *Mass Transit Railway (Land Resumption and Related Provisions) Ordinance* (Cap. 276)). These laws apply indiscriminately to all investors affected. The statutory laws of the HKSAR that relate to expropriation and compensation are subject to Article 105 of the *Basic Law of the HKSAR* which provides that:

- the HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property;
- such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay; and
- the ownership of enterprises and the investments from outside the HKSAR shall be protected by law.

Over the last three years, no cases of expropriation involving foreign investors under domestic law have occurred.

(iii) IPR

*Protection of Intellectual Property*

The HKSAR Government strives to provide effective protection of intellectual property through:

- the administration of comprehensive intellectual property and related laws which provide for civil redress for owners of IPR and criminal sanctions for the manufacture and sales of pirated and counterfeit goods;
- the provision of an efficient and impartial judicial system to deal with law suits relating to intellectual property; and
- the promotion of public awareness in the importance of IPR and their protection.

The comprehensive legal framework in HKSAR enables both foreign nationals and local residents to exploit and protect their IPR.

*Recent Enforcement Efforts*

IPR in HKSAR are primarily civil rights, and the prime responsibility for their protection and enforcement rests with the owner of these rights. To complement civil actions by the owners, there are also criminal sanctions against the manufacture and distribution of pirated works and counterfeit goods.

The Customs and Excise Department (C&ED) is responsible for enforcement actions against IPR infringement activities. Under the sustained and vigorous enforcement action of C&ED, copyright piracy and trade mark counterfeiting activities in HKSAR have been curbed significantly in recent years.

Local counterfeiting activities are mostly related to the sale of counterfeit goods, including clothing, leather goods, watches, electronic products, foodstuff and pharmaceuticals. In 2005, C&ED detected 1,114 cases involving counterfeit trade marks and false trade descriptions with seizure of goods worth HK\$305.3 million and the arrest of 726 persons. From January to July 2006, 559 cases were detected with seizures valued at HK\$79.2 million and the arrest of 397 persons.

Video discs, including VCD and DVD, are major products subject to piracy in the market, followed by other types of optical discs such as TV and computer games, computer software and music. As a result of C&ED's regular and territory-wide raiding operations, retail outlets for pirated optical discs have been significantly reduced. In 2005, C&ED detected a total of 9,794 copyright cases with seizure of goods worth HK\$137.2 million and the arrest of 957 persons. From January to July 2006, 4,807 cases were detected with seizures valued at HK\$93.5 million and the arrest of 582 persons.

The contact point for further information is:

Assistant Director (Advisory)  
Intellectual Property Department  
Tel: (852) 2961 6802  
Fax: (852) 2838 6276  
Email: [enquiry@ipd.gov.hk](mailto:enquiry@ipd.gov.hk)  
Website : <http://www.ipd.gov.hk>

#### (iv) Dispute Settlement

In HKSAR, there are a variety of ways of resolving disputes. These include negotiation, conciliation, mediation, arbitration and litigation. The HKSAR has a well-developed system of courts which have jurisdiction in civil matters:

- The High Court — its jurisdiction is unlimited in civil matters.
- The District Court — its jurisdiction is generally limited to civil actions involving claims of value over HK\$50,000, but not exceeding HK\$3,000,000 (for legal action related to land) or HK\$1,000,000 (for legal action not related to land).
- The Small Claims Tribunal — it hears minor civil claims up to a limit of HK\$50,000.
- The Lands Tribunal — it has a specialised role with jurisdiction in matters of rating and valuation, and in assessing compensation when land is resumed by government or reduced in value by development.

In addition, the Hong Kong International Arbitration Centre assists parties to choose the best available option to resolve disputes and provides a full set of support services for arbitration and mediation of disputes.

The Convention on the Settlement of Investment Disputes between States and Nationals of other States is applicable to the HKSAR. The HKSAR Government does not keep record of such disputes or their settlement.

## **INVESTMENT AND DEVELOPMENT**

There are no performance requirements regarding foreign investment and no measures under the WTO Agreement on Trade-Related Investment Measures (TRIMs) in place in HKSAR. There are no other policy measures affecting inward foreign investment used to promote broad economic development objectives.

## **INVESTMENT PROMOTION AND INCENTIVES**

### **(i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)**

Invest Hong Kong (InvestHK) was established on 1 July 2000 to spearhead HKC's efforts to attract inward investment.

Investment support services provided by InvestHK include supplying up-to-date information needed to make informed business decisions, such as corporate environment reports, profiles on economic sectors, comparative analyses of the costs of setting up business in HKC, vital government statistics and regulations, and key publications.

InvestHK also provides contacts, connects prospective business partners, and facilitates liaison with relevant government departments and commercial organisations.

Once companies arrive in HKC, InvestHK continues to support them with advice and assistance on such matters as work visas, incorporation, trademark registrations, and other administrative, legal and financial matters.

Sector-specific experts in financial services; information technology; technology (especially electronics and biotechnology); telecommunications, media and multi-media; tourism and entertainment; consumer, retail and sourcing; business and professional services; and transportation provide consultation, regulatory advice, and logistics support guidance. InvestHK also gives advice on regional headquarters operations in all sectors.

InvestHK offers solution-oriented investment promotion and support services in a straightforward one-stop shop. In addition, there is a network of nine Investment Promotion Units operating in the Hong Kong Economic and Trade Offices in Brussels, Guangdong, London, New York, San Francisco, Sydney, Tokyo and Toronto, and the Office of the Government of the Hong Kong Special Administrative Region in Beijing. Investment Promotion Units are also planned for the Hong Kong Economic and Trade Offices to be opened in Berlin, Chengdu and Shanghai (2006-07).

<p><u>Hong Kong, China</u> Invest Hong Kong Suites 1501-9, Level 15 One Pacific Place 88 Queensway Hong Kong Tel : (852) 3107 1000 Fax : (852) 3107 9007 Email : <a href="mailto:enq@InvestHK.gov.hk">enq@InvestHK.gov.hk</a>  Website : <a href="http://www.InvestHK.gov.hk">www.InvestHK.gov.hk</a></p>	<p><u>New York</u> Hong Kong Economic and Trade Office 5<sup>th</sup> Floor, 115 East 54<sup>th</sup> Street New York, NY10022 United States Tel : (1-212) 752 3320 Fax : (1-212) 752 3395 Email : <a href="mailto:hketony@hketony.gov.hk">hketony@hketony.gov.hk</a> Website : <a href="http://www.hongkong.org">http://www.hongkong.org</a></p>
<p><u>Beijing</u> The Office of the Government of the Hong Kong Special Administrative Region in Beijing No. 71, Di'anmen Xidajie Xicheng District Beijing 100009 China Tel : (86-10) 6657 2880 Fax : (86-10) 6657 2821 Email : <a href="mailto:bjohksar@bjo-hksarg.org.cn">bjohksar@bjo-hksarg.org.cn</a> Website : <a href="http://www.bjo.gov.hk">http://www.bjo.gov.hk</a></p>	<p><u>San Francisco</u> Hong Kong Economic and Trade Office 130 Montgomery Street San Francisco, CA94104 United States Tel : (1-415) 835 9300 Fax : (1-415) 392 2963 Email : <a href="mailto:hketosf@hketosf.gov.hk">hketosf@hketosf.gov.hk</a> Website: <a href="http://www.hongkong.org">http://www.hongkong.org</a></p>
<p><u>Brussels</u> Hong Kong Economic and Trade Office Rue d'Arlon 118 1040 Brussels Belgium Tel : (32-2) 775 00 88 Fax : (32-2) 770 09 80 Email : <a href="mailto:general@hongkong-eu.org">general@hongkong-eu.org</a> Website: <a href="http://www.hongkong-eu.org">http://www.hongkong-eu.org</a></p>	<p><u>Sydney</u> Hong Kong Economic and Trade Office Level 2, Hong Kong House, 80 Druiitt Street Sydney, NSW 2000 Australia Tel : (61-2) 9283 3222 Fax : (61-2) 9283 3818 Email : <a href="mailto:enquiry@hketosydney.gov.hk">enquiry@hketosydney.gov.hk</a> Website : <a href="http://www.hketosydney.org.au">http://www.hketosydney.org.au</a></p>
<p><u>Guangdong</u> Hong Kong Economic and Trade Office Flat 7101, Citic Plaza 233 Tian He North Road Guangzhou Postal Code: 510613 Tel : (86-20) 3891 1220 Fax : (86-20) 3891 1221 Email : <a href="mailto:general@gdeto.gov.hk">general@gdeto.gov.hk</a> Website : <a href="http://www.gdeto.gov.hk">http://www.gdeto.gov.hk</a></p>	<p><u>Tokyo</u> Hong Kong Economic and Trade Office Hong Kong Economic and Trade Office Building 30-1, Sanban-cho Chiyoda-Ku, Tokyo 102-0075, Japan Tel : (81-3) 3556 8961 Fax : (81-3) 3556 8960 Email : <a href="mailto:tokyo_enquiry@hketotokyo.gov.hk">tokyo_enquiry@hketotokyo.gov.hk</a> Website : <a href="http://www.hketotyto.gov.hk/">http://www.hketotyto.gov.hk/</a></p>

<p><u>London</u>  Hong Kong Economic and Trade Office  6 Grafton Street  London W1S 4EQ  United Kingdom  Tel : (44-20) 7499 9821  Fax : (44-20) 7409 0647  Email : <a href="mailto:general@hketolondon.gov.hk">general@hketolondon.gov.hk</a>  Website : <a href="http://www.hketolondon.gov.hk">http://www.hketolondon.gov.hk</a></p>	<p><u>Toronto</u>  Hong Kong Economic and Trade Office  174 St. George Street  Toronto  Ontario M5R 2M7  Canada  Tel : (1-416) 924 5544  Fax : (1-416) 924 3599  Email : <a href="mailto:info@hketotoronto.gov.hk">info@hketotoronto.gov.hk</a>  Website : <a href="http://www.hketo.ca">http://www.hketo.ca</a></p>
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(ii) Incentives

Scheme / Measure	Details	Contact Point
Concessionary corporate tax rate	<p>A concessionary tax rate at 50% of the prevailing normal profits tax rate is allowed for the profits of professional reinsurance companies authorised in HKSAR derived from the business of reinsurance of offshore risks.</p> <p>In addition, interest income and profits derived from certain qualifying debt instruments issued in HKSAR are subject to a concessionary tax rate at 50% of the prevailing normal profits tax rate.</p>	<p>Profits Tax Unit  Inland Revenue Department  Revenue Tower  5 Gloucester Road  Wan Chai  Hong Kong  Tel : (852) 187 8088  Fax : (852) 2877 1189  Website:  <a href="http://www.info.gov.hk/ird">http://www.info.gov.hk/ird</a></p>
Tax exemptions	<p>Owners of ships registered in HKSAR are exempted from profits tax on international incomes derived from the operation of those ships.</p> <p>In addition, interest income and profits derived from certain bonds issued under the relevant enactments, Exchange Fund debt instruments, Hong Kong dollar denominated multilateral agency debt instruments and qualifying long term debt instruments are exempted from profits tax.</p>	Same as above.
Tax deduction	<p>100% tax deduction is allowed for research and development expenditure, including expenditure on scientific and market research, feasibility studies, design-related activities and other research activities related to business and management sciences.</p>	Same as above.

Scheme / Measure	Details	Contact Point
Depreciation allowances	<p>An immediate 100% write-off is allowed for new expenditure on plant and machinery specifically related to manufacturing, computer hardware and software.</p> <p>Other plant and machinery qualify for initial allowance of 60% and annual allowances of 10%, 20% or 30% (depending on the nature of the plant and machinery) on the reducing balance.</p> <p>Initial allowance of 20% is allowed on capital expenditure incurred in the construction of industrial buildings and certain structures, and an additional 4% per annum thereafter until the total expenditure is written off. A commercial building can qualify for a commercial building allowance of 4% per annum.</p>	Same as above.
Innovation and Technology Fund	<p>The Fund is to support projects that either contribute to innovation and technology upgrading in local industry, or to the upgrading and development of the local industry.</p> <p>There are four programs under the Fund:</p> <ul style="list-style-type: none"> <li>• Innovation and Technology Support Program</li> <li>• University-Industry Collaboration Program</li> <li>• General Support Program</li> <li>• Small Entrepreneur Research Assistance Program</li> </ul>	<p>Innovation and Technology Commission  20/F, Wu Chung House  213 Queen's Road East  Wanchai  Hong Kong  Tel : (852) 2737 2229  Fax : (852) 2957 8726  Website :  <a href="http://www.itf.gov.hk/">http://www.itf.gov.hk/</a></p>

<b>Scheme / Measure</b>	<b>Details</b>	<b>Contact Point</b>
Applied Research Fund	The Fund encourages technology ventures and applied research and development activities that have commercial potential, by providing funding support as a catalyst.	Applied Research Council Secretariat Innovation and Technology Commission 20/F, Wu Chung House 213 Queen's Road East Wanchai Hong Kong Tel : (852) 2737 2206 Fax : (852) 2199 7004 Website : <a href="http://www.itc.gov.hk/en/funding/arf.htm">http://www.itc.gov.hk/en/funding/arf.htm</a>
New Technology Training Scheme	The Scheme provides funding support of up to 75% of the cost for the training of staff in new technologies.	Technologist Training Unit Vocational Training Council 16/F, VTC Tower 27 Wood Road Wan Chai Hong Kong Tel : (852) 2836 1715 Fax : (852) 2574 3759 Website : <a href="http://www.vtc.edu.hk/it/it.htm">http://www.vtc.edu.hk/it/it.htm</a>
Patent Application Grant	The Scheme provides a grant of up to HK\$100,000 to assist companies incorporated in HKSAR or individuals to apply for patent for new inventions.	Innovation and Technology Commission 20/F, Wu Chung House 213 Queen's Road East Wanchai Hong Kong Tel : (852) 2737 2278 Fax : (852) 2957 8726 Website : <a href="http://www.itc.gov.hk/en/funding/pag.htm">http://www.itc.gov.hk/en/funding/pag.htm</a>

Scheme / Measure	Details	Contact Point
Science Park	The Science Park provides premises and support services to technology-based firms engaged in applied research and development activities.	Hong Kong Science and Technology Parks Corporation 8/F, Bio-Informatics Centre No.2 Science Park West Avenue Hong Kong Science Park Shatin, New Territories Hong Kong Tel (852) 2629 1818 Fax (852) 2629 1833 Website : <a href="http://www.hkstp.org">http://www.hkstp.org</a>
Industrial estates	Land on industrial estates is offered at development cost for industries which cannot operate in conventional multi-storey industrial or commercial buildings.	Same as above.
Technology-based and design-based business incubation program	Technology-based and design-based start-up companies with commercially viable business ideas are nurtured through the incubation program providing low-cost accommodation as well as management, marketing, financial and technical assistance in their critical initial two to four years of operation.	Same as above.
DesignSmart Initiative	The Initiative provides funding support to design related projects, which help promote wider use of design and innovation in business and/or upgrade the capability of the design profession, through the following schemes: <ul style="list-style-type: none"> <li>• Design-Business Collaboration Scheme</li> <li>• Design Research Scheme</li> <li>• General Support Scheme</li> <li>• Professional Continuing Education Scheme</li> </ul>	Innovation and Technology Commission 20/F Wu Chung House 213 Queen's Road East Wanchai Hong Kong Tel: (852) 2737 2462 Fax: (852) 2992 0763 Website: <a href="http://www.designsmart.gov.hk">http://www.designsmart.gov.hk</a>

Scheme / Measure	Details	Contact Point
<p>Small and Medium Enterprise (SME) Funding Schemes</p>	<p><u>SME Export Marketing Fund</u></p> <p>The Fund provides funding support to SMEs to participate in local and overseas export promotion activities, including trade fairs and study missions.</p> <p>The maximum cumulative amount of grant an SME may obtain is HK\$80,000. For each successful application, the maximum amount of grant is 50% of the total approved expenditures incurred by the applicant or HK\$30,000, whichever is the less.</p> <p><u>SME Loan Guarantee Scheme</u></p> <p>The Scheme helps SMEs secure loans from lending institutions for acquiring business installations and equipment as well as meeting working capital needs. The objective is to assist SMEs to enhance their productivity and competitiveness.</p> <p>The Scheme covers three types of loans:</p> <ul style="list-style-type: none"> <li>• Business Installations and Equipment Loans</li> <li>• Associated Working Capital Loans</li> <li>• Accounts Receivable Loans</li> </ul> <p>The maximum amount of business installations and equipment loan guarantee for an SME is HK\$2 million, or 50% of the approved loan, whichever is the less. The maximum guarantee period is five years.</p>	<p>Trade and Industry Department  4/F, Trade and Industry Department Tower  700 Nathan Road  Mong Kok  Hong Kong  Tel: (852) 2398 5125  Fax: (852) 2396 5067  Website:  <a href="http://www.smefund.tid.gov.hk">http://www.smefund.tid.gov.hk</a></p>

Scheme / Measure	Details	Contact Point
Small and Medium Enterprise (SME) Funding Schemes (Cont'd)	<p>The maximum amount of associated working capital loan guarantee for an SME is HK\$1 million, or 50% of the co-related business installations and equipment loan guarantee, or 50% of the approved loan, whichever is the less. The maximum guarantee period is two years.</p> <p>The maximum amount of accounts receivable loan guarantee for an SME is HK\$1 million, or 50% of the approved loan, whichever is the less. The maximum guarantee period is two years.</p>	Same as above

There are no free trade zones or ‘special investment areas’ where special incentives are offered to foreign investors established in HKSAR.

## MOBILITY OF CAPITAL AND TECHNOLOGY

There are no regulations/institutional measures that limit capital exports or the outflow of foreign investment from HKSAR.

The import and export of specified strategic commodities as well as their technology are subject to licensing control under the *Import and Export Ordinance* (Cap. 60) and its “Import and Export (Strategic Commodities) Regulations” (Cap. 60G). In this regard, the HKSAR Government follows closely the control standards of various international non-proliferation regimes. In addition, the *Weapons of Mass Destruction (WMD) (Control of Provision of Services) Ordinance* (Cap. 526) prohibits the provision of services which will or may assist the development, production, acquisition or stockpiling of WMD in HKC or elsewhere. For the purpose of this Ordinance, the prohibition covers inter alia those services for transfer of technology related to WMD.

The contact point for further information is:

Strategic Trade Controls Branch  
Trade and Industry Department  
Tel: (852) 2398 5575  
Fax: (852) 2396 3070  
Email: [stc@tid.gov.hk](mailto:stc@tid.gov.hk)  
Website: <http://www.stc.tid.gov.hk>

## LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

### (i) Overview

The labour legislation of the HKSAR applies equally to local and foreign firms. The local employees and expatriate staff of companies in the HKSAR enjoy the same degree of protection provided in the labour legislation.

Except for the wage level of foreign domestic helpers and low-skilled workers imported under the Supplementary Labour Scheme (whose pay cannot be below the Minimum Allowable Wage as set by the HKSAR Government and the median salary of comparable occupations respectively), the HKSAR Government does not regulate the wage levels of workers by legislative means. Employers and employees are free to negotiate wage levels. The prevailing wage rates essentially reflect the situation of demand and supply in the labour market.

The *Employment Ordinance* (Cap. 57) prescribes the statutory minimum standards for employers to comply with in granting employment benefits (e.g. rest days, statutory holidays, paid annual leave, sickness allowance, etc.) to their employees, and provides for severance payment and long service payment payable by employers to employees. Under the Ordinance, employees may seek remedies of reinstatement/re-engagement or terminal payments for unreasonable dismissal, unreasonable variation of the terms of employment contracts, and for unreasonable and unlawful dismissal.

The *Employees' Compensation Ordinance* (Cap. 282) provides for payment of compensation to employees and family members of deceased employees, for injuries and fatalities caused by accidents arising out of and in the course of employment or by certain prescribed occupational diseases. The Ordinance applies to all workers who are employed under a contract of service or apprenticeship. All employers are required to possess valid insurance policies to cover their liabilities under the Ordinance and the common law.

The *Factories and Industrial Undertakings Ordinance* (Cap. 59) and the *Occupational Safety and Health Ordinance* (Cap. 509) and their subsidiary legislation prescribe minimum safety and health standards in workplaces. Employers are required to provide a safe and healthy workplace for their employees in such areas as safety management, accident prevention, fire prevention, first aid, work environment and hygiene.

The *Disability Discrimination Ordinance* (Cap. 487), the *Sex Discrimination Ordinance* (Cap. 480) and the *Family Status Discrimination Ordinance* (Cap. 527) prohibit discrimination in the context of employment against persons with a disability at work, or on grounds of sex, marital status or pregnancy, or that of family status.

The labour legislation of the HKSAR applies equally to local and foreign firms.

(ii) Laws Relating to Labour Disputes / Relations

<b>Ordinance</b>	<b>Summary</b>
<i>Labour Relations Ordinance</i> (Cap. 55)	The Ordinance embodies a set of procedures for settling labour disputes including conciliation, special conciliation, mediation, arbitration, board of inquiry and other actions as necessary.
Employment Ordinance (Cap. 57)	<p>The Ordinance gives all employees the right to become members or officers of trade unions; to take part in trade union activities; and to associate with other persons for the purpose of forming or registering a trade union. Employers are prohibited from preventing or deterring employees from exercising these rights and from dismissing, penalising or discriminating against them for doing so.</p> <p>The Ordinance also gives employees the right to claim remedies if they are dismissed for exercising their rights in respect of trade union membership and/or trade union activities within 12 months immediately before such dismissal. The remedies which the employee may seek include reinstatement/re-engagement or terminal payments and an award of compensation.</p>
<i>Employees' Compensation Ordinance</i> (Cap. 282)	The Ordinance establishes a no-fault, non-contributory employee compensation system, whereby individual employers are liable to pay compensation for work-related accidents or prescribed occupational diseases. It requires all employers to possess valid insurance policies to cover their liabilities under the Ordinance and damages at common law.
<i>Trade Unions Ordinance</i> (Cap. 332)	The Ordinance provides for the registration of trade unions and other matters ancillary to better administration of trade unions such as application of funds, making of rules and rights and liabilities of trade unions. Protection against civil suits for certain acts committed in furtherance of labour disputes is also given to registered trade unions, trade union members/officers, employees and employers under this Ordinance.
<i>Protection of Wages on Insolvency Ordinance</i> (Cap. 380)	The Ordinance provides for the establishment of the Protection of Wages on Insolvency Fund and a board to administer it. Under the Ordinance, employees who are owed wages, wages in lieu of notice and severance payment by their insolvent employers may apply to the Fund for <i>ex gratia</i> payment.
<i>Minor Employment Claims Adjudication Board Ordinance</i> (Cap. 453)	The Ordinance establishes the Minor Employment Claims Adjudication Board within the Labour Department of the HKSAR Government to adjudicate minor employment claims when settlement cannot be achieved through conciliation. The Board is empowered to adjudicate employment claims not exceeding 10 claimants per case with claims not more than HK\$8,000 per claimant.

The contact point for further information is:

Labour Department  
Tel: (852) 2717 1771  
Fax: (852) 2544 3271  
Email: [enquiry@labour.gov.hk](mailto:enquiry@labour.gov.hk)  
Website: <http://www.labour.gov.hk>

(iii) Permits / Visas

For the purpose of making a business visit to HKSAR, most foreign nationals may enter visa-free, except for nationals of those countries who require a visit visa/permit for entry. During the visitors' sojourn in HKSAR, they are permitted to conduct business activities such as attending meetings, conferences, seminars and trade fairs; negotiating and signing contracts; purchasing goods; giving advice on business matters; and making investments in the financial and property markets.

Foreign nationals wishing to take up employment or to establish or join in a business operation in HKSAR need to apply for an employment visa/permit. They must possess special skills, knowledge, or experience of value to and not readily available locally, or be in a position to bring substantial economic contribution.

The requirements mentioned above also apply to foreign technical and managerial personnel. Immediate family members such as spouse and unmarried dependent children of foreign nationals permitted to work or invest in HKSAR are normally allowed to take up residence as dependants.

The contact point for further information is:

Employment and Visit Visas Section  
Immigration Department  
Tel: (852) 2294 2095  
Fax: (852) 2136 6334  
Email: [enquiry@immg.gov.hk](mailto:enquiry@immg.gov.hk)  
Website: <http://www.immd.gov.hk>

(iv) Restrictions on Appointments by Foreign Investors to Senior Management Positions or the Board of Directors

<b>Entity/Sector</b>	<b>Requirements</b>
1. Banking (Section 74(1), Cap. 155)	The chief executive (CE) and not less than one alternate CE appointed by an authorized banking institution shall be an individual who is ordinarily resident in HKSAR.
2. Broadcasting (Section 8(4), Cap. 562)	The company and the majority of its directors or principal officers have been ordinarily resident in HKSAR for at least one continuous period of not less than 7 years.

<b>Entity/Sector</b>	<b>Requirements</b>
3. Ferry Services (Section 9, Cap. 104)  Public Bus Services (Section 8(1), Cap. 230)	A majority of the directors of a grantee of franchise shall be individuals who are ordinarily resident in HKSAR.
4. Tunnels  (Section 11(1), Cap. 215; Section 8(1), Cap. 393; Section 8(1), Cap. 436; and Section 8(1), Cap. 474)	A majority of the directors shall be persons who are ordinarily resident in HKSAR.
5. Mass Transit Railway  (Sections 7 & 8, Cap. 556)	A majority of those directors who are not additional directors must be persons ordinarily resident in HKSAR.
6. Listing of Securities on the Stock Exchange of Hong Kong Limited  (Rules 8.12 & 8.17 of the “Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited”)	Rule 8.12: A new applicant applying for a primary listing on the Exchange must have a sufficient management presence in HKSAR and this will normally mean that at least two of its executive directors must be ordinarily resident in HKSAR.  Rule 8.17: The secretary of the issuer must be a person who is ordinarily resident in HKSAR.

The chapters and sections of the Laws of Hong Kong as well as the rules mentioned above are available at <http://www.legislation.gov.hk/eng/home.htm> and [http://www.hkex.com.hk/rule/listrules/MB%20Chapter%208%20\(E\).pdf](http://www.hkex.com.hk/rule/listrules/MB%20Chapter%208%20(E).pdf).

## **GOVERNMENT PROCUREMENT**

HKC has an open, fair, transparent and non-discriminatory procurement system that aims to ensure that all bidders are treated equally and impartially and the HKSAR Government gets the best value for money. Tender specifications are drawn up according to the functions and performance of the products or services to be procured, not their brand or origin. All necessary information are provided in the tender documents and all potential tenderers are given the same information. Tender evaluation takes into account not just the price, but also compliance with user requirements, reliability of performance, quality, whole life costs, and after-sales support where applicable. All tenders are treated on equal footing and there is no discrimination between products or services on the basis of origin. Normally the offer which is the most advantageous in terms of price and quality and conforms to the tender specifications will be selected for acceptance.

Open tendering is the norm whilst selective and prequalified tendering will be used in cases where it is necessary to ascertain beforehand the financial and technical capabilities of the tenderers to

deliver, such as in tenders for works contracts. Restricted or single tenders are used only in limited, approved circumstances, such as to ensure compatibility with existing equipment, for patented or proprietary products or to meet an urgent delivery schedule.

There is no restriction on the qualification or eligibility of bidders wishing to tender for goods and services invited by way of open tendering - except that as a condition for admission into the list of approved contractors for the purpose of tendering of works contracts, companies must set up a registered office in HKSAR, or appoint a local agent of good standing. HKC is a Party to the WTO Agreement on Government Procurement (GPA). All government departments and several other entities follow the Agreement in their procurement of goods and services above certain thresholds.

The homepage maintained by the Financial Services and the Treasury Bureau (The Treasury Branch) currently serves as the common entry point for government procurement information of HKC on the Internet. (See <http://www.fstb.gov.hk/tb/eng/procurement/content.html>) For general information on the government procurement system see the *Guide to Government Procurement* at

<http://www.fstb.gov.hk/tb/eng/procurement/tender04.html>

There are no special laws or policies for specific sectors from government procurement perspective.

## **COMPETITION POLICY**

HKC is fully committed to the promotion of free trade and competition. Our open economy, which exposes its traders and producers to acute international competition, is a good illustration of this policy.

HKC's approach to promoting competition is grounded on the basic economic philosophy of minimum government intervention in market forces. As we are a small and externally-oriented economy, we regard this approach as the best means to enhancing competition and efficiency on the one hand and keeping costs and prices down on the other. Where necessary, the HKSAR Government will use appropriate and pragmatic measures to address unfair business practices, safeguard competition and protect consumer interests.

The Competition Policy Advisory Group (COMPAG), which was established in 1997, provides a dedicated and high-level forum to review competition-related policy issues and examine the extent to which more competition should be introduced in the public and private sectors. It promulgated a "Statement on Competition Policy" in May 1998 to provide an overarching policy framework to guide sector-specific efforts to promote competition. COMPAG will seek to encourage business sectors to adhere to the guidelines and develop codes of conduct pertaining to their respective areas on the basis of the guidelines. The guidelines are available at <http://www.compag.gov.hk/reference/content.htm>.

To ensure that the Government's competition policy caters for present day's circumstances and meets the needs of time to enable HKC to maintain its competitive edge, the HKSAR Government appointed in June 2005 an independent Competition Policy Review Committee (CPRC) to review the existing competition policy and the composition, terms of reference and operations of COMPAG. The committee completed its review and released its report in June 2006. It recommended that HKC should introduce a cross-sector competition law targeting anti-competitive conduct and that such a law should be enforced by an independent Competition Commission.

Having reviewed the CPRC's recommendations, in November 2006, the Government launched a public consultation exercise on the way forward for Hong Kong's competition policy by issuing a public discussion document. The consultation period ended in February 2007, and in March 2007 the Government issued a report on the outcome of the public consultation exercise, which noted that there was significant support for the introduction of a new cross-sector competition law and the establishment of a Competition Commission. The Government will shortly begin work on the preparation of a new competition law, having regard to the views expressed during the public consultation exercise.

More information can be found at <http://www.compag.gov.hk/about/>

## INDONESIA

### Acronyms

BANI	<i>Badan Arbitrase Nasional Indonesia</i> (Indonesia's National Arbitration Board)
BKPM	<i>Badan Koordinasi Penanaman Modal</i> (Indonesia's Investment Coordinating Board)
BKPMD	<i>Badan Koordinasi Penanaman Modal Daerah</i> (Regional Investment Coordinating Boards)
KAPET	Tax Treatment in the Integrated Economic Development Region
KPPA	A Foreign Company Representative Office
LI	Law Concerning Capital Investment (2007)
NIL	Negative Investment List
PDKB	Bonded Zone

### INTRODUCTION

On 29 March 2007 Indonesia adopted a new investment law — the *Law Concerning Investment* (LI) — which replaced the *Foreign Investment Law No. 1* (1967) as amended by *Law No. 11* (1970) and the *Domestic Investment Law No. 6* (1967) as amended by *Law No. 12* (1970) that primarily governed Indonesia's investment regime.

The new law will provide impetus to investment growth through providing greater certainty to both foreign and domestic investors and a more transparent and streamlined regulatory environment. It is an important step in the government's strategy of investment-led growth. The implementing regulations are expected to be passed by Indonesia's parliament before the end of 2007.

*Presidential Decree No. 76 of 2007* concerning Formulation Criteria and Requirement of List of Lines of Business Closed and Open With Conditions to Investment and *Presidential Decree No. 77 of 2007* concerning List of Lines of Business Closed and Open With Conditions to Investment — which replaced *Presidential Decree No. 96 of 2000* as amended by *Presidential Decree No. 118 of 2000* concerning List of Business Fields Closed and Open to Investment on Certain Conditions. Those new implementing regulations also replaced *Presidential Decree No. 127 of 2001* concerning sectors reserved for Small-Scale Business and Sectors Open for Medium and Large-Scale Business with Patnership Condition.

Thus, the LI will introduce greater transparency. However, it is expected that sectoral ministries will continue to have a key role in setting standards for company operations.

Broadly, the LI should simplify registration and licensing processes, reducing the time taken for these to a maximum of 30 days, though in cases where an environmental permit is required it will take longer. There are now only two main steps required: registration of a corporate entity through

the Law and Human Rights Ministry and issue of a sectoral operating licence through the ministry with direct responsibility. Most this will occur at the local government level, which will also issue the other required permits. To assist investors through the process, the LI provides for the establishment of integrated investment facilitation services set up by the provincial authorities. Where an investment project application straddles more than one region or is deemed strategically important, particularly in the natural resources, the BKPM (Indonesia's Investment Coordinating Board) will adopt an integrated service role.

A new tax law, also of interest to investors, is expected to come into effect late in 2007 and should include *inter alia* the VAT and sales tax.

Article 3 of the LI sets out its principles and objectives.

(1) Investment shall be organized based on the principles of:

- a. legal certainty;
- b. openness;
- c. accountability;
- d. the equal treatment without discriminating the country of origin;
- e. togetherness;
- f. impartial efficiency;
- g. sustainability;
- h. environmental friendly;
- i. independency; and
- j. balance of progress and national economic unity

(2) The objective of investment organization shall be for, among others:

- a. Increasing national economic growth;
- b. Creating job opportunity;
- c. Improving sustainable economic development;
- d. Improving competitiveness of the national business sphere;
- e. Increasing the capacity and the capability of national technology;
- f. Encouraging people economic development;
- g. Processing economic potential into the real economic strength by using fund coming from both domestic and foreign countries; and
- h. Improving the prosperity of the community

Article 4 of the LI outlines the basic principles of investment.

- (1) Government stipulates the basic policy of investment for:
  - a. encouraging the creation of conducive national business climate for investment in order to strengthen the competitiveness of national economy; and
  - b. accelerating the increase in investment
- (2) In making the basic policy set forth in paragraph (1) above, the Government is:
  - a. to provide the same treatment to any domestic and foreign investors, by continuously considering the national interest;
  - b. to warrant legal certainty, business certainty, and business security to any investors since the licensing process up to the end of investment activity pursuant to the rule of law; and
  - c. to give opportunity for development and to give protection to micro, small, and medium business, and cooperatives
- (3) Basic policy set forth in paragraph (1) and (2) above shall be realized in form of General Plan of Investment

Article 5 of the LI describes the required status for foreign investors to invest in Indonesia.

- (1) Domestic investment may be in the form of corporation, non-corporation or individual business, in accordance with the rule of law
- (2) Unless otherwise stipulated by the law, any foreign investment shall be in the form of a limited liability company based on the law of the Republic of Indonesia
- (3) Both domestic and foreign investors making an investment in the form of limited liability company shall be carried out by:
  - a. having shares when such company is established;
  - b. purchasing the shares; and
  - c. any other way pursuant to the rule of law

Article 6 of the LI provides for non-discrimination.

- (1) The Government shall provide the same treatment to any investors originating from any countries making investment in Indonesia pursuant to the rule of law
- (2) Treatment set forth stipulated in paragraph (1) shall not apply to investors of certain countries that have received privilege by virtue of an agreement with Indonesia.

## SCREENING OF FOREIGN INVESTMENT

On 3 July 2007 Indonesia also adopted a new implementing regulations on list of business closed and open with certain condition to investment (The Negative Investment List – NIL) – *Presidential Decree No. 76 of 2007* concerning Formulation Criteria and Requirement of List of Lines of Business Closed and Open With Conditions to Investment and *Presidential Decree No. 77 of 2007* concerning List of Lines of Business Closed and Open With Conditions to Investment – which replaced Presidential Decree No. 96 of 2000 as amended by Presidential Decree No. 118 of 2000 concerning List of Business Fields Closed and Open to Investment on Certain Conditions. Those new implementing regulations also replaced Presidential Decree No. 127 of 2001 concerning sectors reserved for Small-Scale Business and Sectors Open for Medium and Large-Scale Business with Patnership Condition.

Article 5 of the NIL sets out the basic principles on formulating the lines of business closed and open with certain conditions to investment.

1. Simplifying;
2. In line with international agreement or commitments;
3. Transparency;
4. Law certainty;
5. The unity of Indonesian territory as a single market.

Article 8 of the NIL outlines the criteria on stipulating the lines of business closed to investment, to both foreign and domestic investment, based on: healthy, safety, defence and security, environment, and moral/culture (K3LM) and other national interest reasons.

Article 9 of the NIL points the criteria on stipulating the lines of business open to investment with certain conditions.

1. natural resources security;
2. security and encourage micro, small, medium business and cooperatives (UMKMK);
3. production and distribution control;
4. increase of technology capacity;
5. domestic capital participation;
6. in cooperation with business company appointed by Government.

Citation	Summary
<p>Presidential Decree No. 90 of 2000 concerning foreign company representative office (KPPA)</p>	<p>1) A foreign company representative office (KPPA) is the office that is led by one or more foreign or Indonesian citizens which has been appointed by foreign company or several overseas foreign firms as their representative in Indonesia. The office has a specific purpose:</p> <ul style="list-style-type: none"> <li>a. To taking care the interest of companies or their affiliation</li> <li>b. To initiate the preparation of establishment of foreign direct investment companies in Indonesia or other countries</li> </ul> <p>2) KPPA should be located in one of province capitals</p> <p>3) Licensing which be needed for KPPA and a foreign citizen who work for that office is issued by the BKPM Chairman.</p>
<p>Presidential Decree No. 76 of 2007 concerning Formulation criteria and requirement of List of Lines of Business Closed and Open With Conditions to Investment and Presidential Decree No. 77 of 2007 concerning List of Lines of Business Closed and Open With Conditions to Investment.</p>	<p>This decree still shows the Government commitment to encourage the growth of small-scale business as well as to provide transparency and certainty for both domestic and foreign investors in order to accelerate the investment increase. This decree consist of:</p> <ul style="list-style-type: none"> <li>ii. 25 lines of business Closed to Investment (7 sectors);</li> <li>iii. Lines of Business Open to Investment with Certain Conditions, there are: <ul style="list-style-type: none"> <li>a. 43 lines of business Reserved for Small and Medium Scales Enterprises (9 sectors)</li> <li>b. 36 lines of business need to Partnership (5 sectors)</li> <li>c. 120 lines of business with Capital Ownership Limitation (15 sectors)</li> <li>d. 19 lines of business only in Certain Locations (4 sectors)</li> <li>e. 25 lines of business only with Special Permit (11 sectors)</li> <li>f. 48 lines of business with 100% Domestic Capital (11 sectors)</li> <li>g. 17 lines of business with both Capital Ownership limitation and in Certain Location (2 sectors)</li> <li>h. 4 lines of business with both Special Permit and Capital Ownership Limitation (3 sectors)</li> <li>i. 1 line of business with both 100% Domestic Capital and Special Permit (1 sector)</li> </ul> </li> </ul>

*List of Lines of Business regulated by Presidential Decree No. 77 of year 2007 concerning List of Lines of Business Closed and Open with Conditions to Investment.*

*List of Lines of Business Closed to Investment*

1. *Gambling/ Casino*
2. *Historical and Archeological Relics (temples, palace, ancient inscriptions, burial place, archaic buildings, under sea discoveries, etc)*
3. *Museum*
4. *Traditional/ Customary Settlement*
5. *Monument*
6. *Pilgrimage Object (religious place, burial place, graveyard, etc)*
7. *Utilization (extraction) of Natural Coral*
8. *Fishing Species listed in the Appendix 1 CITES*
9. *Management and Operation of Station Monitoring Spectrum Radio Frequency and Satellite Orbit*
10. *Public Broadcasting Service (LPP) of Radio and Television*
11. *Provider and Operator of Terminal*
12. *Installation and Maintenance of Street Supports*
13. *Management and Operation of Weighing-Bridge*
14. *Operator of Motor Vehicle Type Test*
15. *Operator of Motor Vehicle Regular Test*
16. *Telecommunication/ Marine Aids to Navigation*
17. *Vessel Traffic Information System (VTIS)*
18. *Air Traffic Service (ATS) Provider*
19. *Chemical Industry Environmental Damageability, such as: Penta Chlorophenol, Dichloro Diphenyl Trichloro Ethane (DDT), Dieldrin, Chlordane, Carbon Tetra Chloride, Chloro Fluoro Carbon (CFC), Methyl Bromide, Methyl Chloroform, Halon, and the like*
20. *Chemical Industry Schedule-1 Chemical Weapon Convention (Sarin, Soman, Tabun Mustard, Levisite, Racine, Saxitoxin, VX, etc.)*
21. *Alcoholic Beverage Industry (Liquor, Wine, and Malt Beverage)*
22. *Chlor Alkali Industry with Mercury Contained Materials*
23. *Cyclamate and Saccharin Industry*
24. *Non-Ferrous Metal Industry (Lead)*
25. *Marijuana Cultivation*

*List of Lines of Business Open to Investment with Certain Conditions*

*Reserved for Small and Medium Scales Enterprises*

1. Small-Scale Electric Power Plant (up to 10 MW)
2. Travel Agent
3. Art Studio
4. Tourism Service
5. Other Plantation Forrest Development (Sugar Palm, Candlenut, Tamarind, Raw Material of Charcoal, Cinnamon, etc)
6. Swallow Nest Business in the Surroundings
7. Sawn Timber Industry (Production Capacity up to 2000M3 / Year)
8. Primary Industry of Rattan Processing
9. Semi-Finished Product Industry from Chip Wood
10. Primary industry of other non-wood forest products processing (Pine Resin, Bamboo, Essential Oil)
11. Wild Plants and Wild Animal Catching (TSL) from Natural Habitat
12. Marine Capture Fisheries by Using Fishing Vessel in a size up to 30 GT, within Waters Areas up to 12 Mil or less.
13. Fishing in Public Waters
14. Fishery Products Processing (UPI), Fermentation, Reduction/ Extraction, Processing of Surimi and Fish Jelly
15. Community Broadcasting Service (LPK) of Radio and Television
16. Courier Services / Custody Service:
  - Printing Materials Deliveries
  - Newspaper
  - Parcels
  - Packages
  - Money Transfer (Small Scale)

17. Telecommunication Services covering:

- Telecommunication Stall
- Internet Stall
- Cable Installation to Houses and Buildings

18. Construction Service (Construction Services Contractor) for Small Scale

Excavating and Earth Moving Work

Site Preparation Work For Mining

Scaffolding Work

Demolition Work

For Multi Dwelling Buildings

For Warehouse and Industrial Buildings

For Commercial Buildings

For Public Entertainment Buildings

For Hotel, Restaurant and Similar Buildings

For Educational Buildings

For Health Buildings

For Highway (except elevated highway) Streets Roads, Railway and Airfield Runways

For Bridges, Elevated Highways, Tunnels

For Waterways, harbor, dams, and other water works

For Long Distance Pipelines, Communication and Power lines (cables)

For Local Pipelines and Cables, Ancillary Work

For Construction For Sports and Recreation

For Stadium and Sports Grounds

For Other Sport and Recreation Installation

For Engineering Works n.e.c

Assembly and Erection of Prefabricated Construction

Foundation Work, incl. pile driving

Streets Bending and Erection (incl. welding)

Gas Fitting Construction Work

Fire Alarm Construction Work

Burglar Alarm System Construction Work

Lift and Escalator Construction Work

Renting Service Related to Equipment for Construction or Demolition of Buildings or Civil Engineering Work With Operator

Site Investigation Work At Construction

Site Formation and Clearance Work

For One and Two Dwelling Buildings

Water Well Drilling

Roofing and Water Proofing

Concrete Work

Masonry Work

Other Special Trade Construction Work

Heating, Ventilation and Air Conditioning Work

Water Plumbing and Drain Laying Work

Electrical Wiring and Fitting Work

Residential Antenna Construction Work

Other Electrical Construction Work

Insulation Work(Electrical Wiring, Water, Heat, Sound)

Fencing and Railing Construction Work

Other Installation Work

Other Installation Work n.e.c

Glazing Work and Window Glass Installation Work

Plastering Work

Painting Work

Ground Floor and Wall tiling Work

Other Floor Laying, Wall Covering and Wall Papering Work

Wood and Metal Joinery and Carpentry Work

Interior Fitting Decoration Work

Ornamentation Fitting Work

Other Building Completion and Finishing Work

19. Business Services / Construction Services Consultant for Small Scale Public Works

Advisory and Pre Design Architectural Service

Architectural Design Services

Contract Administration Service

Combined Architectural Design and Administration Service

Other Architectural Service

Engineering Design Service for the Construction of Foundation and Building Structures

Engineering Design Service for the Construction of Civil Engineering Works

Other Engineering Services during the Construction and Installation Phases

Other Engineering Services

Integrated Engineering and mgt Service for Water Supply and Sanitation Work Turnkey Projects

Integrated engineering for the Construction of manufacturing Turnkey Projects

Integrated Engineering for Other Turnkey Projects

Urban Planning Service

Landscape Architectural Service

Composition and Purity

Testing and Analysis Service

Testing and Analysis of Integrated Mechanical System

Technical Inspection System

Other Technical Testing and Analysis Service

Landscape Architectural Service

20. Public transportation

a. Route

- City/ Village Bus

b. Non-Route

- Taxi

21. Public Shipping

22. Salting/drying industry of fish and other waters biota and boiling industry of fish and other waters biota

23. Industry of mills dyeing from natural fiber or synthetic fiber to be a motif/ dye, tie-dyeing material using machines powered by hand

24. Hand-made Batik Industry

25. Smoking Rubber Industry

26. Hand-tools industry being manufactured in manual or semi-mechanic basis for carpentry and cutting

27. Clay construction material industry either with or without lazing for households needs

28. Motorcycle maintenance and repair services except those integrated in the sales business of motorcycle (agent/distributor) and reparations industry for personal things and households.

29. Craftsmanship industry having typical of regional culture treasure and value or art that uses natural as well as artificial raw materials

30. Hand-tools industry for agricultural required for the land preparation, production process, harvesting, post harvest, and processing except mattocks and spades.

31. Brown Sugar

32. Foods processing from grains and tuberoses, sago, melinjo (three with edible seeds [gnetum genemon]) and copra.

33. Peeling and cleaning of tuberoses.

34. Tobacco drying and processing industry.

35. Paddy cultivation (less than or equal to 25 Ha)

36. Cassava cultivation (less than or equal to 25 Ha)

37. Corn cultivation (less than or equal to 25 Ha)

38. Cultivation of other foods plantation besides cassava and corn in an area less than or equal to 25 Ha

39. Breeding and cultivating pigs in a quantity less or equal to 125 pigs
40. Breeding and cultivating non-pedigreed chicken and its cross-breeding
41. Plantation business less than 25Ha.
42. Processing industry of plantation products bellow certain capacity in accordance with Ministerial Regulation of Agriculture No. 26/2007
43. Plantation seedbed industry in an area less than 25Ha

*Partnership*

1. Cocoon / silkworm cocoon business (natural silkworm)
2. Bees business
3. Rattan business
4. Bamboo business
5. Aloe business
6. Seedlak business
7. Alternative Food Plant (Sago) Business
8. Pine Resin Business
9. Resin Business
10. Apocynaceae Business
11. Essential Oil Business
12. Seawater Fish Breeding
13. Seawater Fish Hatchery
14. Freshwater Fish Breeding
15. Brackish Water Fish Breeding
16. Brackish Water Fish Hatchery
17. Freshwater Fish Hatchery
18. Fishery products processing (UPI) of fish salting/ drying, smoking and boiling and Fishery
19. Marketing and distribution of fishery

20. - Operator of telephony added value services
  - a. Call centre
  - b. Content centre (ring tone, SMS premium, etc)
  - c. Other telephony added value services
- 21.- Multimedia Service Operator
  - a. Internet Access (ISP)
22. Clove cigarette, plain cigarette and other cigarette industries
23. Preserved fruits and vegetables industry
24. Foods processing from grains and tuberoses, sago, melinjo (three with edible seeds [gnetum genemon]) and copra.
25. Batik industry
26. Rattan Business
27. Finished goods of chip wood industry
28. Essential Oil Industry
29. Industries of hoods from clay for building materials, goods from lime and goods from cement
30. Silver Jewelry Industry
31. Wood boat industry for marine recreation and for fishing including its tools and equipment
32. Agricultural machines manufacture applying medium technology such as unhusked thresher, power corn sheller and handy tractor.
33. Other Craftsmanship Industry
34. Industry of nails, nuts and screws, industry of component and spare parts for motor driver, industry of pumps and compressor, industry of component and equipment of two and three wheels motor vehicle, industry of bicycle and pedicab component and spare parts.
35. Milk powder and sweetened condensed milk procession industry
36. Agriculture, plantation and fishery business in within transmigration area

*Capital Ownership*

*Limitation of Foreign Capital Ownerhip*

1. Offshore Oil and Gas Drilling Services outside Eastern Indonesia Area (Max. 95%)
2. Onshore Oil and Gas Drilling Services (Max. 95%)

3. Operation and Maintenance Services for Oil and Gas Facilities (Max. 95%)
4. Engineering Procurement Construction (EPC) Services (Max. 95%)
5. Power Plant (Max. 95%)
6. Power Plant Transmission (Max. 95%)
7. Electric power consultant (Max. 95%)
8. Construction and Installation of Electric Power Instrument (Max. 95%)
9. Maintenance and Operation Electric Power Instrument (Max. 95%)
10. Development of Technology of Energy and Power Plant Equipment Supplies (Max. 95%)
11. Distribution of Electric Power (Max. 95%)
12. Nuclear Power Plant (Max. 95%)
13. Art Gallery (Max 50%)
14. Art Performance Building (Max 50%)
15. \*)Hotel (1-2 Stars) (Max 50%)
16. \*)Non-Star Hotel (Max 50%)
17. \*)Other Accommodation Services (Motel and Lodging Services) (Max 50%)
18. \*)Homestay/similar lodging (Max 50%)
19. \*)Catering (Max 50%)
20. \*)SPA (Max 50%)
21. \*)Game Maker (Max 50%)
22. \*)Bar/ Café/ Singing Room (Karaoke) (Max 50%)
23. \*)Restaurant (Max 50%)
24. \*) Recreation and Entertainment Operator (recreation centre, swimming pool, natural spring water, fishing pool, game center, bowling alley, billiard house, night club, discotheque, massage parlor, steam-bath parlor) (Max 50%)
25. \*)Travel Bureau (Inbound and Outbound Tour Operator) (Max 50%)
26. \*)Professional Convention Organizer ( PCO) (Max 50%)
27. \*)Impresario Services (Max 50%)
28. \*)Cultural Tourism Object Operator (Max 50%)

29. \*)Natural Tourism Object Operator Outside Conservation Area (Max 50%)
30. Other Forestry Services, in this case is carbon trade (Max 50%)
31. Natural tourism operator in the form of developing facilities, activities and echo-tourism within forest area (Max 25%)
32. Hunting in Buru Park and Buru Block (Max 49%)
33. Wild Plants Cultivating and Wild Animals Breeding (Max 49%)
34. Coral Breeding/ Cultivating (Max 49%)
35. Pharmaceutical Industry (Max 75%)
  - Medicinal Drug Industry
  - Medicinal Raw Material
36. \*)Private Hospital Services (Specialist /Sub-Specialist) (Max 65%)
37. Clinic Specialized Medical Services (Max 65%)
38. Clinic Specialized Dental Services (Max 65%)
39. Supporting Health Services (Clinic Laboratory) (Max 65%)
40. Other Hospital Service (Clinic Mental Rehabilitation) (Max 65%)
41. Health care support services (Medical Check-up Clinic) (Max 65%)
42. \*)Nursing Services (Max 49%)
43. \*)Heath care support service (Rental Medical Equipment) (Max 49%)
44. Test laboratory services for the calibration, maintenance and reparation of medical equipment (Max 49%)
45. Heath care support service (Hospital Management Services) (Max 65%)
46. Heath care support service (assistance services in emergency medical evacuation and human evacuation) (Max 65%)
47. Acupuncture services (Max 49%)
48. Leasing (Max 85%)
49. Non-Leasing Financing (Max 85%)
50. Ventura Capital (Max 85%)
51. General Insurance Company (Max 80%)
52. Life Insurance Company (Max 80%)

53. Reinsurance Company (Max 80%)
54. Insurance Broker Company (Max 80%)
55. Reinsurance Broker Company (Max 80%)
56. Insurance Appraisal Company (Max 80%)
57. Actuary Consultant Company (Max 80%)
58. Insurance Agent Company (Max 80%)
59. Foreign Exchange Bank (Max 99%)
60. Non Foreign Exchange Bank (Max 99%)
61. Syariah Bank (Max 99%)
62. Money Market Company (Max 99%)
63. Telecommunication Network Operator
  - a. Fixed Network Operator
    - Local cable-based, with circuit switched or packet switched technology (Max 49%)
    - radio-based, with circuit switched or packet switched technology (Max 49%)
  - b. Close-Fixed Network Operator (Max 65%)
  - c. Mobile Network Operator
    - Cellular (Max 65%)
    - Satellite (Max 65%)
64. Multimedia Service Operator
  - data communication system services (Max 95%)
  - Internet interconnection service (NAP) (Max 65%)
  - Telephony internet services for public demands (Max 49%)
  - Other multimedia services (Max 49%)
65. Establishment of Telekomunikasi Instrument Test Institute (laboratory test) (Max 95%)

66. Construction Services (Construction contractor services) Non-Small Scale (Max 55%)

Excavating and earthmoving work

Site Preparation work for mining

Scaffolding work

Demolition work

For multi dwelling buildings

For warehouse and industrial buildings

For commercial buildings

For Public entertainment buildings

For hotel, restaurant and similar buildings

For education buildings

For health buildings

For other buildings

For highways (except elevated highway ), streets, roads, railways and airfield runway

For bridges, elevated highways, tunnels, harbor, dams and other waterworks

For long distance pipelines, communication and power-lines (cables)

67. Construction Services (Construction contractor services) (Max 55%)

Non-Small Scale

Site Investigation Work at Construction

Streets bending and erection (incl. Welding)

Gas fitting construction work fire alarm construction work

Burglar alarm system construction work

Lift and escalator construction work

Renting service related to equipment for construction or demolition of buildings or civil engineering work with operator

Site Investigation work at construction

Site formation and clearance work

For one and Two Dwelling Buildings

Water well drilling

Roofing and Water Proofing

Concrete work

Masonry work

Other special trade construction work

Heating, ventilation and air conditioning work

Water plumbing and drain laying work

Electrical wiring and fitting work

Residential antenna construction work

Other electrical construction work

Insulation work (electrical wiring, water, heat, sound)

Fencing and railing construction work

Other installation work

other installation work n.e.c

Glazing work and window glass installation work

Plastering work

Painting work

Ground floor and wall tiling work

Other floor laying, wall covering and wall papering work

Wood and metal joinery and carpentry work

Interior fitting decoration work

Ornamentation fitting work

Other building completion and finishing work.

68. Business services/ construction consultant services (Max 55%)

Non-Small Scale

Advisory and pre design architectural service

Architectural design service

Contract administration service

Combined architectural design and administration service

Other architectural service

Engineering design service for the construction of foundation and building structures

Engineering design service for the construction of civil engineering work

Other engineering service during the construction and installation phases

Other engineering service during the construction

Integrated engineering for transportation infrastructure turnkey projects

Integrated engineering and mgt service for water supply and sanitation works turnkey projects

Integrated engineering for the construction of manufacturing turnkey projects

Integrated engineering for other turnkey projects

Urban planning service

Landscape Architectural service

Composition and purity testing and analysis service of physical properties

Testing and analysis of integrated mechanical and electrical systems

Technical inspection systems

Other technical testing and analysis service

69. Business services/ construction consultant services (Max 55%)

Non-Small Scale

Landscape architectural service

70. Toll Road Operator (Max 95%)

71. Drinking Water Operator (Max 95%)

72. Basic and Middle Education (Max 49%)

73. High Education (Max 49%)
74. Non-Formal Education (Max 49%)
75. Business and management consultation services (Max 49%)
76. Direct selling through marketing network developed by business partner (Direct Selling) (Max 60%)
77. Crossing Transport Services (Max 49%)
78. River and Lake Transport Services with Boat < 30 GT (Max 49%)
79. ASDP Facilities (Max 49%)
80. General Cargos Transport Services (Max 49%)
81. Hazardous Materials Transport Services (Max 49%)
82. Specific-Cargos Transport Services (Max 49%)
83. Container Transport Services (Max 49%)
84. Heavy Equipment Transport Services (Max 49%)
85. Supporting services at terminal (Max 49%)
86. Scheduled Public Domestic Transport Services (Max 49%)
87. Scheduled Pioneer Domestic Air Transport Services (Max 49%)
88. Scheduled International Transport Services (Max 49%)
89. Non-Scheduled Public Domestic Air Transport Services (Max 49%)
90. Non-Scheduled Pioneer Domestic Air Transport Services (Max 49%)
91. Special Air Transport Services for Sky Activities: Spraying and Pulverizing (Max 49%)
92. Special Air Transport Services for Sky Activities: Photography, Survey and Mapping (Max 49%)
93. Special Air Transport Services for Sport (Max 49%)
94. Special Air Transport Services for Medical Evacuation (Max 49%)
95. Special Air Transport Services for Crews Training (Max 49%)
96. Airport Services (Max 49%)
97. Transportation Arrangement Services (Max 49%)
98. Air Forwarding Services (Max 49%)

99. General Sales Agent (GSA) of Foreign Air Transport Services (Max 49%)
100. Supporting Services for Flight Activities (Max 49%)
101. Domestic Sea Transportation, International (Max 49%)
102. Loading/ Unloading (Max 49%)
103. Port facilities services (jetty, building, delay time of vessel, container terminal, liquid-bulk terminal, dry-bulk terminal and RO-RO terminal) (Max 49%)
104. Providing port facilities in the form of waste reception facilities (Max 49%)
105. Salvage service and/or under water work (PBA) (Max 49%)
106. Car maintenance and reparation (Max 49%)
107. Paddy cultivation (more than 25 Ha) (Max 95%)
108. Corn cultivation (more than 25 Ha) (Max 95%)
109. Cassava cultivation (more than 25 Ha) (Max 95%)
110. Food plants cultivation other than cassava and corn (more than 25Ha) (Max 95%)
111. Seedling paddy (rice) and non-staple food crops (Max 95%)
112. Plantation business for more than 25Ha or more, until certain area in accordance with Minister Regulation of Agriculture No. 26 of 2007, without processing unit (Max 95%)
113. Processing plantation products industry (with equal capacity or exceeding certain capacity in accordance with Ministerial Regulation of Agriculture No. 26 of 2007) (Max 95%)
114. Agriculture business for 25Ha or more which is integrated with processing unit with equal capacity or exceeding certain capacity in accordance with Ministerial Regulation of Agriculture No. 26 of 2007 (Max 95%)
115. Plantation seedbed industry in an area of 25Ha or more (Max 95%)
116. \*)Plantation and/or Processing Industry of Palm Products above 25Ha and/or above certain capacity in accordance with Ministerial Regulation of Agriculture No. 26 of 2007 (Max 95%)
117. \*)Raw material industry for explosives (Ammonium Nitrate) (Max 49%)
118. \*) Explosives industry and its component for industry demands (commercial) (Max 49%)
119. Placement of Indonesian workers domestically (such as registration, recruitment, formalities, shelter, orientation of pre-departure, departure, assignment and repatriation of workers) (Max 49%)
120. Job Training (to provide, obtain, increase and develop work competence, productivity, discipline, conduct and ethos of work which among others covers vocational of technique and engineering, commerce, language, tourism, management, information technology, art and agriculture directed to help youth generation entering the world of work) (Max 49%)

\*) Remarks: in addition to the regulation as referred to herein, the said Lines of Business remain in relation with other regulations.

*Certain Locations*

1. \*)Hotel (1-2 Stars), [No conflict with PERDA (Regional Regulation)]
2. \*)Non-Star Hotel, [No conflict with PERDA]
3. \*)Other Accommodation Services (Motel and Lodging Services), [No conflict with PERDA]
4. \*)Homestay/similar lodging, [No conflict with PERDA]
5. \*)Catering, [No conflict with PERDA]
6. \*)SPA, [No conflict with PERDA]
7. \*)Game Maker, [No conflict with PERDA]
8. \*)Bar/ Café/ Singing Room (Karaoke), [No conflict with PERDA]
9. \*)Restaurant, [No conflict with PERDA]
10. \*)Recreation and Entertainment Operator (recreation centre, swimming pool, natural spring water, fishing pool, game center, bowling alley, billiard house, night club, discotheque, massage parlor, steam-bath parlor), [No conflict with PERDA]
11. \*)Travel Bureau (Inbound and Outbound Tour Operator), [No conflict with PERDA]
12. \*)Professional Convention Organizer ( PCO), [No conflict with PERDA]
13. \*)Impresario Office Services, [No conflict with PERDA]
14. \*)Cultural Tourism Object Operator, [No conflict with PERDA]
15. \*)Private hospital services (Specialist/ Sub-specialist), [Medan and Surabaya]
16. \*)Nursing Services, [Medan and Surabaya]
17. \*)Heath Care Support Services (Rental Medical Equipment), [Capital City of Province in Indonesia]
18. Trading in large scale, [In conformity with laws and regulations in spatial]
  - a. Mall
  - b. Supermarket
  - c. Department Store
  - d. Shopping Center/ Hypermarket

19. Breeding and Cultivating Pigs (more than 125 pigs), [No conflict with PERDA]

\*) Remarks: in addition to the regulation as referred to herein, the said Lines of Business remain in relation with other regulations.

*Special Permit*

1. Radioactive Mineral Mining; [Having recommendation from BATAN and cooperating with BATAN]

2. \*)Operator of Natural Tourism Object Outside Conservation Area; [Recommendation from the authorities of natural tourism]

3. Sawn timber industry with production capacity above 2000M3/ Year; [Secured raw materials supplies continuously and regulated in accordance with Government Regulation No. 6/2007]

4. Veneer Industry; [Secured raw materials supplies continuously and regulated in accordance with Government Regulation No. 6/2007]

5. Plywood industry; [Secured raw materials supplies continuously and regulated in accordance with Government Regulation No. 6/2007]

6. Laminated Veneer Lumber (LVL) industry; [Secured raw materials supplies continuously and regulated in accordance with Government Regulation No. 6/2007]

7. Wood chip industry; [Secured raw materials supplies continuously and regulated in accordance with Government Regulation No. 6/2007]

8. Technology Development by Utilizing Genetic Wild Plants and Animals; [Statement of cooperation with an accredited/ national institute in the field of research and development appointed by Minister of Forestry]

9. Marine capture fisheries by using fishing vessel in a size of 100 GT and/or more within ZEEI capture areas; [Terms and conditions are stipulated in accordance with Ministerial Regulation of Maritime Affairs and Fisheries No. PER.17/MEN/2006]

10. Postal Unit Services; [Monopoly for State Owned Enterprises only whose scope of business covers post affairs namely PT. POS Indonesia]

- Letters

- Postal Draft

- Post Cards

11. Narcotics Production (Pharmaceutical Industry); [Special Permit from Minister of Health]

12. Narcotics Pharmaceutical Wholesaler; [Special Permit from Minister of Health]

13. Providing and operating connecting port; [In cooperation with a company appointed by the Government]

14. Providing and operating river and lake port; [In cooperation with a company appointed by the Government]

15. Special Printing Industry/Security documents such as, post-stamp, stamp duty, commercial paper, passport, residency document and hologram; [(1) Requiring operating permit from BOTASUPAL/ BIN, (2) Requiring recommendation from the Ministry of Industry]

16. Securities Paper Printing; [(1) Requiring operating permit from BOTASUPAL/ BIN (Securities Papers of RI (rupiah) only managed by PT. Peruri), (2) Requiring recommendation from the Indonesian Central Bank]

17. Securities Paper Industry ; [(1) Requiring operating permit from BOTASUPAL/ BIN, (2) Requiring recommendation from the Ministry of Industry]

18. Special Ink Industry; [(1) Requiring operating permit from BOTASUPAL/ BIN, (2) Requiring recommendation from the Ministry of Industry]

19. Pulp Industry; [Raw materials originated from imported chip or raw material security from Industrial Plantation Forest (HTI)]

20. Clove cigarette, plain cigarette and other cigarette industries; [(1) Recommendation from Ministry of Industry that the said business entity is a developed industry from the existed one, or is a small scale cigarette industry which has been developed, or (2) Required to cooperate with small/ medium scale cigarette industry and cooperative]

21. \*)Raw material industry for explosives (Ammonium Nitrate), [In cooperation with a business entity having recommendation from Ministry of Defence]

22. \*)Explosives industry and its component for industry demands (commercial); [(1) In cooperation with a business entity having recommendation from Ministry of Defence, (2) Manufacturing is required, while the storage and distribution is conducted by a company appointed by the Government]

23. \*)Weapon, ammunition, detonator and war equipment production; [In cooperation with a business entity having recommendation from Ministry of Defence]

24. Utilization of Agricultural Genetic Resources; [Recommendation from Minister of Agriculture based on assessment from a national commission]

25. \*)Plantation business and/or processing industry of palm products above 25 Ha and/or above certain capacity in accordance with Ministerial Regulation of Agriculture No. 26 of 2007; [Recommendation for Ministry of Agriculture]

\*) Remarks: in addition to the regulation as referred to herein, the said Lines of Business remain in relation with other regulations.

### *100% Domestic Capital*

1. Film Production

2. Film promotion facilities production (advertisement, poster, still, photo, slide, plate, banner, pamphlet, ballyhoo, folder, etc)

3. Film Technical Services:

- Shooting studio

- Film production facilities
- Facilities of editing, dubbing, text processing, film duplication, etc.

4. Film Distribution (export, import and distribution)
5. Show: movie/ film theatre
6. Recording Studio (Cassette, VCD, DVD, etc)
7. Utilizing wood forest products at natural forest (IUPHHKHA)
8. Utilizing water environment in forest area
9. Supply and Distribution of Seeds and Germs of Plants Forest (export and import of seeds of plantation forest)
10. Marine capture fisheries by using fishing vessel in a size of 100 GT and/or more within offshore capture areas
11. Marine capture fisheries by fishing vessel in a size above 30 GT, within waters area above 12 Mil
12. Pit Sand Mining
13. Pharmaceutical Wholesales
14. Raw Material Pharmaceutical Wholesales
15. Traditional Medicine Industry
16. General Medical Services/ General Hospital/ General Clinic
17. Heath Care Support Service (Ambulance Services)
18. Other Health Care Services (Residential Health Services)
19. Individual Paramedic Services
20. Basic Health Service Facilities
21. Health Research Center/ Institute
22. Health Supporting services (Pest Control/ Fumigation Services)
23. Traditional Medical Procession
24. Private Maternity House
25. Pharmacy (pharmacist Profession Practice)
26. Public Drugstore/ Pharmacy
27. Pension Fund

28. Conventional BPR
29. Syariah BPR
30. Money Changer
31. +)Private Broadcasting Service (LPS)
32. +)Subscribed Broadcasting Service (LPB)
33. Press Company
34. Business services/ construction consultant services for large, medium and small scales
  - \* Advisory and consultative engineering Service
  - \* Engineering design service for industrial process and production
  - \* Engineering design service n.e.c
35. Retails Trading:
  - a. Retails Street Vendor;
  - b. Retails Traveling Trader;
  - c. Retails in /other than outside Supermarket, Department Store, Hypermarket and the like
  - d. Community Store
  - e. Convenience Store
  - f. Mini Market
  - e. Retails through media and the like
36. Wholesales based on fee or contract (agency service/commission agent, distributor\*)
 

\*) Referred to distributor herein is a distributor which may sell products until end-customers.
37. Wholesales and Retail Sales of alcoholic beverages (importer, distributor, sub distributor and retailer)
38. Trading Survey Services
39. Property/ real estate broker based on fee or contract
40. Rental Land Transport Service (Rental Without Operator)
41. Rental other machineries and its equipment
42. Building Cleaning Services
43. Cleaning Services

44. Non-classified company services

45. Other activities services

46. \*)Weapon, ammunition, detonator and war equipment production

47. Placement of Indonesian workers domestically (such as registration, recruitment, formalities, shelter, orientation of pre-departure, departure, assignment and repatriation of potential Indonesian workers).

48. Labor/ worker supply services [registration, recruitment, formalities process (among others employment agreement), negotiation to obtain job from employer company, to hire worker/ labor, such as cleaning service, security force, catering and other supporting services]

\*) Remarks: in addition to the regulation as referred to herein, the said Lines of Business remain in relation with other regulations.

+) Private Broadcasting Services and Subscribed Broadcasting Services may carry out addition and development in the frame of fulfilling capital originated from foreign investment, the amount of which is not more than 20% (twenty per cent) from the entire capital and at the minimum owned by 2 (two) shareholders.

*Capital Ownership limitation and in Certain Location*

*Limitation of Foreign Capital Ownership and Certain Location*

1. \*)Hotel (1-2 Stars); [Max. 50% and No conflict with PERDA (Regional Regulation)]

2. \*)Non-Star Hotel; [Max. 50% and No conflict with PERDA]

3. \*)Other Accommodation Services (Motel and Lodging Services); [Max. 50% and No conflict with PERDA]

4. \*)Homestay/similar lodging; [Max. 50% and No conflict with PERDA]

5. \*)Catering; [Max. 50% and No conflict with PERDA]

6. \*)SPA; [Max. 50% and No conflict with PERDA]

7. \*)Game Maker; [Max. 50% and No conflict with PERDA]

8. \*)Bar/ Café/ Singing Room (Karaoke); [Max. 50% and No conflict with PERDA]

9. \*)Restaurant; [Max. 50% and No conflict with PERDA]

10. \*)Recreation and Entertainment Operator (recreation centre, swimming pool, natural spring water, fishing pool, game center, bowling, alley, billiard house, night club, discotheque, massage parlor, steam-bath parlor); [Max. 50% and No conflict with PERDA]

11. \*)Travel Bureau (Inbound and Outbound Tour Operator); [Max. 50% and No conflict with PERDA]

12. \*)Professional Convention Organizer (PCO); [Max. 50% and No conflict with PERDA]

<p>13. *)Impresario Office Services; [Max. 50% and No conflict with PERDA]</p> <p>14. *)Cultural Tourism Object Operator; [Max. 50% and No conflict with PERDA]</p> <p>15. *)Private Hospital Services; [Max. 65% and location only in Medan and Surabaya]</p> <p>16. *)Nursing Services; [Max.49% and location only in Medan and Surabaya]</p> <p>17. *)Supporting health services (Rental medical equipment); [Max.49% and location in Capital City of Province in Indonesia]</p> <p><i>Special Permit and Capital Ownership Limitation</i></p> <p><i>Special Permit and Limitation of Foreign Capital Ownership</i></p> <p>1. Operator of Natural Tourism Object Outside Conservation Area; [Max. 50%]</p> <p>2. Raw Material Industry for Explosives (Ammonium Nitrate); [Max. 49%]</p> <p>3. Explosives Industry and its Component for Industry Demands; [Max.49%]</p> <p>4. Plantation and/or Processing Industry of Palm Products above 25Ha and/or above certain capacity in accordance with Ministerial Regulation of Agriculture No. 26 of 2007; [Max. 95%]</p> <p><i>100% Domestic Capital and Special Permit</i></p> <p>1. Weapons, Ammunition, Detonator and War Equipment Production</p>	
Minister of Investment/ Chairman of BKPM No. 38 of 1999	This decree is an explanation for filing applications for domestic and foreign investment and required documents which should be completed.

## INVESTMENT REVIEW AND APPROVAL

<b>Proposal</b>	<b>Guidelines/ Conditions</b>
Merger (Yes)	The field of business concerned is open for foreign direct investment. The companies have already been in commercial production.
Acquisitions (Yes)	The field of business concerned is open for foreign direct investment.
Greenfield (Yes) Investment	Submitting the application form Model I/PMA with complete data/information required to the Investment Coordinating Board  Evaluation or assessment of application will be conducted and confirmed against the criteria and prerequisites.
Real estate/ (Yes) Land	For single house/housing complex construction, the ratio between small, medium and luxury houses are 6:3:1  For flats, condominium and apartments, the size of units is left to the investor to determine.

<b>Proposal</b>	<b>Guidelines/ Conditions</b>
Telecommunications (Yes)	Basic telecommunications services should be delivered in cooperation with state-owned company (PT. Telkom and/or PT. Indosat), in the form of joint venture or joint operation or management contract. In case of joint venture, the foreign partner has already conducted business in the basic telecommunication services.
Media (Yes)	Based on the prevailing laws and regulations, foreign direct investment is not allowed to enter mass media activities, except <i>multimedia information services</i> .
Transport (Yes)	<p>1. Taxi/bus operation is reserved only for domestic enterprise</p> <p>2. Domestic and international shipping:</p> <ul style="list-style-type: none"> <li>- It is compulsory to own at least one vessel carrying Indonesian flag with minimum GT.5000; and</li> <li>- the parties are foreign shipping company/foreign legal entity/foreign citizen must be in joint venture with the national shipping company/Indonesian Legal entity/Indonesian citizen</li> <li>- Ownership of foreign shares amounts to maximum 95%</li> <li>- Ferry transportation:</li> </ul> <p>Particularly Domestic Sea Transportation in the framework of Domestic Investment, it has sea-worth Indonesian-flag ship with minimum cumulative size of GT.175, or tug boat with driving motor capacity of minimum 150 PK, with a barge of minimum GT.175 and fulfilling the sailing safety requirements and straits and harbours technical specifications.</p>
Agriculture (Yes)	<p>1. The application of plantation sector should be attached with the recommendation letter from Ministry of Forestry and Plantation concerning the availability of land for plantation</p> <p>2. Joint venture company may hold a “Land Right Cultivation (HGU)”.</p>
Marine and Fishery Sector (Yes)	The application of fishery catching should be attached with coordinates of catching area which are issued by Department of Marine and Fishery.
Other : Mining (Yes)	Foreign direct investment must be in cooperation with the government in the form of a “contract of work”. In coal mining, cooperation in the form of “coal mining cooperation agreement”.

<b>Proposal</b>	<b>Guidelines/ Conditions</b>
Oil and Gas (Yes)	Based on <i>Law No. 22 of 2001</i> , this sector is divided into 2 categories namely up stream and down stream oil and gas industry  In up stream oil and gas industry, production sharing contract made between foreign investor and institution pointed by government is required, whereas the investment in field of down stream oil and gas industry is regulated by <i>Law No 25 of 2007</i> .
Electricity (Yes)	Before submitting the application Model I/PMA to BKPM, investor should have a Power Purchasing Agreement (PPA) with the State Owned Electricity Company (PLN) regarding the electric power projects for electric power activities and the selling price of electric power.
Toll Road (Yes)	Investor should negotiate technical aspects with state owned company, PT. Jasa Marga with address: Kantor Pusat Tol Plaza, Taman Mini Indonesia Indah, Jl. Tol Jagorawi, Jakarta 13350, Indonesia. Based on the negotiation with PT. Jasa Marga, investor submits the application Model I/PMA to BKPM  Toll road construction and management should be in cooperation with PT. Jasa Marga, be in the form of joint venture, or BOO (Built, Operate and Own), or BOT (Built, Operate and Transfer).

At present there are no exceptions to national treatment for the purpose of foreign investment including the following (although this may change under the new NIL). For up-to-date information please contact:

<b>Agency</b>	<b>Address/Telephone/Fax</b>
Investment Coordinating Board of Indonesia (BKPM)	JL. GATOT SUBROTO NO. 44 Jakarta 12190 Tel. : (62-21) 525-2008 (62-21) 525-4981 Telex : 62654 BKPM IA Fax : (62-21) 525-4945 (62-21) 522-7609 Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>

Basically all investment licenses are based on principles of fairness, simple, quick and transparent mechanism and procedure. However, Indonesia does not have legal infrastructure to support e-government yet

If an application is submitted in the complete form and data, the whole process will be completed in average 10 working days. Previously, it took about 2 to 4 weeks

The agency responsible for dealing with appeals is:

Agency	Address/Telephone/Fax
Investment Coordinating Board of Indonesia (BKPM)	JL. JEND. GATOT SUBROTO NO. 44 Jakarta 12190 Tel. : (62-21) 525-2008 (62-21) 525-4981 Telex : 62654 BKPM IA Fax : (62-21) 525-4945 (62-21) 522-7609 Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>

The average time to apply for the modification of an investment proposal for an appeal to be considered is 10 working days

For a new project, investor shall fill out the application Model I / PMA, fulfill the documents and information needed, and submit it to the Investment Coordinating Board of Indonesia (BKPM). The details of required documents and information are as follows:

1) Foreign Participant:

- a. Articles of Association of the company in English or Indonesian language; or
- b. Copy of valid passport for foreign individual

2) Foreign Investment Company:

- a. Articles of Association of the company and any amendments(s)
- b. Permanent Business License
- c. Tax Registration Code Number

3) Indonesian Participant:

- a. Articles of Association of the company and any amendment(s) or Identity Card for Individual
- b. Tax Registration Code Number

4) a. Flowchart of the production process and a raw materials

- b. Explanation of business activities for services sector

5) Power of Attorney to sign the application if the participant(s) are represented by another party

6) Other requirements from the sectoral Ministry concerned, if any, as stated among others in "Technical Guidance's Book on Investment Implementation (Buku Petunjuk Teknis Pelaksanaan Penanaman Modal/PTPPM)

7) For certain business sectors where mandatory partnership is required:

- a. Agreement between Small-scale Business and Medium/Large-scale Business outlining among others, name and address of each party, pattern of partnership, right and obligation each party as well as guidance provided for small-scale business
- b. Statement from the Small-scale Business outlining that the enterprise fulfils the criteria of small-scale business based on *Law No. 9 of 1995 concerning Small Scale Business*

(i) *List of agencies that consider foreign investment related complaints, the types of complaints that the agency deals with and how the agency can be contacted for appeals (addresses, and phone / fax numbers for these agencies)*

Agency	Address / telephone / fax	Type of Complaint
Investment Coordinating Board of Indonesia (BKPM)	Jl. Jend. Gatot Subroto No. 44 Jakarta 12190, Indonesia Tel. : (62-21) 525-2008 (62-21) 525-4981 Telex : 62654 BKPM IA Fax : (62-21) 525-4945 (62-21) 522-7609 Website: <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>	Investment Application Procedures
Directorate-General of Immigration	Jl. H.R. rasuna Said, Kav 8 – 9 Jakarta Selatan, Indonesia Tel : (62-21) 522-4658 Fax : (61-21) 522-3036 Website : <a href="http://www.imigrasi.go.id">www.imigrasi.go.id</a>	<ul style="list-style-type: none"> <li>• Passport</li> <li>• Visitor's Pass</li> <li>• Employment Pass</li> <li>• Dependent's Pass</li> <li>• Student Pass</li> </ul>
Directorate-General of Tax Office	Tel : (62-21) 525-0208 Fax : (62-21) 520-7204 Website : <a href="http://www.pajak.go.id">www.pajak.go.id</a> Email : <a href="mailto:info@pajak.go.id">info@pajak.go.id</a> <a href="mailto:ditpenpa@pajak.go.id">ditpenpa@pajak.go.id</a>	<ul style="list-style-type: none"> <li>• Income Tax</li> <li>• Company Tax</li> <li>• Real Property Gain Tax</li> <li>• Duty exemption on raw material and machinery and components</li> </ul>

<b>Agency</b>	<b>Address / telephone / fax</b>	<b>Type of Complaint</b>
Directorate-General of Customs & Excise	Jl. Jend. Ahmad Yani Jakarta 13230 Po Box 108 Jakarta 10002 Tel : (021) 4890308 Telex : DJBC Website : <a href="http://www.beacukai.go.id">www.beacukai.go.id</a> Email : <a href="mailto:perpen@beacukai.go.id">perpen@beacukai.go.id</a>	Customs procedures
Ministry of Manpower and Transmigration	Jl. Jend. Gatot Subroto Kav. 51, Jakarta Selatan, Indonesia Tel : (62-21) 525-5733 Website : <a href="http://www.nakertrans.go.id">www.nakertrans.go.id</a>	Work permit for expatriate
Ministry of Justice and Human Rights	Jl. H.R. Rasuna Said Kav 4 – 5 Jakarta Selatan, Indonesia Tel : (62-21) 525-3004 Fax : (62-21) 525-3167 Website : <a href="http://www.depkehham">www.depkehham</a>	<ul style="list-style-type: none"> <li>• Notarial document for article of association of company</li> <li>• Authorization of the limited liability companies</li> </ul>

Before releasing new deregulation measures, the Government always tries to collect all opinions and comments, views and information from many sources, including:

- Articles and issues which are published in mass media
- Exchange of views with the business society: Indonesia Chambers of Commerce, foreign business associations, etc
- Comment or opinion from private sector, be at seminars, business meetings or through the mail
- Dialogue with Parliament
- Reports on Indonesian economic development issued by International Organizations, such as World Bank, Asian Development Bank, ESCAP, UNCTAD, etc

All comments, views and suggestions will be adopted by the Government as input for policy formulation

A list of sub-national agencies that may play a part in the approval process follows.

<b>Agency</b>	<b>Address / Telephone / Fax</b>	<b>Functions</b>
Kantor Pertanahan Kabupaten/Kotamadya (The Regional land Affair)	Regional Land Affair Office in Regency concerned.	Issue location permits

<b>Agency</b>	<b>Address / Telephone / Fax</b>	<b>Functions</b>
Dinas Pekerjaan Umum Kabupaten/Kotamadya (The Regional Public Work)	Office of Regent/Mayor concerned.	Issue Building Construction Permits (IMB).
Sekretaris Wilayah Dati II (The Regency Secretary)	Office of Regent/Mayor concerned.	Issue Nuisance Act Permits (UUG/HO).
Badan Koordinasi Penanaman Modal Daerah / BKPMMD (Regional Investment Coordinating Board)	Capital city of province concerned. For addresses of BKPMMDs, please see below.	Issue Working Permits for Foreign Expatriates.

An address list of regional Investment Agencies (BKPMMD) follows.

<b>No.</b>	<b>BKPMMD</b>	<b>Address</b>
1.	BKPM Provinsi Nanggroe Aceh Darussalam Tel. (0651) 23170, 22697 Fax. (0651) 23171	Jl. Jend. A. Yani No. 39, Banda Aceh, Nanggroe Darussalam
2.	Badan Investasi dan Promosi (BAINPROM) Provinsi Sumatera Utara Tel. (061) 4564447, 564155 Fax. (061) 4564155	Jl. Imam Bonjol No. 11, Medan, Sumatera Utara
3.	Badan Promosi Investasi (BPI) Provinsi Riau Tel. (0761) 20212, 20214, 33616 Fax. (0761) 20213	Jl. Gajah Mada 200 Lt. 3, Pekanbaru, Riau
4.	Badan Koordinasi Promosi dan Penanaman Modal Daerah (BKP&PMD) Provinsi Sumatera Barat Tel. (0751) 34232, 22168 Fax. (0751) 22297	Jl. Jend. Sudirman No. 43, Padang 25138, Sumatera Barat
5.	Dinas Koperasi Pengusaha Kecil Menengah dan Penanaman Modal Provinsi Sumatera Selatan Tel. (0711) 352082 Fax. (0711) 357069	Jl. Jend. Sudirman Km. 3,5 No. 565, Palembang 30129, Sumatera Selatan

<b>No.</b>	<b>BKPMD</b>	<b>Address</b>
6.	Badan Penanaman Modal dan Promosi Daerah (BAPEMPRODA) Provinsi Jambi Tel. (0741) 60450, 669352 Fax. (0741) 63420, 60450	Jl. R.M. Noor Atmadibrata No. 1A, Jambi
7.	Badan Koordinasi Penanaman Modal Daerah Provinsi Bengkulu Tel. (0736) 21092, 21450 Fax. (0736) 22044, 21092	Jl. Batang Hari No. 108, Padang Harapan, Bengkulu
8.	Dinas Promosi Investasi Kebudayaan dan Pariwisata (DPIK & P) Provinsi Lampung Tel. (0721) 261430, 266184, 81430 Fax. (0721) 266184	Jl. Jend. Sudirman No. 29, Bandar Lampung 35127
9.	Badan Koordinasi Penanaman Modal Daerah (BKPMD) Provinsi Kepulauan Bangka Belitung Tel. (0717) 437705 – 7, Ext. 209, 211, 213 Fax. (0717) 439324	Jl. Merdeka No. 4, Pangkal Pinang 33126, Bangka Belitung
10.	Biro Perekonomian dan Kesra Provinsi Kepulauan Riau Tel. (0778) 326361/60 Fax (0778) 326333/344	Kantor Gubernur Prov. Kepulauan Riau, Jl. RM. Martadinata S Kupang, Batam
11.	Badan Promosi dan Penanaman Modal Daerah (BPPMD) Provinsi Jawa Barat Tel. (022) 4237369 Fax. (022) 4237081	Jl . Sumatera No. 50, Bandung 40115, Jawa Barat
12.	Badan Penanaman Modal dan Pendayagunaan Kekayaan dan Usaha Daerah (BPM & PKUD) Provinsi DKI Jakarta Tel. (021) 7949660, 7949528 Fax. (021) 7949567	Jl. MT. Haryono Kav. 45-46, Jakarta Selatan
13.	Badan Penanaman Modal (BPM) Provinsi Jawa Tengah Tel. (024) 3547438, 3541487 Fax. (024) 3549560	Jl. MGR. Soegiyopranoto No. 1, Semarang 50131, Jawa Tengah

<b>No.</b>	<b>BKPM</b>	<b>Address</b>
14.	Badan Investasi dan Pengembangan Potensi Wilayah (BAPEDA), Provinsi Daerah Istimewa Yogyakarta Tel. (0274) 562811 ext 215, 52618, 586712 Fax. (0274) 586712	Kantor Gubernur Kepatihan Danureja, D.I. Yogyakarta 55123
15.	Badan Penanaman Modal (BPM) Provinsi Jawa Timur Tel. (031) 8418676, 8410877 Fax. (031) 8412363	Jl. Jagir Wonokromo No.352, Surabaya 60244, Jawa Timur
16.	Badan Koordinasi Penanaman Modal Daerah (BKPM) Provinsi Banten Tel. (0254) 200547 Fax. (0254) 218884	Jl. Veteran No.12, Serang, Banten 42112
17.	Badan Koperasi UKM Kerjasama Promosi dan Investasi (BAKOMAPIN) Provinsi Kalimantan Barat Tel. (0561) 743491, 732705 Fax. (0561) 769472	Jl. Sutan Syahril No.17, Pontianak 78116, Kalimantan Barat
18.	Badan Koordinasi Penanaman Modal Daerah dan Kawasan Pengembangan Ekonomi Terpadu (BKPM & KAPET) Provinsi Kalimantan Selatan Tel. (0511) 3354145, 3354154 Fax. (0511) 3355580	Jl. Pangeran Samudera No. 40, Banjarmasin 70111, Kalimantan Selatan
19.	Badan Penanaman Modal Daerah (BPMD) Provinsi Kalimantan Tengah Tel. (0536) 31416, 31474, 31456 Fax. (0536) 31454, 3231456	Jl. Tjilik Riwut Km. 5,5, Palangkaraya 73112, Kalimantan Tengah
20.	Badan Promosi dan Investasi Daerah (BPID) Provinsi Kalimantan Timur Tel. (0541) 743235, 743487 Fax. (0541) 736446, 744917	Jl. Basuki Rachmat No. 56, Samarinda 75117, Kalimantan Timur
21.	Badan Koordinasi Penanaman Modal dan Kerjasama Regional (BKPMKR) Provinsi Sulawesi Utara Tel. (0431) 8655599 ext 144 Fax. (0431) 863284	Jl. Tujuh Belas Agustus No. 56, Manado 95119, Sulawesi Utara

<b>No.</b>	<b>BKPMD</b>	<b>Address</b>
22.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Sulawesi Tengah Tel. (0451) 421807, 424325, 423325 Fax. (0451) 421807	Jl. Pramuka No. 23, Palu 94111, Sulawesi Tengah
23.	Badan Promosi dan Penanaman Modal Daerah (BPPMD) Provinsi Sulawesi Tel. (0411) 453614 Fax. (0411) 423478, 736446	Jl. Jend. Urip Sumohardjo No. 269, Makassar 90231, Sulawesi Selatan
24.	Dinas Koperasi UKM dan Penanaman Modal Daerah Provinsi Sulawesi Tenggara Tel. (0401) 322096, 321724 Fax. (0401) 329672	Jl. Mayjend. S. Parman No. 47, Kendari 93121, Sulawesi Tenggara
25.	Dinas Perindustrian & Perdagangan dan Penanaman Modal (DPPM) Provinsi Gorontalo Tel. (0435) 831607 Fax. (0435) 831606	Jl. Prof. Dr. Aloe Soboe No. 43, Gorontalo
26.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Bali Tel. (0361) 237991, 229593 Fax. (0361) 731711, 237991	Jl. D.I. Panjaitan No. 5, Denpasar, Bali
27.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Nusa Tenggara Barat Tel. (0370) 631060, 632632 Fax. (0370) 634926	Jl. Udayana No. 4, Mataram, Nusa Tenggara Barat (NTB)
28.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Nusa Tenggara Timur Tel. (0380) 821834, 833080 Fax. (0380) 821834, 833213	Jl. Kenanga No. 1, Kupang 85117, Nusa Tenggara Timur (NTT)
29.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Maluku Tel. (0911) 353421, 310165 Fax. (0911) 310165	Jl. Pattimura No. 1, Ambon 97214, Maluku
30.	Badan Koordinasi Penanaman Modal Daerah (BKPMMD) Provinsi Maluku Utara Tel. (0921) 328559, 328080 Fax. (0921) 328559, 328080	Jl. Saleh Effendi, Kelurahan Kampung Pisang, Ternate, Maluku Utara

No.	BKPMD	Address
31.	Badan Promosi dan Investasi Daerah (BPID) Provinsi Papua Tel. (0967) 533600, 531332 Fax. (0967) 536943	Jl. Dr. Sam Ratulangi No. 32, Jayapura, Papua
32.	Dinas Perindustrian Perdagangan Koperasi dan Penanaman Modal (DPPKM) Provinsi Irian Jaya Barat Tel. (0986) 212537 Fax. (0986) 212537	Jl. Siliwangi No. 1, Manokwari, Irian Jaya Barat

## INVESTMENT PROTECTION

### (i) Repatriation and Convertibility

There are no regulations which restrict the repatriation of funds, related to foreign investment, such as profits, dividends, royalties, loan payments and liquidation

### (ii) Expropriation and Compensation

*(a) List and summary of all laws and regulations relating to expropriation and compensation of foreign investment. Summary of the application and function of these laws/regulations.*

Laws/Regulations	Application and Function
Law No. 25 of 2007 concerning Investment	<ul style="list-style-type: none"> <li>• The government shall neither nationalize nor take over the ownership right of any investors, except through the law</li> <li>• In the event that Government either nationalizes nor takes over the ownership right of any investors set forth in paragraph (1) above, the Government is required to pay compensation whose amount is stipulated based on market price</li> <li>• If any of the parties fails to reach agreement on the compensation or indemnity set forth in paragraph (2) above, it shall be settled through arbitration.</li> </ul>

### (iii) IPR

Indonesia has trade mark, copyright and patent laws which are compatible with international standard:

- 1) *Act No. 6 of 1989 and Act No. 13 of 1997 on patents as amended by Act No. 14 of 2001.* Technology invention would be protected by this act. Criteria of protection are new, inventive and can be implemented in industry. A patent application is submitted in Indonesian language to Government Patent Office, with the appropriate fee decided by the

Minister of Justice. The patent is valid for 20 years from the received date of patent, and 10 years for simple patent

- 2) Act No.6 of 1982 on copyright as amended by Act No.7 of 1987 and No.12 of 1997. This law protects people's creations on science, art and literature
- 3) Act No.19 of 1992 and Act No.14 of 1997 concerning trademark as amended by Act No.15 of 2001. The trademark protects trademarks in goods and services. The Criteria for obtaining the trademark are unique and not against the common rules. A trademark application is submitted in Indonesian language to Government Trademark Office, with the appropriate fee decided by Minister of Justice. The trademark is valid for 10 years from the date the trademark application is received

(iv) Dispute Settlement

Indonesia participates in the international convention on the settlement of investment dispute between state and nationals of other states. Consequently, disputes that may arise from foreign investment can be referred to ICSID

Disputes of problems related to laws, regulations and procedures can be referred to the Deputy Chairman, BKPM) and the Court of State's Administration

Disputes between shareholders/investors can be referred to Badan Arbitrase Nasional Indonesia / BANI (Indonesia's National Arbitration Board) and the Pengadilan Negeri (Court)

Agency	Address/telephone/fax
Investment Coordinating Board of Indonesia (BKPM)  Attention: Deputy Chairman for Investment Control	Jl. Jend. Gatot Subroto No.44 Jakarta 12190 – Indonesia Tel : (62-21) 525-2008 ext 3347 (62-21) 522-5819 Telex : 62654 BKPM IA Fax : (62-21) 526-9859 Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>
Badan Arbitrasi Nasional Indonesia/BANI  (Indonesian National Arbitration Board)	D/a. Kamar Dagang dan Industri Indonesia (KADIN), Gedung Chandra Lt.5 Jl. M.H Thamrin No.20 Jakarta, Indonesia Tel : (62-21) 310-3529 (62-21) 334-596 Fax : (62-21) 334-596

## INVESTMENT AND DEVELOPMENT

Indonesia has no performance requirements that could impose limits on trade and investment and indicate any Trade Related Investment Measures (TRIMs)

## INVESTMENT PROMOTION AND INCENTIVES

### (i) One-Stop-Shop

Agencies	Address/telephone/fax
Investment Coordinating Board of Indonesia (BKPM) Attention: Deputy Chairman for Investment Services	Jl. Jend. Gatot Subroto No.44 Jakarta 12190 Tel : (62-21) 525-2008 ext 3338 (62-21) 525-5261 Telex : 62654 BKPM IA Fax : (62-21) 5296-0581 Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>

### (ii) Incentives

Program (National/sub-national)	Nature of Incentive	Contact Point
National	<ul style="list-style-type: none"> <li>• For all investment projects, all expenses for:                             <ul style="list-style-type: none"> <li>– Research and development (R&amp;D) activities conducted in Indonesia</li> <li>– Scholarship, education and training</li> <li>– Waste management facilities</li> </ul>                             will be counted as a cost and deducted to gross income                         </li> <li>• For investment activities in certain priority sectors and/or certain areas will be granted tax allowance as follows:                             <ul style="list-style-type: none"> <li>– An investment Tax Allowance of 30% for 6 (six) years, in the form of taxable income reduction as much as 30% of the realized investment spread in 6 (six) years</li> <li>– Accelerated depreciation and amortization.</li> </ul> </li> </ul>	Director General of Taxation, Department of Finance Jl. Jend. Gatot Subroto No. 40-42, Jakarta 12190 Tel (62-21) 381-1179

	<p>The rate for the depreciable asset :</p> <table border="0"> <thead> <tr> <th>Physical</th> <th>Useful</th> <th colspan="2">Method of</th> </tr> <tr> <th>Calculation</th> <th></th> <th></th> <th></th> </tr> </thead> <tbody> <tr> <td><u>Assets</u></td> <td><u>Life (years)</u></td> <td><u>Straight</u></td> <td></td> </tr> <tr> <td><u>Line</u></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="4"><u>Declining</u></td> </tr> <tr> <td colspan="4"><u>Non Building</u></td> </tr> <tr> <td>a. Group I</td> <td>2</td> <td>50%</td> <td>100%*)</td> </tr> <tr> <td></td> <td colspan="3">*)charged all at once</td> </tr> <tr> <td>b. Group II</td> <td>4</td> <td>25%</td> <td>50%</td> </tr> <tr> <td>c. Group III</td> <td>8</td> <td>12,5%</td> <td>25%</td> </tr> <tr> <td>d. Group IV</td> <td>10</td> <td>10%</td> <td>20%</td> </tr> <tr> <td colspan="4">e.</td> </tr> <tr> <td colspan="4"><u>Building</u></td> </tr> <tr> <td>a. Permanent</td> <td>10</td> <td colspan="2">10%</td> </tr> <tr> <td>b. Non Permanent</td> <td>5</td> <td colspan="2">20%</td> </tr> </tbody> </table> <ul style="list-style-type: none"> <li>• A loss carried forward facility for period of more than 5 years but not more than 10 (ten) years</li> <li>• A 10% income tax on dividends, and possibly being lower if stipulated in the provisions of an existing particular tax treaty</li> <li>• Investment activities located in eastern part of Indonesia are granted with special incentive i.e. 50% reduction of land and building tax (PBB) for 8 years.</li> </ul>	Physical	Useful	Method of		Calculation				<u>Assets</u>	<u>Life (years)</u>	<u>Straight</u>		<u>Line</u>				<u>Declining</u>				<u>Non Building</u>				a. Group I	2	50%	100%*)		*)charged all at once			b. Group II	4	25%	50%	c. Group III	8	12,5%	25%	d. Group IV	10	10%	20%	e.				<u>Building</u>				a. Permanent	10	10%		b. Non Permanent	5	20%		
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	<ul style="list-style-type: none"> <li>• Special incentives for investment activities located in Bonded Zone: <ul style="list-style-type: none"> <li>– Exemption from Import Duty, Excise, Income Tax Article 22, Value Added Tax and Sales Tax on Luxury Goods on the importation of capital goods and equipment including raw materials for the production process</li> </ul> </li> </ul>																																																													

	<ul style="list-style-type: none"> <li>- Allowed diverting their products, amounting to 50% of the final product and 100% of the unfinished product exported (in terms of export realization) to the Indonesian customs area, through normal import procedure including payment of customs duties</li> <li>- Allowed selling scrap or waste to Indonesian custom area as long as it contains at the highest tolerance of 5% of the amount of the material used in the production process</li> <li>- Allowed to lend their own machineries and equipments to their subcontractors located outside bonded zones, for no longer than two years, in order to further process their own products</li> <li>- The exemption of Value Added Tax on Luxurious goods on delivery of products for further processing from Bonded Zones to their subcontractors outside the Bonded Zones, or the other way around as well as among companies in these areas</li> <li>- Transactions of goods from producer located outside bonded zones to company located in bonded zones for further processing is provided the same fiscal facilities with exported goods</li> <li>• The Government has established 15 Integrated Economic Development Areas(KAPET) throughout Indonesia. For Investment activities in these areas shall enjoy same incentives, among others: <ul style="list-style-type: none"> <li>- Tax Allowance of 30% from the amount of investment</li> <li>- Loss compensation as from the subsequent tax year consecutively up to 10 years</li> <li>- Income Tax deductions on dividends in the amount 10% from the amount otherwise payable</li> </ul> </li> </ul>	
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- Value Added Tax and Sales Tax on Luxury Goods are not imposed to entrepreneurs in KAPET for domestic purchases and/or imports of capital goods and other equipments, import of taxable goods for further processing and also some other interesting incentives.
- Accelerated depreciation and amortization

The rate for depreciable assets :

Physical	Useful	Method of
Calculation		
<u>Assets</u>	<u>Life (years)</u>	<u>Straight</u>
<u>Line</u>		
<u>Declining</u>		
<u>Non Building</u>		
a. Group I 100%*)	2	50%
*) charged all at once		
b. Group II 50%	4	25%
c. Group III 25%	8	12,5%
d. Group IV 20%	10	10%
<u>Building</u>		
c. Permanent	10	10%
d. Non Permanent	5	20%

(iii) Taxation

Citation	Summary
Act No. 7 of 1983 and Act No. 10 of 1994 on Income Tax as amended by Act No. 17 of 2000.	Tax rates had been substantially simplified and lowered. The Income Tax and The Value Added Tax system in Indonesia is progressive and applied both to individual and corporations. The amount of income tax payable is determined through the self-assessment method.
Act No. 8 of 1983 on Value Added Tax as amended by Act No. 18 of 2000	<p>Value Added Tax is imposed on:</p> <ul style="list-style-type: none"><li>a) any transfer of Taxable Goods within the Customs Area by entrepreneurs (10% rate);</li><li>b) any import of a Taxable Good (10% rate);</li><li>c) any transfer of Taxable Services within the Customs Area by entrepreneurs (10% rate);</li><li>d) any use of Intangible Taxable Goods from outside Customs Area to the inside Customs Area (10% rate);</li><li>d) any use of Taxable Services from outside Customs Area to the inside Customs Area (10% rate); or</li><li>e) export of Taxable Goods by Taxable Entrepreneurs (<b>0% rate</b>)</li></ul> <p>Tax on Luxury Goods is imposed on:</p> <ul style="list-style-type: none"><li>a) any delivery of Luxury Goods by the manufactures, in the Customs Area in the course of business or professional work;</li><li>b) any import of a Luxury Good</li></ul> <p>The Sales Tax on Luxury Goods shall be applied one time only at the time of delivery by the manufacturing Firm or at the time of import (the rate is ranging from 10% to 75%).</p>
Government Regulation No. 146 Year 2000 concerning Import and or the Transfer of Certain Taxable Goods and or The Transfer of Certain Taxable Services which are Exempted From VAT, as lastly amended by Government Regulation No. 38 Year 2003	This Government Regulation regulates the VAT exemption for certain delivery or importation of Taxable Goods and certain delivery of Taxable Services.

Government Regulation No. 12 Year 2001 concerning Import and or The Transfer of Certain Strategic Taxable Goods which are Exempted From VAT as lastly amended by Government Regulation No. 31 Year 2007	
Government Regulation No. 20 Year 2000 concerning Tax Treatment in the Integrated Economic Development Region (KAPET) as lastly amended by Government Regulation No. 147 Year 2000	This Government Regulation regulates “non-withheld VAT” facilities for the entrepreneur’s activities (who are domiciled in the Bonded Zone (PDKB), within the KAPET).

#### 1. *Income Tax*

Income tax in Indonesia is progressive and applied to individuals, enterprises, and permanent establishments. A self assessment method is used to compute the tax

The tax rates are as follows:

<b>Taxable income for individuals</b>	<b>Tax rate</b>
Income up to Rp. 25 million	5%
Income over Rp. 25 million up to Rp. 50 million	10%
Income over Rp. 50 million up to Rp. 100 million	15%
Income over Rp. 100 million up to Rp. 200 million	25%
Income over Rp. 200 million	35%
<b>Taxable income for enterprises and Permanent Establishment</b>	<b>Tax rate</b>
Income up to Rp. 50 million	10%
Income over Rp. 50 million up to Rp. 100 million	15%
Income over Rp. 100 million	30%

## 2. *Losses*

The Government provides a loss carried forward facility for a period of 5 years

## 3. *Depreciation and Amortization Rates*

Depreciation and amortization cost on assets is deductible from the income before tax. Depreciable assets are grouped into four categories on the useful life of assets. Investors may choose either the straight line method (for periods of less than 20 years) or the fast declining balance method (except for buildings)

The depreciation and amortization rate is determined according to the useful life and utilization such as:

Group of Tangible Asset	Useful Life (years)	Method of Calculation	
		Straight Line (%)	Declining Balance (%)
I. Non Building Class			
Group 1	2	50	100
Group 2	4	25	50
Group 3	8	12.5	25
Group 4	10	10	20
II. Building Class			
Permanent	10	10	
Non Permanent	5	20	

## 4. *Withholding Tax*

Payments of dividend, interest, premium, discount, royalties, technical and management fees for services, income regarding guarantee of debt payment in Indonesia to Indonesian and non-Indonesian residents are subject to withholding tax. The withholding tax rate varies depending on whether it is paid to a resident or non-resident as follows:

(1) For payments to Indonesian residents, the rate is 15% of the gross amount of:

- dividends
- interest
- royalties

2) gift and rewards

- a. 15% of gross amount of savings interest paid by a cooperative as a final tax
- b. 15% of deemed profit on:

- : rent and other income in connection with the use of property
- : compensation in connection with technical, management, construction, consultation and other services

(1) payment to non residents, the rate is 20% of the gross income of:

- a. dividends;
- b. interest, including premiums, discounts, swap premiums and compensation in accordance with a loan guarantee;
- c. royalties, rent and other income connected with the use of property;
- d. compensation for services employment and activities;
- e. gifts and rewards;
- f. pensions and other periodic payments

## 5 Land and Building Tax

Land and building taxes are payable annually on land, buildings and permanent structures. The effective rates are nominal, typically not more than 0.1% of the property's value

## 6 Double Taxation Avoidance Agreements

To avoid incidental double taxation on certain income such as profits, dividends, interests, fees and royalties, Indonesia has signed 57 agreements (tax treaties) with the following economies:

Algeria	Hungary	Pakistan	Taiwan
Australia	India	Philippines	Thailand
Austria	Italy	Poland	Tunisia
Bangladesh	Japan	Romania	Turkey
Belgium	Jordan	Russia	United Arab Emirates
Brunei Darussalam	Korea — Republic of	Saudi Arabia	Ukraine
Bulgaria	Korea — Democratic People's Republic of	Seychelles	United Kingdom
Canada	Kuwait	Singapore	USA
Czech Republic	Luxembourg	Slovak Republic	Uzbekistan
China — People's Republic of	Malaysia	South Africa	Venezuela
Denmark	Mexico	Spain	Viet Nam
Egypt	Mongolia	Sri Lanka	
Finland	Netherlands	Sudan	
France	New Zealand	Sweden	
Germany	Norway	Switzerland	
		Syria	

*Non-tax Incentives*

<b>Program</b>	<b>Nature of Incentive</b>	<b>Contact Point</b>
National	<p>All investment projects approved by BKPM, in the framework of Foreign Direct Investment (PMA) as well as domestic investment (PMDN) are granted the following facilities:</p> <ul style="list-style-type: none"> <li>• Reduction of import duty: <ul style="list-style-type: none"> <li>– On the importation of capital goods namely machinery, equipment, spare parts, and auxiliary equipments</li> <li>– On the importation of raw materials for the purpose of two years full production</li> </ul> </li> <li>• Exemption from Transfer of Ownership Fee for ship registration deed/certification made for the first time in Indonesia, but no more than two years after commencing commercial operation.</li> </ul> <p><u>Some incentives are provided for exporting Manufacturers</u></p> <ul style="list-style-type: none"> <li>• Restitution (drawback) of import duty on the importation of goods and materials needed to manufacture the exported finished products</li> <li>• The company can import raw materials required regardless of the availability of comparable domestic products.</li> </ul>	<p>Investment Coordinating Board of Indonesia (BKPM)</p> <p>Attention: Deputy Chairman for Investment Services  Jl. Jend. Gatot Subroto No.44  Jakarta 12190  Tel : (62-21) 525-2008 ext 3338  (62-21) 525-5261  Telex : 62654 BKPM IA  Fax : (62-21) 5296-0581  Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a>  Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a></p> <p>Export Facility Services and Financial Data Processing Board (BAPEKSTA),  Attention: Head of Export Facility services and Financial Data Processing Board  Jl Lapangan Banteng Timur No.2-4  Jakarta Pusat  Tel. (62-21) 525-1609, 525-0208</p>

Program	Nature of Incentive	Contact Point
	<ul style="list-style-type: none"> <li>Investment activities located in eastern part of Indonesia, and at least 65% of production for export, are allowed to use freely foreign expatriates regardless of the availability of local manpower.</li> </ul>	Investment Coordinating Board of Indonesia (BKPM) Attention: Deputy Chairman for Investment Services Jl. Jend. Gatot Subroto No.44 Jakarta 12190 Tel : (62-21) 525-2008 ext 3338 (62-21) 525-5261 Telex : 62654 BKPM IA Fax : (62-21) 5296-0581 Website : <a href="http://www.bkpm.go.id">www.bkpm.go.id</a> Email : <a href="mailto:sysadm@bkpm.go.id">sysadm@bkpm.go.id</a>
Regional	Some regional governments offer some additional incentives to investors by providing a reduction on regional levies or retribution fee.	Regional Investment Coordinating Board (BKPMMD) concerned.

## MOBILITY OF CAPITAL AND TECHNOLOGY

Indonesia has a free foreign currency exchange regime. There are no restrictions on the convertibility of currencies for the overseas transfer of funds

## LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

A visa for the members of the board of directors will be issued as long as they are still appointed and entrusted by the shareholders for the position. The duration of the foreign expatriate to work in Indonesia is subject to Government Regulation, based on expertise and the availability of an Indonesian to replace the position. The visa extension for a foreign expatriate is based on the extension of a working permit issued by The Ministry of Manpower and Transmigration. The extension of the visa will be issued by the Immigration Office

The replacement is based on the following regulations:

1. Act. No. 13/2003 on Manpower
2. Presidential Instruction No. 6/2007 on Investment Climate Policy (Policy Package for The Acceleration of Real Sector and MSME empowerment)

Restrictions on the entry/sojourn of foreign technical/managerial and their accompanying family members follow.

Restrictions	Description
Presidential Decree No. 75 of 1995 concerning Employment of Expatriate.	<p>Indonesia still needs expatriates, but they are limited to certain areas of expertise/occupation which can not be occupied by Indonesians</p> <p>Directors can be fulfilled by foreign citizens, except for personnel Director</p> <p>Commissioners can be fulfilled by foreign citizens as long as the whole or part of the company's shares are owned by foreign investors.</p>

The provision as stated in the Presidential Decree No. 75 of 1995 concerning Employment of Expatriate in point b is still valid since it is aligned with the Law No. 13/2003 on Manpower

The following domestic labour law applies to foreign firms in the context of labour disputes/relations.

Law	Summary
Law No. 2 of 2004 on Labour Disputes Settlement.	<p>In case of negotiation between employer and worker/workers failed within 30 (thirty) days and causing labour disputes, the disputing parties may choose judicial process either through mediation; conciliation; or arbitration processes. In case of mediation or conciliation failed, the final decision shall be filed to the Labour disputes Settlement Court. Meanwhile, Arbitration's decision is a final one and only concern with worker' interest and intra union disputes.</p>

## COMPETITION POLICY

Indonesia has enacted Law No. 5 of 1999 on the *Prohibition on Monopoly Practices and Unfair Business Competition*. Under this law, the Government regulates and prohibits any monopoly practices and unfair business practices that could be harmful to the public's interests. By this law, as long as a business sector is opened for investment activity, there is no barrier to the new entry to enter domestic market. So, it is hoped that business activity will grow more in quantity as well as quality. This law reflects a strong commitment from the Government to create a fair and healthy business competition and more conducive climate for investment and business activities in Indonesia

This law applies equally to domestic as well as foreign investment companies with the same treatment

Law No.1 of 1995 on the *Limited Liability Company* covers the issue of competition. This law, which primarily sets out the country's rules governing the creation and operation of companies,

contains an express legislative statement<sup>19</sup> that promotes fair competition among businesses and prohibits monopolistic business combinations if the result from mergers, consolidations and other acquisitions. Under article 104 of the law, mergers and acquisitions of the companies in Indonesia must observe “the interests of the public and fair competition in business<sup>20</sup>.” The elucidation of the law (which is adopted as part of the law and given the same binding legal force) goes even further in the protection of competition and interprets the article as prohibiting mergers, consolidations and acquisitions that create a monopoly if there is a “loss to the public<sup>21</sup>”

Whether a monopolist has been created and whether there has been a resulting loss to the public are to be determined by an investigation conducted at the request of the Attorney-General<sup>22</sup>. If a request is considered reasonable by the Chairman of the District Court, the investigation will be conducted by experts appointed by the Court<sup>23</sup>. This law is significant in that Indonesia now clearly put in place a legal framework for the regulation of mergers with the intent of guarding against the negative impact of monopolies. The law calls for an investigation into effects of business combinations on the public and economy as whole. While the law is not comprehensive, and is silent on the legal ramifications of a finding by the investigatory commission that a merger with negative competition effects has occurred, it is step in the incremental process of creating a political as well as economic environment that is conducive to competition law

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<sup>19</sup> The 1984 *Law on Industry* and the 1955 *Law on Small Business* contain similar references.

<sup>20</sup> Law No.1 of 1995, Article 194 (I) b

<sup>21</sup> Elucidation, Law No.1 of 1995, Article 104, Paragraph (I)

<sup>22</sup> Law No.1 of 1995, Article 110 (3) (c)

<sup>23</sup> *Ibid.*, Article 111 (2) and (3)



# JAPAN

## Acronyms

IBSC	Invest [Japan] Business Support Center
JETRO	Japan External Trade Organization
JFTC	Japan Fair Trade Commission
JIC	Japan Investment Council
NTT	Nippon Telegraph And Telephone [Corporation]

## INTRODUCTION

### Japan's target for 2010 (set out in 2006)

Japan encourages and welcomes foreign direct investment (FDI). Under the revitalized and reenergized “Invest Japan” initiative (originally launched in 2003), Japan is now accelerating its efforts in promoting more inwards FDI.

The effective implementation and execution of various measures and efforts set out in the “Program for the Promotion of Foreign Direct Investment in Japan” (2003) have resulted in a solid increase in FDI to Japan; the inwards FDI stock rose to a record high JPY 11.9 trillion at the end of 2005, 1.8 times the 2001 level, bringing the 2006 target of JPY 13.2 trillion within reach. Drawing on this positive trend, then Prime Minister Koizumi emphasized in his General Policy Speech of January 2006 that the current plan to double the amount of foreign investment to Japan by 2006 is being steadily advanced, and also announced that “The Government intends to promote further investment with even grander targets.”

Following up on the above statement, in March 2006, the Japan Investment Council (JIC), which is chaired by the Prime Minister, reaffirmed the importance of inwards FDI and set a new goal to double the ratio of inwards FDI stock against GDP by 2010, namely to raise it to a level of around 5%. To achieve this new target, in June 2006, the JIC launched a program called the “Program for the Acceleration of Foreign Direct Investment in Japan” which focuses on 3 key issues:

- regional centers for economic growth and improved quality of life;
- improvement of an investment environment capable of overcoming global competition; and
- domestic and international public information activities.

### The “Invest Japan” initiative (2003-06)

The “Invest Japan” initiative, a government-wide effort to actively promote FDI into Japan, was launched in 2003 by then Prime Minister Koizumi. At that time, he set a target of doubling the stock of inwards FDI within 5 years from its 2001 level of JPY 6.6 trillion. He announced in his General Policy Speech of January 2003 that “Foreign direct investment to Japan will bring new

technology and innovative business management methods, and will also lead to greater employment opportunities” and he promised to take measures to present Japan as an attractive destination for foreign firms.

To meet this goal, the JIC established the “Program for the Promotion of Foreign Direct Investment into Japan” in 2003, consisting of 74 measures (increased to 87 in 2005) under the following five areas:

- dissemination of information within Japan and abroad: Promoting Japan’s efforts and its advantages;
- improvements in the business environment;
- reviewing administrative procedures: making them faster, simpler and clearer;
- create favorable employment and living environments: easing entry of foreign personnel and providing comfortable living conditions for foreigners; and
- improve local and national structures and systems: facilitating national and local initiatives.

Much was achieved and substantive progress materialized in all areas under this program such as:

- the creation of the Invest Japan Business Support Center (IBSC), a one-stop office to provide information and support to foreign companies and potential foreign investors, in the Japan External Trade Organization (JETRO);
- the establishment of Invest Japan information desks at concerned ministries and local governments;
- the establishment of the Corporate Code in 2005 which introduces the Japanese version of the Limited Liability Company. The Code also allows companies to use cash and other property (including shares of a domestic or foreign parent company) as compensation for mergers, etc. from 1 May 2007;
- the establishment of a *Law Concerning Limited-Liability Partnership Contracts*;
- the promotion of translation of Japanese laws and ordinances into foreign languages; and
- the nationwide expansion of special zone measures, such as the extension of the upper limit on the period of stay for qualified foreign researchers and IT workers.

**▼ For Further Information See:**

**Invest Japan Website**

[Http://Www.Investment-Japan.Go.Jp/Index.Htm](http://www.investment-japan.go.jp/index.htm)

**Invest Japan Information Desks At Each Ministry**

[Http://Www.Investment-Japan.Go.Jp/Ij/Files/List.Html](http://www.investment-japan.go.jp/ij/files/list.html)

**10 Advantages To Investing In Japan**

[Http://Www.Jetro.Go.Jp/En/Invest/Whyjapan/Advantage/](http://www.jetro.go.jp/en/invest/whyjapan/advantage/)

## SCREENING OF FOREIGN INVESTMENT

Japan does not have a screening process *per se* for inwards FDI. Japan has a highly liberalized and open investment regime, and in principle, the *Foreign Exchange and Foreign Trade Law* (hereafter referred to as the *Foreign Exchange Law*) requires only ex post facto reporting<sup>24</sup> for FDI to Japan.

The exception to the above applies to investments in sectors: (a) which may conceivably be classified as related to national security, public order, or public safety (e.g. aircraft, arms, explosives, nuclear energy, space, electricity utility, biological preparations, security, telecommunications, broadcasting); and (b) where liberalization is not required under the OECD Codes for the Liberalization of Capital Movement (e.g. agriculture, forestry, fisheries, mining<sup>25</sup>, leather, water transport, air transport). Such investments require prior notification<sup>26</sup>.

**▼ Contact Point For Notification/Reporting Under The Foreign Exchange Law**

**Bank Of Japan, International Department**

**Tel: +81-3-3277-2107**

[Http://Www.Boj.Go.Jp/About/Madoguchi/Mado Tame.Htm](http://www.boj.go.jp/about/madoguchi/mado_tame.htm) (In Japanese)

## SECTOR SPECIFIC LAWS AND POLICIES

The following is a list of exceptional sectors or matters where Japan reserves the right to adopt and/or maintain measures that do not conform with one or more of its principle positions of providing national and most-favored nation treatment to foreign investors and prohibiting performance requirements.

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<sup>24</sup> The report is to be made within 15 days from the date of investment.

<sup>25</sup> Although the mining industry in Japan is exempted from liberalization under the OECD's Code, only ex post facto reporting is required as of April 1998 with the revision of the *Foreign Exchange Law*.

<sup>26</sup> The notification is to be made within 3 months prior to the planned date of investment. Once the notification is made, the investor must wait 30 days before executing the investment, but normally this waiting period may be shortened to 2 weeks.

	<b>Sectors Or Matters</b>	<b>Legal Source Or Authority: Foreign Exchange Law</b>	<b>Legal Source Or Authority: Other</b>
1	Primary Industries Related to Agriculture, Forestry and Fisheries	√	In Addition:  (I) For Agriculture: Seeds and Seedlings Law, Seeds and Seedlings Law Enforcement Regulation; and  (Ii) For Fisheries: Law For Regulation of Fishing Operation by Foreign Nations
2	Oil Industry	√	<i>Mining Law</i>
3	Leather and Leather Products Manufacturing Industry	√	
4	Heat Supply Industry	√	
5	Biological Preparations Manufacturing Industry	√	
6	Water Supply and Water Works Industry	√	
7	Railway Transport Industry	√	
8	Omnibus Industry	√	
9	Water Transport Industry	√	<i>Ship Law</i>
10	Telecommunications Industry	√	<i>Law Concerning Nippon Telegraph And Telephone Corporation, Etc.</i>
11	Security Industry	√	

	<b>Sectors Or Matters</b>	<b>Legal Source Or Authority: Foreign Exchange Law</b>	<b>Legal Source Or Authority: Other</b>
12	Mining Industry (Including Oil and Natural Gas Exploration and Development)		<i>Mining Law</i>
13	Air Transport Industry	√	<i>Civil Aeronautics Law</i>
14	Registration of Aircraft in the National Register and Matters Arising from such Registration		<i>Civil Aeronautics Law</i>
15	Matters Related to or Arising from the Nationality of a Ship, and the Acquisition of Ship or of any Interest in Ship		<i>Ship Law</i>
16	Explosives Manufacturing Industry	√	
17	Aircraft Industry	√	
18	Arms Industry	√	
19	Nuclear Energy Industry	√	
20	Space Industry	√	
21	Electricity Utility Industry	√	
22	Gas Utility Industry	√	
23	Broadcasting Industry	√	<i>Radio Law</i> <i>Broadcast Law</i>
24	Freight Forwarding Business Industry		<i>Freight Forwarding Business Law</i>
25	Financial Services (in regard of Deposit Insurance)		<i>Deposit Insurance Law</i> <sup>27</sup>

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<sup>27</sup> The deposit insurance system only covers financial institutions which have their head offices within the jurisdiction of Japan.

	<b>Sectors Or Matters</b>	<b>Legal Source Or Authority: Foreign Exchange Law</b>	<b>Legal Source Or Authority: Other</b>
26	The Maintenance, Establishment or Disposal (Including Privatization) of a Public Monopoly or State Enterprise		N/A
27	Subsidies		N/A <sup>28</sup>
28	Land Transaction		<i>Alien Land Law</i> <sup>29</sup>

## **INVESTMENT PROTECTION**

### Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

All payments relating to investments of an investor may be freely transferred into and out of Japan without delay. (In exceptional cases, a transfer may be delayed or prevented through the equitable, non-discriminatory and good faith application of its laws. Japan also reserves the right to delay or prevent transfers in the event of serious balance-of-payments and external financial difficulties or threat thereof, etc.)

### Expropriation and Compensation

Japan provides fair and equitable treatment and full and constant protection and security to all foreign investments and investors. Any exceptional cases of expropriation or nationalization of foreign investments or any measure tantamount to expropriation or nationalization (hereinafter referred to as “expropriation”) may only be: (a) for a public purpose; (b) in a non-discriminatory manner; (c) upon payment of prompt, adequate and effective compensation; and (d) in accordance with due process of law. Compensation shall be equivalent to the fair market value of the expropriated investments when the recognition of project was notified. Investors affected have a right of access to the courts of justice or the administrative authorities. Data is not available on expropriation cases over the last three years. (Local government in Japan can also undertake expropriation, but there is no available data that consolidates all the expropriations undertaken in Japan both at the national level and the local level.)

### IPR

#### (i) *Industrial Property*

Japan protects technology, designs and trademarks under four industrial property laws: the *Patent Law*, *Utility Model Law*, *Design Law* and *Trademark Law*. Furthermore, Japan protects well-known trademarks which have goodwill under the *Unfair Competition Prevention Law*.

Japan is a member of major intellectual property agreements, such as the Agreement on Trade-Related Aspects of IPR (TRIPS), the Convention Establishing the World Intellectual Property

<sup>28</sup> National treatment may not be accorded in the case of subsidies designed for R&D investments.

<sup>29</sup> Japan may prohibit or restrict the acquisition or lease of land properties in Japan by foreign investors, in principle, Japan will do so only on a reciprocal basis, and to date, such measures have never been executed.

Organization (WIPO), the Paris Convention for the Protection of Industrial Property, the Trademark Law Treaty, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Patent Cooperation Treaty and the Budapest Treaty on the International Recognition of Deposit of Microorganisms for the Purposes of Patent Procedure. Foreign right holders are generally given the same protection as Japanese right holders under these laws.

(ii) *Copyright*

In 1970, *The Copyright Law* was comprehensively revised. The law has been amended almost every year since due *inter alia* to technological progress and the conclusion of various treaties. In addition, Japan became a Party to the following international agreements (with the year of accession in brackets):

- Convention Establishing the WIPO (1975);
- the Paris Act of the Berne Convention (1975)
- the Paris Act of the Universal Copyright Convention (1977);
- the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms [“Phonogram Convention”] (1978);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [Rome Convention] (1989);
- the TRIPS Agreement (1994);
- the WIPO Copyright Treaty (2000); and
- the WIPO Performances and Phonograms Treaty (2002).

Thus, foreigners’ copyrights and related rights are protected in the same way as those of Japanese in general.

(iii) *Layout-Designs (Topographies) of Integrated Circuits*

The *Law Concerning the Semiconductor Integrated Layout* was enacted in 1985 to protect the IPR of circuit layouts of semiconductor integrated circuits. The same protection applies to foreigners as well as Japanese under the law.

(iv) *Trade Secrets*

Japan permits claims for damages and the right to request an injunction against the act of unfair acquisition, using or disclosing of trade secrets through the *Unfair Competition Prevention Law*. This Law gives the same protection to foreigners as Japanese.

**For Further Information See:**

**Japan Patent Office Website [Http://Www.Jpo.Go.Jp/Index.Htm](http://www.jpo.go.jp/index.htm)**

**Agency For Cultural Affairs Website [Http://Www.Bunka.Go.Jp/English/2002-Index-E.Html](http://www.bunka.go.jp/english/2002-index-e.html)**

Dispute Settlement

For settlement of disputes associated with investment in Japan, foreign investors have access to the same courts and tribunals as domestic investors. Japan signed the International Center for Settlement of Investment Disputes (ICSID) convention in 1965. In addition, foreign investors have access to a range of alternative dispute settlement mechanisms such as international arbitration, etc. The Government of Japan has not been involved in any cases both ISDS and SSDS relating investment issues in Japan.

**INVESTMENT AND DEVELOPMENT**

Performance requirements:

There are few exceptional performance requirements in Japan.<sup>30</sup>

**INVESTMENT PROMOTION AND INCENTIVES**

Investment Promotion Agencies

The Japan External Trade Organization (JETRO) is a government-related organization that works to promote mutual trade and investment between Japan and the rest of the world. Its current core focus is on attracting FDI into Japan. JETRO undertakes strategic investment promotion activities through 73 overseas offices in 55 countries, as well as 38 offices in Japan, including their Tokyo and Osaka headquarters.

JETRO has established 6 Invest Japan Business Support Centers (IBSC), i.e. “one-stop service centers” for foreign investors, in Japan. IBSC offers a wide range of services and facilities to assist foreigners who wish to start or invest in a business in Japan.

**▼ Contact Details For Jetro’s Ibscs Can Be Found At:**

**[Http://Www.Jetro.Go.Jp/En/Invest/Investmentservices/Ibsc/](http://www.jetro.go.jp/en/invest/investmentservices/ibsc/)**

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<sup>30</sup> See “Senior Management and Board of Directors.”

## Fiscal, Financial, Tax or Other Incentives

Many municipalities and cities offer incentives in the form of subsidies and/or reduction of local taxes (e.g. Fixed Property Tax, City Planning Tax etc.) to enterprises (both foreign and domestic) that set up operations in that area.

### ▼ Details On Incentives Etc. Provided By Local Governments Can Be Found At:

[Http://Www.Jetro.Go.Jp/En/Invest/Region/](http://www.jetro.go.jp/en/invest/region/)

[Http://Www.Investment-Japan.Go.Jp/Db.Htm](http://www.investment-japan.go.jp/db.htm)

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Prior notification is required for outwards FDI in specific cases. In principle, an investor wanting to withdraw some/all of his capital need only present to the Minister of Finance, through the Bank of Japan, a notification regarding the investment within 20 days of the investment having been made. In a limited number of sectors, investors must notify the Minister of Finance of the intention to transfer capital, through the Bank of Japan, up to two months prior to the capital transfer. The sectors for which a prior notification is required (so-called “restricted industries”) are listed by Government Notice by the Minister of Finance and Minister in charge of the industry involved.

### Foreign Exchange Control Order

The Government of Japan examines the transfer of specific technology to specific destinations from the viewpoint of maintaining international peace and security. It's laws contains a governmental order; the “Foreign Exchange Order”. This governmental order includes lists of controlled technologies under control. See <http://www.meti.go.jp/policy/anpo/index.html>

## **LABOUR, MOVEMENT OF PEOPLE AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS**

### Labour

The following laws apply to both domestic and foreign firms on a non-discriminatory basis.

(i) *Labour Standards Law*

This law provides the minimum standards of working conditions, such as wage and working hours, which each employer should guarantee. The purpose of this law is to make employers fulfill the standards by means of penal regulations and inspection.

(ii) *Minimum Wages Law*

This law provides the minimum wage which each employer should pay. The purpose of this law is to keep the workers' living stable, raise the quality of the labour force and secure the fair competition among undertakings by improving the working conditions.

## Movement of People

Japan recognizes that human resources play a substantial role as a driving force in industrial growth. Securing quality personnel is essential to running a successful business. Facilitating the resident-eligibility clearance for quality foreign managers, researchers and engineers is vital for the promotion of inward FDI into Japan. Furthermore, it is also important to create a comfortable living environment for foreign professionals and their families in Japan. This requires improvement in education, medical services and pension systems. In this context, Japan is carrying out various measures such as further improving the system related to entry and sojourn of foreign nationals.

Japan issues Working Visas for foreign nationals for certain statuses of residence. “Investor/Business Manager” and “Intra-company Transferee” are examples of main types of statuses of residence related to inbound investments for Japan.

As a basic rule, a visa must be applied for at the Japanese Embassy or Consulate closest to the applicant’s place of residence. Regarding visas other than “Temporary Visitor” visas,<sup>31</sup> it is recommended that the applicant first obtain a Certificate of Eligibility at a local immigration office in Japan. (One may apply by a proxy.) This document is required to speed visa issuance and obviates the need to supply various documents certifying the purpose of visit.

### ▼ Details On Visas:

(1) For General Information [Http://Www.Mofa.Go.Jp/J\\_Info/Visit/Visa/Index.Html](http://www.mofa.go.jp/j_info/visit/visa/index.html)

(2) For Specific Information [Http://Www.Mofa.Go.Jp/About/Emb Cons/Mofaserv.Html](http://www.mofa.go.jp/about/emb_cons/mofaserv.html)

### ▼ Details on status of residence:

(1) For “Investor/Business Manager”

[http://www.mofa.go.jp/j\\_info/visit/visa/appendix1.html#1](http://www.mofa.go.jp/j_info/visit/visa/appendix1.html#1)

(2) For “Intra-company Transferee”

[http://www.mofa.go.jp/j\\_info/visit/visa/appendix1.html#7](http://www.mofa.go.jp/j_info/visit/visa/appendix1.html#7)

### ▼ Details on Certificate of Eligibility

[http://www.mofa.go.jp/j\\_info/visit/visa/03.html#c](http://www.mofa.go.jp/j_info/visit/visa/03.html#c)

In April 2003, Japan joined the APEC Business Travel Card (ABTC) scheme, which facilitates the movement of business people within the APEC region. A business person can travel to applicable APEC economies with a passport and an ABTC only (i.e. he/she does not need a visa). There are currently 17 APEC economies participating in this scheme.

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<sup>31</sup> Short-time stay within 90 days, not working directly for remuneration in Japan.

**▼ Details On Japan's Participation In Abtc:**

[Http://Www.Mofa.Go.Jp/Policy/Economy/Apec/Abtc/Index.Html](http://www.mofa.go.jp/policy/economy/apec/abtc/index.html)

*Senior Management and Board of Directors*

With the exception of the Telecommunications sector, there are no restrictions on the nationality of Directors in Japan.

At least one representative director of a corporation (so called “kabushiki kaisha” in Japanese) (one representative officer in the case of a corporation with committees) must be a resident in Japan. A Japanese version of the Limited Liability Company (so called “godo kaisha” in Japanese) is subject to a similar requirement with respect to its representative members. (Under the Corporate Code, a foreign company intending to engage in transactions in Japan must appoint at least one representative who is a resident in Japan.)

In the Telecommunications' sector board members and auditors in Nippon Telegraph and Telephone Corporation (NTT), NTT East and NTT West are required to have Japanese nationality.

**GOVERNMENT PROCUREMENT**

See the Ministry of Foreign Affairs 'Government Procurement Information portal  
<http://www.mofa.go.jp/policy/economy/procurement/index.html>

**COMPETITION POLICY**

Japan strongly promotes and upholds fair and free competition, focusing on the enforcement of the *Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade* (i.e. the “*Anti-monopoly Act*”; hereinafter referred to as *AMA*). The *AMA* mainly prohibits three types of business practices, namely; (1) private monopolization; (2) unreasonable restraint of trade; and (3) unfair trade practices.

The *AMA* was amended in January 2006, and is expected to further strengthen the capabilities of the Japan Fair Trade Commission (JFTC) to enforce the *AMA* and eliminate/deter anti-competitive activities, in particular hard-core cartels and bid rigging activities.

The amended *AMA* includes the following main items which are expected to strengthen its enforcement powers.

### *Revision of the surcharge system*

The rate of surcharge which is ordered and paid by an enterprise engaged in unreasonable restraint of trade has been increased as follows:

Manufactures, etc.	Large-Sized Enterprise: 6%→10% Small And Medium-Size Enterprises (Smes): 3%→4%
Wholesalers	Large-Size Enterprises: 1%→2% Smes: 1% (No Change)
Retailers	Large-Size Enterprises: 2%→3% Smes: 1%→1.2%

### *Introduction of a leniency program*

The leniency program which was introduced into the *AMA* allows enterprises that disclose their violations and provide related information to the JFTC (before a JFTC on-the-spot inspection) receive immunity or a reduction in surcharge payments.

### *Introduction of compulsory measures for criminal investigations, etc.*

The provisions relating to compulsory measures for criminal investigations were developed for cases where officers of the JFTC inspect, search and seize based on court-issued warrants.

### *Revision in procedures of investigations, etc.*

The JFTC issues orders for elimination measures without issuing recommendations after having provided the respondent with a preliminary opportunity to submit his/her opinion.

#### **▼ Details On The Amendments Of Ama:**

[Http://Www.Jftc.Go.Jp/E-Page/Pressreleases/2005/April/050420.Pdf](http://www.jftc.go.jp/E-Page/Pressreleases/2005/April/050420.Pdf)

#### **▼ Details On The Ama:**

[Http://Www.Jftc.Go.Jp/E-Page/Legislation/Ama/Amended\\_Ama.Pdf](http://www.jftc.go.jp/E-Page/Legislation/Ama/Amended_Ama.Pdf)

#### **▼ Website Of The Japan Fair Trade Commission:**

[Http://Www.Jftc.Go.Jp/E-Page/Index.Html](http://www.jftc.go.jp/E-Page/Index.Html)

# REPUBLIC OF KOREA

## Acronyms

KFTC	Korea Fair Trade Commission
KOTRA	Korea Trade Investment Promotion Agency

## INTRODUCTION

Korea's current FDI regime is based on the *Foreign Investment Promotion Act* enacted in 1998. With the introduction of this Act, policies on FDI and the related systems have been restructured to make investment in Korea easier from the foreign investor's perspective.

Above all, under this Act, foreign and domestic investments are treated identically, and dividend remittance is guaranteed. No specific restrictions may apply unless such investments violate laws and ordinances.

Since the mid-1980s, Korea has pursued policies strongly to attract foreign investment. With the Asian financial crisis hitting Korea in 1997, we shifted our policies on attracting foreign investment to positive opening and liberalization in order to expand foreign exchange and conduct corporate restructuring. Accordingly, we opened the economy to global foreign investment, abolished the previous *Foreign Exchange Management Act*, and drastically liberalized the newly enacted *Foreign Exchange Trade Act*. Regarding foreign exchange trade, we abolished foreign exchange restrictions relating to the external operating activities of corporations and financial institutions in 1994, and other foreign exchange restrictions for personal capital trade towards the end of 2000. Thus, we shifted the principle of foreign exchange trade from "banning in principle and allowing exceptionally" to "allowing in principle and banning exceptionally." Moreover, we completely liberalized the acquisition by foreigners of Korean land, allowing foreigners to freely acquire land for either business or non-business purposes in Korea.

In 2000, we added real estate and stocks, among others, to the scope of items in which foreigners can invest. Likewise, even in the event that more than two foreign investors invest in the same region, we have eased conditions for designating foreign investment zones to facilitate these efforts, as well as relaxed registration conditions for foreign-investing corporations, thereby bolstering support for foreign investors, improving the foreign investment environment, and moving toward the promotion of foreign investment.

After 2002, the global economy entered a period of recession, slowing M&A worldwide, and leading to a continued decrease in foreign investment in Korea. Thus, we are concentrating on efforts to bolster the provision of incentives for foreign investment, to boost the attractiveness of investment by improving foreigners' living environments, and to enhance the professionalism of the government officials responsible for foreign investment.

## Where to find further information:

Further information is available through:

Invest Korea

KOTRA Bldg. 300-9, Yomgok-dong, Seocho-gu, Seoul 137-170, Korea

Telephone: 82-2-3460-7543/7545

Facsimile: 82-2-3460-7946/7

Website: <http://www.investkorea.org>

## SCREENING OF FOREIGN INVESTMENT

### i) What is screened?

We have in principle no prior approval or screening systems for foreign investment, but we operate a system for the notification of general matters regarding investment.

#### 1) Prior notification

- FDI through acquiring newly-issued stocks;
- FDI through acquiring existing stocks (companies in the defense industry should obtain permission from the Minister of Commerce, Industry and Energy in advance to acquire existing stocks);
- FDI through long-term loans;

#### 2) Ex-post-facto notification

- Acquisition of stocks through mergers (within 30 days);
- Transfer of stock or equity (within 30 days from the first day of the contract);
- Decrease in stock or equity ([within 30 days](#));
- Application for registration of foreign invested firm, changes, or deletion

### ii) Transparency of the screening process

Korea provides information relating to the regulatory framework on foreign capital participation through the “Guide to the Investment Regimes of the APEC Member Economies.” Under the *Foreign Investment Promotion Act*, to promote the transparency of Korea’s FDI regime and provide further convenience for foreign investors, a comprehensive annual announcement on all FDI restrictions in various individual laws is made by the Minister of Commerce, Industry and Energy.

## Where to find further information:

Korea's foreign investment policy summaries

<http://english.mocie.go.kr>

<http://www.investkorea.org>

*Foreign Investment Promotion Act*

<http://www.moleg.go.kr/>

*Foreigner Land Acquisition Act*

<http://www.moleg.go.kr/>

## SECTOR-SPECIFIC LAWS AND POLICIES

### (i) Telecommunications

FDI in core telecommunication business is subject to domestic law: foreign governments, foreign nationals and foreign corporations may own 49% or less of the total quantity of stocks or equity with voting rights.

### (ii) Media

Radio broadcasting and television broadcasting are wholly closed to foreign investors. Foreign investment in the cable broadcasting and broadcasting channel use is permitted when the foreign investment ratio is 49% or less of the total quantity of stocks or equity with voting rights. Foreign investment in the satellite broadcasting and the news provision is allowed when the foreign investment ratio is 33% or less and less than 25%, respectively.

### (iii) Transportation

Foreign investment in the coastal water passenger/freight transportation is allowed when it is transportation between South and North Korea. In addition, joint venture with Korean shipping company is mandatory, and the foreign investment is allowed when the foreign investment ratio is less than 50%. The scheduled air transport and non-scheduled air transport is allowed at less than 50%.

### (iv) Real Estate

#### 1) Land acquisition through notification

- **Subject:** land acquired through contract
- **Period:** within 60 days from the agreement date of the contract.

- **Place:** Land Registration Division of the competent city/county/district office.
- Required documents:
  - Transcript of land registration; and  
Land acquisition contract

2) Land acquisition subject to prior permission

- **Subject:** land in military installation reservations; naval bases; military air base areas; cultural property protection zones; ecosystem preservation districts; islands necessary for military purposes; green belt zones.
- **Period:** prior to the contractual agreement.
- **Place:** Land Registration Division of the competent city/county/district office.
- **Required documents:**
  - Transcript of land registration; and  
Land acquisition contract.
- **Processing period:** Within 15 days from the filing date of the application.
  - The head of city/county/district office must grant permission on the condition that the acquisition of land located in the said designated areas does not cause any inconvenience in such areas (Article 4.3 of the *Foreign Land Acquisition Act*).

**Where to find more information:**

<http://www.moleg.go.kr/>

**INVESTMENT PROTECTION**

(i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

With respect to the proceeds that come from stocks acquired by a foreign investor, the proceeds from the sale of stocks, the principal, interest and service charges paid in accordance with the long-term loan contract, and the compensation paid in accordance with a contract for the introduction of technology, the remittance thereof to foreign economies shall be guaranteed in accordance with the contents of the permission or report of the contract for foreign investment or for the introduction of technology, as of the time of the said remittance.

The suspension of foreign exchange transactions or other restrictive measures taken under situations of critical and rapid change in the domestic economic situation, and war as stipulated by Article 6.4 of the *Foreign Exchange Transactions Act*, shall not apply to FDI made pursuant to the Foreign Investment Promotion Act.

(ii) Expropriation and Compensation

The purpose of expropriation, range of public purpose, and procedures and compensation for expropriation are stipulated concretely in the Act for Acquisition and Compensation for Losses and from Land for Public Use.

Korea follows international standards of law, and as such limits permissible expropriation to cases involving a public purpose where expropriation is undertaken in a non-discriminatory manner under due process of law and is accompanied by payment of prompt, adequate and effective compensation.

Investors whose property is to be expropriated for a public purpose can be given appropriate compensation according to international law and the relevant domestic laws.

(iii) IPR

Laws relating to intellectual property ownerships are as follows:

*Patents Act*

*Trademark Act*

*Copyright Act*

*Computer Programs Protection Act*

*Unfair Competition Prevention And Trade Secret Protection Act*

IPR refer to the rights granted by law for original works in the areas of literature, art, music, compilations, databases and computer programs, which are so valuable as to be protected by law. Just like the ownership rights for real estate or movable assets such as machinery which can be used by the owner or leased to others, the same is true for intellectual property.

In order to comply with the TRIPS Agreement, Korea revised all of its relevant domestic laws in 2001 to meet international standards to improve the protection of IPR. To further strengthen this commitment, Korea has joined the following:

The Convention Establishing the WIPO (1967);

The Paris Convention for the Protection of Intellectual Property (1980);

The Patent Cooperation Treaty (PCT) (1984);

The Budapest Treaty on the International Recognition of the Deposit Microorganism for the Purpose of Patent Procedure (1988);

The WTO Agreement on Trade-related Aspects of IPR [TRIPs Agreement] (1995);

The Berne Convention for the Protection of Literary and Artistic Works (1996);

The Strasbourg Agreement Concerning the International Patent Classification (1998);

The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Trademarks (1998);

The Trademark Law Treaty (2002); and

Protocol Relating to the Madrid Agreement Concerning the International Registration of Trademarks (2003).

In Korea, with the Office for Government Policy Coordination taking the leading role, five projects are being promoted to enhance the protection of IPR:

- (a) strict enforcement of regulations against the infringement of IPR;
- (b) advancement of laws and systems for the protection of IPR;
- (c) enhancement of public awareness about the protection of IPR; and
- (d) reinforcement of international countermeasures for the protection of IPR; and (e) the establishment of a cross-departmental implementation system.

(iv) Dispute Settlement

Korea is a member of the International Center for the Settlement of Investment Disputes (ICSID). According to bilateral investment agreements and FTAs contracted between Korea and other countries, most foreign investors can submit disputes to the ICSID.

## **INVESTMENT AND DEVELOPMENT**

(i) Performance requirements

Since the abolition of performance requirements on foreign investment in 1989, no performance requirements such as export or local content obligations that are inconsistent with the WTO's Trade-related Investment Measures [TRIMs] (1995) Agreement have been in force.

(ii) Other policy measures affecting inward foreign investment

Not available.

## **INVESTMENT PROMOTION AND INCENTIVES**

(i) Investment Promotion Agencies

Invest KOREA is the Korean national investment promotion agency (IPA), established with the sole purpose of facilitating the entry and successful establishment of foreign business in Korea. Its involvement doesn't stop there, since it delivers an extensive post-establishment service designed to promote the rapid settlement of foreign corporations in Korea and ensure that they utilize the benefits of the Korean investment environment to the fullest extent.

Invest KOREA is the new name of the Korea Investment Service Center which was established in 1998 as part of a radical liberalization of the Korea investment regime under the *Foreign Investment Promotion Act* of the same year.

Invest KOREA is staffed with KOTRA (Korea Trade Investment Promotion Agency) employees who have extensive expertise and experience in supporting inbound FDI, public servants from other related government agencies, and experts from the private sector in fields such as accounting, law (including tax and labor law), as well as M&A. Invest KOREA personnel have become progressively more specialized to meet the increasingly particular needs of clients. Accordingly, the agency's staff will be bolstered by specialists from specific industrial sectors to provide faster and more accurate investment-related services to foreign investors. Invest KOREA operates a network of 36 overseas branch offices located across five continents in the major financial and decision-making centers of the world.

(ii) Fiscal, Financial, Tax or Other Incentives

Since Korea has a limited land area and high labor costs compared to other competitors, it offers many incentives to foreign investors. Korea offers tax breaks to highly intensive technology related business, R&D business, and companies working in foreign economic zones. These businesses are granted tax breaks of corporate income tax and income tax for up to 7 years, and some tariff cuts are given to capital related to foreign investment. Large-scale investment companies are designated as foreign investment areas and are provided with benefits such as tax cuts or leasing costs exemption. In addition, for foreign investors investing in high-technology, Korea provides cash grants (5-15%) depending on the level of technology or scale of employment.

**Further information is available through:**

Invest Korea

KOTRA Bldg. 300-9, Yomgok-dong, Seocho-gu, Seoul 137-170, Korea

Telephone: 82-2-3460-7543/7545

Facsimile: 82-2-3460-7946/7

<http://www.investkorea.org>

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

There are no restrictions on the repatriation of capital and earnings by foreign investors related to foreign investment. There is a reporting system for cash transactions over US\$10,000, and a maximum of US\$10,000 in cash may be taken out of Korea by an individual. Any larger amounts must be transferred through the banking system. There are no laws or regulations that restrict the export of technology.

## LABOR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

This offers foreign corporations an explanation of the laws relating to private operation (e.g. Law on minimum wages, labour, minimum qualifications for engineers). The entry and departure procedures of Korea are similar to those of many other countries in the world. Many convenient measures are provided, especially to those who work for foreign companies.

Foreigners who wish to receive a visa to work at a foreign company should attach several documents to a visa application form and submit them to a Korean embassy or consulate. When employees of a foreign company wish to extend the original duration of their stay, they should submit an application form for a visa extension with references and a work certificate to the Invest KOREA of KOTRA or a local immigration office.

Regarding labor disputes, the following outlines and explains the domestic labour laws applicable to foreign corporations.

Labor related laws are as follows:

- *Labor Standards Act*: The main contents include establishment of the uniform standards relevant to the formation/contents/modification and completion of an employment contract, invalidation of the employment contract in question when the established standards are violated, and, at the same time, imposition of sanctions on the employer who is in violation of the standards.
- *Trade Union and Labor Relations Adjustment Act*: The purpose of this Act is to promote preservation/improvement of working conditions and status improvement of workers by prescribing matters relevant to the rights of association, collective bargaining, and collective action which are guaranteed by the Constitution, and to maintain industrial peace by preventing and resolving labor union disputes through fair mediation whenever a dispute arises between a trade union and the employer.

Korea uses the status of sojourn system with respect to immigration policy. There are 35 types of visas reflecting specific social activities and residency purposes for foreigners. Any foreigner residing in Korea must obtain permission from the relevant authorities should he or she attempt to engage in any activity that differs from what is permitted under the assigned visa.

**Further information may be found at the Ministry of Justice:**

<http://www.moj.go.kr>

## GOVERNMENT PROCUREMENT

In Korea's procurement framework, the *Act on Contracts to Which the State is a Party* underpins the procurement for central government organizations, while the *Act on Contracts to Which the Local Government is a Party* regulates procurement for local governments and lastly the Framework Act on the Management of Government-Invested Institutions for public enterprises.

Each Act articulates procurement procedures which the procurement agency has to comply with, thus ensuring the realization of the Best Value through enhanced transparency in government procurement.

The Best Value is the major principle which Korea has pursued in its government procurement. This principle can be achieved through participation by interested suppliers.

The Best value in government procurement can be promoted by:

- introducing a wide range of electronic means in government procurement
- enhancing efficiency, effectiveness, and transparency through the disclosure of procurement information
- extending competition with the adoption of non-discrimination principles in the WTO Government Procurement Agreement.

## **COMPETITION POLICY**

The Korea Fair Trade Commission (KFTC) was organized in 1981 pursuant to the Fair Trade Act. The Fair Trade Commission is responsible for enforcing the Fair Trade Act, the Fair Subcontract Transactions Act and the Standardized Contract Act, all of which aim to encourage fair and free competition.

Korea's competition policy aims to encourage free and fair competition by prohibiting abuse of market dominant positions, excessive concentration of economic power, undue collaborative activities, and unfair trade practices.

The KFTC has led economic deregulation within the government in order to promote industrial competitiveness. Through such efforts, the KFTC has contributed to the strengthening of market functions and has brought about substantial deregulation. The KFTC has strived to minimize any public inconveniences that may arise in the process of filing complaints, and has established a "consumer satisfaction administrative system" to make KFTC affairs more consumer-oriented.

**Further information may be found at:**

<http://www.ftc.go.kr/data/hwp/heritage.doc>



## MALAYSIA

### Acronyms

AALCC	Asian-African Legal Consultative Committee
CEPT	Common Effective Preferential Tariff
DOSH	Department Of Occupational Safety And Health
FCZ	Free Commercial Zones
FIC	Foreign Investment Committee
FIZ	Free Industrial Zones
ICT	Information and Communication Technology
IGA	Investment Guarantee Agreement
MDEC	Multimedia Development Corporation
MIDA	Malaysian Industrial Development Authority
MITI	Ministry of International Trade And Industry
MSC	Multimedia Super Corridor
MYIPO	Intellectual Property Corporation Of Malaysia
RDAS	Regional Development Authorities
RM	Malaysian Ringgit
SEDCS	State Economic Development Corporations
SOCSSO	Social Security Organisation

## INTRODUCTION

Malaysia has always maintained a liberal foreign investment regime because it recognises the contribution of FDI to economic performance and international competitiveness. FDI is sought as a source of capital funds and foreign exchange, and as a means of securing industrial technology, managerial expertise, and marketing know-how and networking to achieve higher levels of growth, employment, productivity and export performance.

Malaysia promotes both FDI and domestic investment as sources of economic growth. Over the years, various policies and measures were introduced to promote investment. Among these are liberal policies which allow 100% foreign equity ownership in the manufacturing and related services sectors. These liberal policies, investment facilitation measures and dynamic promotional efforts have been successful in attracting a large number of investment projects into the economy.

FDI has contributed significantly to the economic development of the economy not only in terms of GDP growth, but also in terms of structural changes that have transformed Malaysia from basically a producer of primary commodities to an industrialised economy. With over three decades of industrial development, Malaysia has developed a strong base for manufacturing related service sectors and currently hosts a substantial commercial presence of major multinational companies from around the world.

In the 1960s, foreign investors were largely involved in developing import-substitution industries such as food, beverages and tobacco, printing and publishing, building materials, chemicals and plastics.

To address the growing unemployment problem and limitations posed by the small domestic market, the development of export-oriented and labour-intensive industries was encouraged in the 1970's. The 1970s saw an influx of foreign investment primarily in the electrical & electronics and textiles industries, utilising abundant labour and other comparative advantages. In the late 1980s, following further liberalisation of foreign investment policies, provision of attractive incentives/facilities, intensification of promotional efforts and favourable external factors, FDI flows into the manufacturing sector increased significantly.

From the 1990s, investment and industrial policies were geared towards encouraging capital and technology intensive industries. Towards this end, projects which embodied high technology, high value-added and skills intensity and which created industrial linkages were promoted. To further diversify the economy, the manufacturing services sector covering value chain activities such as R&D, design, engineering and prototyping, integrated logistics, marketing and distribution, operational headquarters, international procurement centres/ regional distribution centres, regional and representative offices are being promoted.

The development, planning and implementation of the Malaysian economy is undertaken through the National Development Plans, National Vision Plan, the 5 year plans and the 10 to 15 years' Industrial Master Plans. The current development plan is the 9<sup>th</sup> Malaysia Plan and the 3<sup>rd</sup> Industrial Master Plan which were launched in March and August 2006 respectively. The emphasis of the 9<sup>th</sup> Malaysia Plan include, among others, to raise the economy up the value chain, increase the capacity for knowledge and innovation, and nurture a "first class mentality" and to address persistent socio-economic inequalities constructively and productively. The 3<sup>rd</sup> Industrial Master Plan covers a 15 year period from 2006-2020 charts the policy directions/strategies aimed at developing the manufacturing and services sectors. It consists of 10 goals which include aspects related to strengthening Malaysia's position as major global trading nation, generating investments in targeted growth areas, integrating Malaysian companies into regional and global networks,

sustaining industrialisation, positioning the services sector as a major source of growth, and developing innovative and creative human capital.

## SCREENING OF FOREIGN INVESTMENT

Malaysia maintains a screening process regime for both foreign and domestic investments to ensure the orderly development and growth of the economy. There are no specific foreign investment laws. The relevant laws and regulations that apply to both foreign and domestic investors are summarised as below:

Citation	Summary
<i>Industrial Coordination Act 1975</i>	Provides for the coordination and orderly development of manufacturing activities.
<i>Promotion of Investments Act</i> 1986	Provides for incentives for manufacturing, agriculture, tourism and hotel and other services related projects.
<i>Companies Act 1965</i>	Provides guidelines and registration procedures for all companies conducting businesses in Malaysia.
<i>Income Tax Act 1967</i>	Contains tax law, special incentive relief and exemptions from tax.
<i>Free Zones Act 1990</i>	Enables operations in the zones to enjoy minimum custom control and formalities regarding the import of raw materials, parts, machinery and equipment as well as in the export of finished goods.
<i>Exchange Control Act 1953</i>	Provides for the recording, monitoring and supervision of payments to non-residents, and also to protect the country's foreign exchange position should the need arise.

**N.B. An investment guidebook entitled *Malaysia-Investment in the Manufacturing Sector — Policies, Incentives and Facilities* is available from the Malaysian Industrial Development Authority (MIDA).**

### (i) Manufacturing

Under the *Industrial Coordination Act 1975*, companies — whether local or foreign owned, with shareholders' funds of RM2.5 million and more or which employ 75 or more full time workers are required to be licensed. Companies below these threshold limits are not required to be licensed. Approvals for a Manufacturing Licence for new manufacturing projects and for expansion / diversification projects for non-sensitive industries are granted 7 working days from the date complete information is received. In the case of sensitive industries, approvals are granted within 8 weeks from the date complete information is received.

The guidelines on foreign equity ownership participation in greenfield investment in the manufacturing sector are as follows:

- 100% foreign ownership is allowed for investments in Malaysia for all new investment projects, as well as for expansion and diversification projects, without any export requirements, except for some limited areas which affect national security, public health, morals and where there is excess capacity or a shortage of raw materials' supply.
- The export conditions previously imposed on manufacturing companies have also been relaxed. All existing companies with export conditions can now apply for approval to sell in the domestic market:
  - Up to 100% of their output for those products with nil duty or those products not produced locally.
  - Up to 80% of their output if the domestic supply is inadequate or there has been an increase in imports from ASEAN for products with Common Effective Preferential Tariff (CEPT) duties of 5% and below.

(ii) Non-manufacturing Sector

For the non-manufacturing sector, generally, foreign ownership is restricted to a maximum of 30% equity participation in the services sector, except for certain sectors where higher levels of foreign equity are allowed. Nevertheless, to promote selected strategic services sectors, up to 100% foreign equity participation is allowed in the case of companies granted incentives. These include International Procurement Centres, Regional Distribution Centres and Operational Headquarters.

(iii) Mergers, Acquisitions and Takeovers

The acquisitions of assets, mergers or takeovers of companies are governed by the Foreign Investment Committee (FIC) Guidelines for activities not under the purview of respective Ministries and agencies. Acquisitions by licensed manufacturing companies and corporate proposals by listed and non-listed public companies are under the purview of the Ministry of International Trade and Industry and the Securities Commission respectively. The FIC guidelines are aimed at ensuring that the Mergers & Acquisitions:

- (a) result directly or indirectly in a more balanced Malaysian participation in equity ownership and control.
- (b) lead directly or indirectly to net economic benefits in terms of Malaysian participation, particularly participation by Bumiputera (Malaysian of indigenous Malay origin), ownership and management, income distribution, growth, employment, exports, quality, range of products and services, economic diversification, processing and upgrading of local raw materials, training efficiency, and R&D.
- (c) do not have adverse consequences in terms of national policies in such matters as defence, environmental protection or regional development.
- (d) are in line with the objectives of the New Economic Policy on the acquiring parties concerned.

Malaysia has liberalised the FIC guidelines on mergers, acquisition and takeovers effective 21 May 2003 as follows:

- (i) For acquisitions by Malaysian and foreign interests, the equity condition imposed will be Bumiputera equity of at least 30%. In the case of acquisitions by foreign interests, the remaining equity can be held either by foreign interests or jointly by foreign and Malaysian interests.
- (ii) The threshold level for acquisitions by foreign and Malaysian interests which is exempted from FIC approval has been raised from RM5 million to RM10 million. Acquisition and control by foreign interests below the RM10 million threshold is not subject to FIC rules subject to the proviso that any proposed acquisition does not amount to more than 15% by any one foreign interest or associated group or in the aggregate more than 30% of the equity/voting power of a Malaysian company or business.
- (iii) In line with Malaysia's liberal investment regime, foreign interests are allowed to acquire landed properties exceeding RM150,000 per unit (previously not allowed to acquire landed property valued less than RM250,000 except for industrial land).

(iv) Multimedia Super Corridor

Malaysia has established the Multimedia Super Corridor (MSC) to spearhead the development of the Information and Communication Technology (ICT) sector. A significant number of foreign companies have located in Malaysia, using the economy as a base for IT and multimedia activities for the regional and global market. A fully empowered one-stop agency, the Multimedia Development Corporation (MDeC) has been established to ensure the MSC meets company needs.

Companies with MSC status are entitled to enjoy a set of incentives and benefits backed by the Malaysian Government's Bill of Guarantees which:

- Provide a world-class physical and information infrastructure;
- Allow unrestricted employment of knowledge workers from overseas;
- Ensure freedom or ownership of companies;
- Allow freedom of sourcing capital globally for MSC infrastructure and freedom of borrowing funds;
- Provide competitive financial incentives including no income tax for up to 10 years or an Investment Tax Allowance of 100%, and no duties on the import of multimedia equipment;
- Provide for intellectual property protection;
- Ensure no censorship of the Internet; and
- Provide globally competitive telecommunication tariffs.

(v) Land and Building Ownership

Acquisition of land is subject to the approval of the Federal and/or respective State governments. Foreigners can purchase industrial land which is usually developed by government agencies, such as State Economic Development Corporations (SEDCs) and Regional Development Authorities (RDAs). Currently there are over 200 industrial estates or parks developed by these agencies. The ownership of industrial land is usually on a leasehold basis, ranging from 30 to 99 years.

Foreigners are also allowed to acquire properties for business and residential purposes. In line with Malaysia's liberal investment regime, foreign interests are allowed to acquire properties exceeding RM150,000 per unit with no limit on the number of properties acquired. The details are in the FIC guidelines available at <http://www.epu.jpm.my>

Generally, the following applications are considered by the following organisations:

<b>Agency</b>	<b>Address/Telephone/Fax</b>	<b>Types of Applications</b>
1. Malaysian Industrial Development Authority (MIDA)	5th Floor, Plaza Sentral, Jalan Stesen Sentral 5, Kuala Lumpur Sentral, P.O. Box 10618 50470 Kuala Lumpur Tel: (60 3) 2267 3633 Fax: (60 3) 2274 7970 Website: <a href="http://www.mida.gov.my">http://www.mida.gov.my</a> Email: <a href="mailto:mida@mida.gov.my">mida@mida.gov.my</a>	1. Manufacturing licence 2. Incentives for manufacturing, manufacturing related services, agriculture, hotel, and tourism, environmental protection, R&D and training 3. Expatriate posts relating to manufacturing and manufacturing related services 4. Duty exemption on raw material, components and machinery/tariff protection
2. Ministry of International Trade and Industry (MITI)	15th Floor, Block 10, Government Offices Complex, Jalan Duta 50622 Kuala Lumpur Tel: (60 3) 6201 3022 Fax: (60 3) 6203 1305 Website: <a href="http://www.miti.gov.my">http://www.miti.gov.my</a>	1. Import licence 2. Export licence 3. Pioneer Status Certificate
3. Ministry of Finance	Ministry of Finance Complex, Presint 2, Federal Government Administration Centre 62592 Putrajaya Tel: (603) 8882 3000 Fax: (603) 8882 3892 Website: <a href="http://www.treasury.gov.my">http://www.treasury.gov.my</a> Email: <a href="mailto:webmaster@treasury.gov.my">webmaster@treasury.gov.my</a>	1. Training programme/training institutions for purpose of double deduction. 2. Approval for 'approved research companies' status. 3. Incentives/Allowances

Agency	Address/Telephone/Fax	Types of Applications
4. Inland Revenue Board	15th Floor, Block 11 Government Offices Complex Jalan Duta 50600 Kuala Lumpur Tel: (60 3) 6201 7055 Fax: (60 3) 6201 3798 Website: <a href="http://www.hasilnet.org.my">http://www.hasilnet.org.my</a> Email: <a href="mailto:lhdn@hasilnet.org.my">lhdn@hasilnet.org.my</a>	<ol style="list-style-type: none"> <li>1. Income Tax</li> <li>2. Petroleum Tax</li> <li>3. Real Property Gains Tax</li> <li>4. Stamp Duty</li> <li>5. Incentives (such as Reinvestment Allowance, Industry Building Allowance)</li> </ol>
5. Immigration Department	Level 1-7, (Podium) Block 2G4 Presint 2, 62550 Putrajaya Tel: (603) 8880 1000 Fax: (603) 8880 1200 Website: <a href="http://www.imi.gov.my">http://www.imi.gov.my</a> Email: <a href="mailto:pro@imi.gov.my">pro@imi.gov.my</a>	<ol style="list-style-type: none"> <li>1. Passport</li> <li>2. Visit Pass</li> <li>3. Employment Pass</li> <li>4. Dependent's Pass</li> <li>5. Student Pass</li> <li>6. Foreign Workers</li> </ol>
6. Foreign Investment Committee (FIC)	Economic Planning Unit Prime Minister's Department Level -1, Block B5, Federal Government Administration Centre, 62502 Putrajaya Tel: (603) 8888 3333 Fax: (603) 8888 3917	<ol style="list-style-type: none"> <li>1. Acquisitions, mergers and takeovers for activities which are not under the purview of other respective Ministries or agencies</li> </ol>
7. Companies' Commission of Malaysia	11th-17th Floor, Putra Place 100, Jalan Putra 50622 Kuala Lumpur Tel: (603) 4043 3366 Fax: (603) 4043 3778 Website: <a href="http://www.ssm.gov.my">http://www.ssm.gov.my</a>	<ol style="list-style-type: none"> <li>1. Registration of Companies</li> </ol>
8. Royal Malaysian Customs	Block 11, Government Offices Complex, Jalan Duta 50596 Kuala Lumpur Tel: (603) 6201 6088/6201 9088 Fax: (603) 6201 4927 Website: <a href="http://www.customs.gov.my">http://www.customs.gov.my</a> Email: <a href="mailto:kastam@rced.gov.my">kastam@rced.gov.my</a>	<ol style="list-style-type: none"> <li>1. Service Tax Licence</li> <li>2. Sales Tax Licence</li> <li>3. Excise Licence</li> <li>4. Licensed Manufacturing Warehouse</li> </ol>

Agency	Address/Telephone/Fax	Types of Applications
9. Ministry of Agriculture	Wisma Tani, Lot 4G1, Presint 4, Pusat Pentadbiran Kerajaan Persekutuan, 62624 Putrajaya, Malaysia Tel: (60 3) 88701000 Fax: (60 3) 88886020 Website: <a href="http://agrolink.moa.my">http://agrolink.moa.my</a>	1. Incentives for Food Production
10. Multimedia Development Corporation Sdn. Bhd. (MDeC)	MSC Headquarters 63000 Cyberjaya Selangor Darul Ehsan Tel: (603) 8318 8477 Fax: (603) 8318 8519 Website: <a href="http://www.mdec.com.my">http://www.mdec.com.my</a> Email: <a href="mailto:info@mdec.com.my">info@mdec.com.my</a>	1. Multimedia Super Corridor Status (incentives and other benefits)
11. Human Resources Development Board	7 <sup>th</sup> Floor, Wisma Chase Perdana, Off Jalan Semantan, Bukit Damansara, 50490 Kuala Lumpur Tel: (603) 2098 4800 Fax: (603) 2093 5722 Website: <a href="http://www.hrdnet.com.my">www.hrdnet.com.my</a>	1. HRDF Training Grants

Policies are generally formulated after consultations with the private sector. Regular public-private sector industry dialogues/meetings are held by various ministries and agencies to consult with the private sector and obtain private sector inputs to improve the business and investment environment.

## INVESTMENT PROTECTION

### (i) Conversion, Repatriation and Transfers

#### *Foreign Exchange Regime*

Malaysia has always maintained a liberal foreign exchange administration policy. The implementation of foreign exchange administration policies in Malaysia supports the monitoring of capital flows into and out of the country to preserve its financial and economic stability.

#### *Expropriation and Compensation*

Non-residents are free to invest in any RM assets in Malaysia. There are no restrictions on the repatriation of capital, profits and income earned from Malaysia, including salaries, wages, royalties, commissions, fees, rental, interest, profits or dividends. There are also no restrictions for a non-resident to convert RM into foreign currency for repatriation overseas.

There are no cases of uncompensated expropriation of foreign-held assets by the Malaysian government. The government's stated policy is that all investors, both foreign and domestic, are

## *Investment Guarantee Agreements*

The purpose of Investment Guarantee Agreements (IGAs) is to ensure against non-commercial risks such as nationalization and expropriation and allow for remittances and repatriation of capital. Malaysia has IGAs with 71 countries and country groupings.

Under the IGAs, two forms of disputes may arise. Firstly, disputes on the interpretation or the application of the agreement itself and secondly, disputes in connection with investments in contracting countries.

(a) In most of the IGAs that Malaysia has signed, it is provided that disputes on the interpretation or application of an agreement shall be settled by consultation through diplomatic channels with a view towards arriving at an amicable solution. Where a dispute fails to be settled in the above manner, it will be submitted to an arbitration tribunal for settlement.

(b) Disputes in connection with investment between a national or company (investor) and the host country shall first be settled by making use of local administrative and judicial facilities. If the above means fail to settle the issue, then it should be submitted for reconciliation or arbitration to the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of other states opened for signature at Washington D.C. on 18 March 1965, or to the arbitrator or International ad hoc Arbitral Tribunal established under the Arbitration Rules of UNCITRAL.

Further information is available at: <http://www.treasury.gov.my> and <http://www.mida.gov.my>

### (ii) IPR

Intellectual property protection in Malaysia comprises patents, trademarks, industrial designs, copyrights, geographical indications and layout designs of integrated circuits. The Intellectual Property Corporation of Malaysia (MyIPO), established on 3<sup>rd</sup> March 2003, is the lead agency that regulates IP laws and promotes IP awareness.

Malaysia is a member of the WIPO and a signatory to the Paris Convention (for the protection of IP consisting of patent, trademark and industrial designs) and Berne Convention (for the protection of copyright works) which govern these IPR. In addition, Malaysia joined the Patent Cooperation Treaty in 2003.

Malaysia is a signatory to the Agreement on Trade Related Aspects of IPR (TRIPS) signed under the auspices of the WTO. Therefore, Malaysia's intellectual property laws are in conformance with international standards, and provide adequate protection to both local and foreign investors.

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Further information on Intellectual Property is available at: <http://www.myipo.gov.my>

(iii) Dispute Settlement

Malaysia is a signatory and ratified the provisions of the Convention on the Settlement of Investment Disputes. The domestic legal system is open and accessible. Should local administrative and judicial facilities fail to satisfy claimants, the dispute is submitted to ICSID. Over the last three years, there was only one investor state dispute involving the Government of Malaysia. However, ICSID tribunal decided that it did not have jurisdiction to hear the case since the subject matter is not an investment issue.

The Kuala Lumpur Regional Centre for Arbitration (<http://www.rcakl.org.my>) was established in 1978 under the auspices of the Asian-African Legal Consultative Committee (AALCC) - an inter-governmental organisation in cooperation with and with the assistance of the Government of Malaysia.

The Centre is intended to serve the Asia-Pacific region. It is a non-profit organisation and has been established with the objective of providing a system for the settlement of disputes for the benefit of parties engaged in trade and commerce and investments with and within the region.

Further information available at: <http://www.agc.gov.my>

## **INVESTMENT AND DEVELOPMENT**

In line with WTO TRIMs requirement, Malaysia phased out local content requirements in the automotive sector on 31 December 2003. Malaysia has also phased out the local content requirements linked to investment incentives since 2000.

## **INVESTMENT PROMOTION AND INCENTIVES**

(i) Investment Promotion Agency

Malaysian Industrial Development Authority (MIDA)

5th Floor, Plaza Sentral,

Jalan Stesen Sentral 5,

Kuala Lumpur Sentral,

P.O. Box 10618

50470 Kuala Lumpur

Tel: (60 3) 2267 3633

Fax: (60 3) 2274 7970

Website: <http://www.mida.gov.my>

Email: [mida@mida.gov.my](mailto:mida@mida.gov.my)

MIDA is the one-stop agency responsible for facilitating and promoting foreign and domestic investments in the manufacturing and services sectors. Besides a global network of offices, MIDA has branch offices in various states to assist investors in the establishment and operation of their projects. MIDA provides assistance to investors from the pre-establishment stage (e.g. in obtaining

approvals and incentives) through to the post-establishment stage (e.g. overcoming any problems that may arise in the implementation and operation of projects.)

Up-to-date information pertaining to Malaysia's investment regime is available on the websites of the Malaysian Industrial Development Authority ([www.mida.gov.my](http://www.mida.gov.my)) and Ministry of International Trade and Industry ([www.miti.gov.my](http://www.miti.gov.my)). The websites are also linked to relevant major ministries/agencies, Chamber of Commerce/industry associations and regional and international organisations (e.g. ASEAN, APEC and WTO).

## (ii) Incentives

Malaysia offers both fiscal and non-fiscal incentives for investments in the manufacturing, agriculture and services sectors to promote the development of targeted industries and activities that can contribute to the future growth and development of the Malaysian economy. These incentives are provided for in the *Promotion of Investments Act 1986*, *Income Tax Act 1967*, *Labuan Offshore Business Activity Tax Act 1990*, *Customs Act 1967*, *Sales Tax Act 1972*, *Excise Act 1976* and *Free Zones Act 1990*. The direct tax incentives grant income tax exemption/deduction for a specified period while indirect tax incentives come in the form of exemptions from import duty, sales tax, and excise duty.

Further information is available at: <http://www.mida.gov.my>; <http://www.mdec.com>; <http://www.lofsa.gov.my>

## (iii) Free Zones

Free Zones are categorized into Free Industrial Zones (FIZs) and Free Commercial Zones (FCZs). FIZs are areas designed for export orientated companies and enjoy minimum customs formalities and duty free import of raw materials, component parts, machinery and equipment required directly in the manufacturing process, as well as, minimal formalities in exporting their finished products.

FCZs are areas specifically designed for businesses engaging in trading, bulk breaking, grading, re-packing, re-labelling and transit. Within a FCZ, goods are allowed to be imported without customs duties provided the processed goods — after the activities of breaking bulk, grading, re-packing and re-labelling — are ultimately exported.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Foreign investors are free to repatriate capital, profits or proceeds from the sale of investments in Malaysia and funds related to investments. There are generally no restrictions on outward investment. The government encourages outward investment especially in areas where Malaysian businesses have a comparative advantage in skill and know-how and in areas that would bring about economic benefits to Malaysia.

Residents without domestic RM credit facilities are free to remit any amount for investment abroad. These investments can be refinanced by:

- any amount of a resident's own foreign currency funds retained in accounts in Malaysia or overseas.

- up to an aggregate of RM10 million from foreign currency credit facilities.
- any amount of foreign currency funds converted from resident's own RM funds.

Residents with domestic RM credit facilities are allowed to invest abroad as follows:

- any amount in foreign currency assets using own foreign currency funds maintained in Malaysia or overseas.
- up to an aggregate of RM10 million from foreign currency credit facilities.
- up to RM10 million equivalent per calendar year by a company on a corporate group basis.
- up to RM100,000 per calendar year by an individual.

Further information on investments abroad by residents is available at:

<http://www.bnm.gov.my/fxadmin>

## **LABOUR, MOVEMENT OF PEOPLE AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS**

### (i) Labour Laws and Regulations

*The Employment Act 1955* is the principal legislation regulating the terms and conditions of employment for both domestic and foreign companies in Peninsular Malaysia and the Federal Territory of Labuan. In the states of Sabah and Sarawak, the Labour Ordinance, Sabah and the Labour Ordinance, Sarawak regulate the administration of labor laws respectively.

The *Employees Provident Fund Act, 1991* stipulates compulsory contribution for employees. Within the provision of this Act, all employers and employees, except foreign workers, must contribute to the Employees Provident Fund at the minimum rates of 12% and 11% of the employee's monthly wages respectively.

The Social Security Organisation (SOCSO) administers the Employment Injury Insurance Scheme and the Invalidity Pension Scheme, as provided for under the *Employees' Social Security Act 1969*. SOCSO however covers only Malaysian workers and permanent residents.

The Act provides for the payment of compensation for injuries sustained in accidents during employment and imposes an obligation on the employers to insure workers. The *Foreign Workers' Compensation Scheme (Insurance) Order 2005* issued under this Act requires every employer employing foreign workers to insure with the panel of insurance companies appointed under this order and to effect payment of compensation for injuries sustained from accidents during and outside working hours.

The *Occupational Safety and Health Act 1994* provides the legislative framework to promote, stimulate and encourage high standards of safety and health at work. The Department of Occupational Safety and Health (DOSH) is responsible for enforcing compliance with the *Occupational Safety and Health Act*. DOSH also enforces compliance with the *Factories and Machinery Act 1967*.

The Government encourages the growth of healthy, democratic and responsible trade unions and, towards this end, has enacted the *Trade Unions Act 1959* and the *Trade Unions Regulations 1959*.

The *Industrial Relations Act 1967* regulates relations between employers and workmen and their trade unions, including the prevention and settlement of trade disputes.

In a non-unionized establishment, the normal practice for settling disputes is for the employee to try to obtain redress from his supervisor, foreman or employer directly. An employee can also lodge a complaint with the Ministry of Human Resources which will then conduct an investigation.

(ii) Visas/Permits

*General*

All persons entering Malaysia must possess valid national passports or other internationally recognised travel documents valid for travel to Malaysia. These passports or travel documents must be valid for at least six months beyond the date of entry into Malaysia.

Among APEC economies, only nationals from The People's Republic of China, Chinese Taipei and the holders of Certificates of Identity are required to apply for a visa prior to their arrival in Malaysia.

Application for entry visas should be made at the nearest Malaysian mission abroad. In economies where Malaysian missions have not been established, applications should be made to the nearest British High Commission or Embassy.

The visa requirements for other countries are as follows:

(i)	No Visa Required for Social and Study	USA
(ii)	Special Approval from Malaysian Government	Israel (Prior Approval from Ministry of Internal Security) and Serbia Montenegro, (Prior Approval from Ministry of Home Affairs).
(iii)	No Visa Required for any Purpose Of Visit	All Commonwealth Countries except India, Pakistan, Bangladesh, Sri Lanka and Nigeria.
(iv)	Visa Required for Students/ Employments/Dependent/ Professional	
(A)	No Visa Required for Social Visit. Duration of Stay 3 Months Only.	Albania, Algeria, Argentina, Australia, Austria, Bahrain, Belgium, Bosnia, Herzegovina, Brazil, Canada, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Italy, Japan, Jordan, Kyrgyzstan, Kuwait, Kyrgyz Republic, Lebanon, Liechtenstein, Luxembourg, Morocco, Netherlands, New Zealand, North Yemen, Norway, Oman, Peru, Poland, Qatar, Romania, St. Marino, Saudi Arabia, Slovakia, South Africa, South Korea, Spain, Sweden, Switzerland, Tunisia, Turkmenistan, Turkey, U.S.A, U.A.E, United Kingdom, Uruguay.

(B)	No Visa Required for Social Visit. Duration of Stay 1 Month Only.	All Asean Countries Except Myanmar, Antigua & Bermuda, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Botswana, Bulgaria, Cambodia, Chile, Costa Rica, Cyprus, Dominica, Ecuador, El Salvador, Estonia, Fiji, Gabon, Gambia, Georgia, Ghana, Greece, Grenada, Guatemala, Guyana, Haiti, Honduras, Hong Kong Sar, Ivory Coast, Jamaica, Kazakhstan, Kenya, Kiribati, Latvia, Lesotho, Lithuania, Macao Sar, Macedonia, Malawi, Maldives, Moldova, Malta, Mauritius, Mexico, Moldavia, Monaco, Mongolia, Namibia, Nauru, Nicaragua, North Korea, Panama, Papua New Guinea, Paraguay, Portugal, Russia, Sao Tome & Principe, Slovenia, Solomon Island, St. Kitts & Nevis, St. Lucia, St. Vincent, Sudan, Surinam, Swaziland, Tajikistan, Tanzania, Togo, Tonga, Trinidad & Tobago, Tuvalu, Uganda, Ukraine, Upper Volta, Uzbekistan, Vanuatu, Vatican City, Venezuela, Western Samoa, Zaire, Zambia, Zimbabwe, Other Countries.
(C)	No Visa Required for Social Visit. Duration of Stay 14 Days Only	Iran (15 Days), Iraq, Libya, Syria, Macoa (Travel Permit), Portugal (Alien Passport), Palestine, Sierra Leone, Somali, Somalia, South Yemen.
(v)	No Visa Required for all Purpose of Visit (Total Abolition)	Liechtenstein, Netherlands, Switzerland, St. Marino.
(vi)	Visa Required for any Purpose of Visit.	Sub. Continent Nationals: Bangladesh, India, Pakistan, Sri Lanka, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo Republic, Congo Democratic Republic, Cote D'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Guinea-Bissau, Ghana, Liberia, Mali, Mozambique, Niger, Nigeria, Rwanda, Western Sahara, Taiwan, Myanmar, Nepal, Bhutan, Pr China, Colombia.  All Holders of Certificate of Identity, All Holders of Laisser Passer, All Holders of Titre De Voyage, Afghanistan (Visa with Reference)

### *Visit Passes at Point of Entry*

A visit pass for the purpose of a social or business visit may be issued at the point of entry if the visitor can satisfy the immigration authority at the point of entry that he/she has a valid passport and visa (where applicable). The types of passes issued are as follows:

- Visit Pass (Social)
- Visit Pass (Business)
- Conversion of Passes

Foreign visitors who have entered Malaysia on social visit passes may apply to the Immigration Department to convert their social passes into business visit passes. This aims to assist foreign visitors who wish to undertake business activities.

All applications for converting social visit passes into business passes must be submitted to the Immigration Department with a letter of recommendation from the MITI.

#### *Passes Issued Upon Arrival in Malaysia*

The types of passes issued are as follows:

- Visit Pass (Temporary Employment)
- Employment Pass
- Visit Pass (Professional)
- Dependant's Pass
- Student's Pass

#### *APEC Business Travel Card*

Malaysia is a participant of the APEC Business Travel Card. The APEC Business Travel Card is a card for short-term business visitor which is valid for a period of three years. Card holders will enjoy visa free entry from all participating APEC member economies.

Malaysia allows companies in the manufacturing and related services sectors to employ expatriate personnel, especially in areas where there is a shortage of trained Malaysians. In addition, foreign companies are allowed 'key posts' or posts that are filled permanently by foreigners. The guidelines for the employment of expatriate personnel in the manufacturing sector are as follows:

- Companies with foreign paid-up capital of US\$2 million and above will automatically be allowed up to 10 expatriate posts including five key posts.
- Companies with foreign paid-up capital of more than US\$200,000 but less than US\$2 million will be allowed up to 5 expatriate posts, including at least 1 key post.
- For companies with foreign paid-up capital of less than US\$200,000, key posts will be considered where the paid-up capital is at least RM500,000.

For time posts, expatriates may be employed up to a maximum period of 10 years for executive posts, and for non-executive posts, expatriates may be employed up to maximum period of 5 years.

In the manufacturing related services sector such as Regional Distribution Centres, Operational Headquarters and International Procurement Centres, the number of expatriates posts, (both key posts and time posts) will be considered as requested based on a company's requirements.

Further information is available at <http://www.mida.gov.my>; <http://www.imi.gov.my> and <http://www.mohr.gov.my/>

## COMPETITION POLICY

Malaysia does not have a general competition law. There are various laws which address competition issues and implement competition regulation, i.e. *Communications and Multimedia Act* 1998, for the communications and multimedia sector, the *Energy Commission Act* 2001, for the energy sector and the *Banking and Financial Institution Act* 1989, for the banking and financial sector.

Malaysia is currently drafting the *Fair Trade Practices Law*, following the approval of the Fair Trade Practices Policy by the Government in October 2005. The Ministry of Domestic Trade and Consumer Affairs entrusted with implementing the law, is undertaking capacity building measures by attending courses, seminars and workshops on competition policy and law. A number of competition advocacy programs through briefings and workshops for all stakeholders is being undertaken so as to disseminate information on the proposed law as well as to inculcate a competition culture in the country.

Further information is available at <http://www.kpdnhep.gov.my>

## MEXICO

### Acronyms

ALTEX	The Highly Exporting Companies' Program
ERC	Energy Regulatory Commission
ECEX	Foreign Trade Companies
FCC	Federal Competition Commission
FECL	Federal Economic Competition Law
FIL	Foreign Investment Law
IIF	The Institute of International Finance
IMMEX	Decree to Promote the Manufacturing, Maquila and Service Export Industries
IMPI	Mexican Industrial Property Institute
IRO	The Investor Relations Office
NCFI	National Commission of Foreign Investment
PITEX	Temporary Import Program for Producing Export Goods
PROSEC	Sector-specific Promotion Programs
SCT	Secretaría de Comunicaciones y Transportes (Ministry of Communications and Transportation)
SRE	Secretaría de Relaciones Exteriores (Ministry of Foreign Affairs)

## INTRODUCTION

The public policy implemented by the Mexican Government, as reflected in the National Development Plan and ancillary documents, gives great importance to FDI, for its capacity to complement and foster domestic industry, create jobs, enhance competitiveness and attract technology. In this regard, Mexico actively promotes *inter alia* trade liberalization and legal protection to productive investment.

Consequently, Mexico has removed significant foreign investment barriers as part of an ambitious economic plan aimed at creating a more favourable environment for investment. The main domestic legal framework applicable to foreign investment is the *Foreign Investment Law* of 1993 (FIL), and its amendments enacted in 1995, 1996, 1998, 1999 and 2001.

Pursuant to the FIL, foreign investment may participate in any percentage in the capital stock of Mexican companies (except as otherwise provided by the FIL) However, such exceptions are so limited, that according to several industrial classification codes, more than 95% of economic activities are open to foreign capital.<sup>32</sup> Additionally, the FIL — consistent with the NAFTA — does not condition the reception or operation of an investment to any performance requirements.

Further, the legal framework removed the restriction for Mexican companies without foreigners' exclusion clauses to acquire real estate within the restricted zone for non-residential purposes.<sup>33</sup> Foreign individuals and foreign corporations may acquire rights over real estate located within the restricted zone through a trust for 50 years after which duration it may be extended.

The neutral investment mechanism allows Mexican companies to issue shares (which may be acquired directly by foreigners) which grant to their holders pecuniary rights and limited corporate rights. Since such participation is not considered by the FIL as foreign investment *per se* in the capital stock of Mexican corporations, the scheme allows foreign capital into some reserved or restricted activities.

The Regulations to the FIL, enacted in 1998, complement and clarify the FIL, with the objective of simplifying the administrative procedures and creating favourable conditions for the entrance of capital flows.

*The following activities have been liberalised*

As previously said, since its enactment in 1993, the FIL provides that all activities not specifically reserved or restricted are open to FDI. without the need for prior authorization.

Since 1993, additional economic activities have been liberalized:

- In June 2001, sub-paragraphs l), m) and n), of article 7, paragraph III of the FIL were derogated (limit of 49% in holding companies of investment corporations and in shares representing the fixed capital of investment companies)

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<sup>32</sup> The FIL establishes four categories of activities: (1) those reserved to the Mexican State (e.g. oil, power generation); (2) those reserved to Mexican nationals or to Mexican enterprises wholly owned thereby (e.g. broadcasting, domestic freight transportation, retail of gasoline); (3) economic sectors in which foreign investment may not exceed percentage limits that go from 10% to 49% (e.g. cooperatives, aviation, explosives, telecommunications, inland and coastal navigation); and (4) activities that require prior authorization so that foreign investments can exceed 49% of capital.

<sup>33</sup> The "restricted Zone" is a 100-kilometer strip along Mexico's borders and a 50-kilometer strip inland from its coasts where foreigners may not acquire real estate rights.

- From 1 January 2004, pursuant to Transition Article 6 of the FIL, foreign investment may take up to 100% in the capital stock of Mexican corporations engaged in international land transportation (passengers, tourism and freight) between points within the territory of Mexico and ancillary services.

The following activities have been liberalized in 2006, allowing up to 100% foreign participation:

- In July 2006, sub-paragraphs i), j) and k) of article 7, paragraph III of the FIL were derogated (limit of 49% in financial leasing companies, factoring companies and limited scope financial institutions).

## SCREENING OF FOREIGN INVESTMENT

### (i) Overview

The FIL sets forth a pre-establishment screening procedure applicable to the economic activities expressly listed in Article 8, where the foreign investor seeks a participation of more than 49% in such activities. Similarly, Article 9 of the FIL applies a similar procedure applicable when, by means of a transaction, foreign investment exceeds 49% of the capital stock of Mexican corporations undertaking non-regulated activities by the FIL, but only when the total value of the assets of the relevant corporation exceeds a threshold fixed on an annual basis by the National Commission of Foreign Investment (NCFI). Both screenings are applied by the NCFI.

The Regulations to the FIL are a set of rules that clarify and complement the FIL for operative purposes.

The office in charge of the Regulations is the:

Directorate General for Foreign Investment  
 Ministry of Economy  
 Av. Insurgentes Sur 1940, 8<sup>th</sup> Floor  
 Postal Code 01030, Mexico, D.F.  
 Mexico  
 Tel: (52) 55 52 29 61 67  
 Fax: (52) 55 52 29 65 07

### (ii) Mergers and Acquisitions

Except for the procedures contained in Articles 8 and 9 of the FIL (mentioned above), M&As are allowed and not regulated by the FIL. However, M&As may be regulated by competition laws and other laws of general application.

### (iii) Real Estate

Foreign nationals or foreign enterprises may not acquire property rights (*dominio directo*) over land and water in the Restricted Zone (see the second footnote).

Mexican enterprises without a foreigners' exclusion clause may not acquire property rights over real estate located in the Restricted Zone, used for residential purposes.

Pursuant to the procedure described below, Mexican enterprises without a foreigners' exclusion clause may acquire rights for the use and enjoyment over real estate in the Restricted Zone, used for residential purposes. Such a procedure shall also apply when foreign nationals or foreign enterprises seek to acquire rights for the use and enjoyment over real estate in the Restricted Zone regardless of the purpose for which the real estate is used.

A permit from the SRE is required for credit institutions to acquire, as trustees, rights to real estate located in the Restricted Zone, when the purpose of the trust is to allow the use and enjoyment of such real estate, without granting real property rights thereof, and the trust beneficiaries are the Mexican enterprises without a foreigners' exclusion clause, or the foreign nationals or foreign enterprises referred to above.

The terms "use" and "enjoyment" of the real estate located in the Restricted Zone mean the rights to use or enjoy such real estate, including, as applicable, obtaining fruits, products and, in general, any yield resulting from lucrative operation and exploitation through third parties or through the credit institutions acting as trustees.

The duration of the trust referred to in this reservation shall be for a maximum period of 50 years, which may be renewed on request by the interested party. The SRE can verify at any time the compliance with the conditions under which the permits referred to in this reservation are granted, as well as the submission and veracity of the notices mentioned above. The SRE shall resolve on the permits, considering the economic and social benefits that these operations could imply to the Nation.

Foreign nationals or foreign enterprises seeking to acquire real estate outside the Restricted Zone, shall previously submit to the SRE a statement agreeing to consider themselves Mexican nationals for the above mentioned purposes, and waiving to invoke the protection of their governments with respect to such real estate.

#### (iv) Joint Ventures

Joint ventures are not subject to screening under the FIL, however, the relevant limitations for FDI participation in certain activities - shall be observed. Joint venture contracts are regulated by commercial and industrial property laws.

- Provide a statement of the transparency of the screening process covering:
  - average time taken for screening process decisions;
  - how investors can expedite the approval process;
  - avenues for consultation about decisions before they are made;
  - avenues for appeal and how to lodge them; and
  - any published statistics on the outcomes of investment screening (i.e. numbers of approvals, rejections and approvals subject to conditions).

The NCFI shall meet at least twice a year and will decide upon the issues within its competence by a majority vote. In case of a draw the chairman of such Commission will have a casting vote. The NCFI has the following powers:

- I. To issue political guidelines on foreign investment matters and to design mechanisms to promote foreign investment in Mexico;
- II. To resolve, through the Ministry of Economy, on the feasibility and, as the case may be, on the terms and conditions for the participation of foreign investment in activities or acquisitions with specific regulation, pursuant to Articles 8 and 9 of the FIL;
- III. To be the mandatory consulting entity on foreign investment matters for the federal government;
- IV. To establish the criteria for the application of legal and regulatory provisions on foreign investment, through the issuance of general resolutions; and
- V. All others entrusted to it pursuant to the FIL.

In the case of authorizations for the participation of foreign investment in the cases described above, the NCFI shall issue its decision within a period of 45 business days upon the respective request. If the NCFI fails to make a decision within such period, the request shall be considered approved as submitted.

The NCFI, in order to evaluate applications submitted for its consideration shall take into account the following criteria:

- (a) the effects on employment and training of workers;
- (b) the technological contribution;
- (c) the compliance with the environmental provisions contained in the environmental legislation;  
and
- (d) in general, the contribution to increase the competitiveness of the Mexican productive system.

However, when resolving an application, the NCFI may only impose requirements that do not distort international trade.

or reasons of national security, the Commission may prevent acquisitions by foreign investment.

The Regulations to the FIL specify the requisite documents and information in order to file a request:

## SECTOR-SPECIFIC LAWS AND POLICIES

Under Article 5 of the FIL, the following activities determined by the relevant laws in the following strategic areas are reserved exclusively for the State:

- I. Petroleum and other hydrocarbons;
- II. Basic petrochemicals;
- III. Electricity;
- IV. Generation of nuclear energy;
- V. Radioactive minerals;
- VI. Telegraphy;
- VII. Radiotelegraphy;
- VIII. Postal service;
- IX. Bank note issuing;
- X. Coining;
- XI. Control, supervision and surveillance of ports, airports and heliports; and

Under Article 6 of the FIL, the economic activities and companies mentioned hereunder are reserved exclusively to Mexicans or to Mexican companies with foreigners' exclusion clause:

- I. Domestic land transportation for passengers, tourism and freight, not including messenger or courier services;
- II. Gasoline retail sales and distribution of liquefied petroleum gas;
- III. Radio broadcasting services and other radio and television services, other than cable television;
- IV. Credit unions;
- V. Development banking institutions, as provided by the applicable law; and
- VI. Professional and technical services set forth expressly by applicable legal provisions.

Under Article 7 of the FIL, foreign investors may participate in the following economic activities and corporations, up to the identified percentages:

- I. Up to 10% in:
  - Cooperative production enterprises;
- II. Up to 25% in:
  - a) Domestic air transportation;
  - b) Air taxi transportation; and
  - c) Specialized air transportation;
- III. Up to 49% in:
  - a) Insurance companies.
  - b) Bonding companies.
  - c) Currency exchange houses;
  - d) Bonded warehouses;
  - e) Companies to which article 12 Bis of the Securities Market Law refers;
  - f) Retirement funds management companies;
  - g) Manufacture and commercialization of explosives, firearms, cartridges, ammunitions and fireworks, not including acquisition and use of explosives for industrial and extraction activities nor the preparation of explosive blends for use in such activities;
  - h) Printing and publication of newspapers for circulation solely throughout Mexico;
  - i) Series "T" shares in companies owning agricultural, livestock, and forest lands;
  - j) Fresh water, coastal, and exclusive economic zone fishing not including aquaculture;
  - k) Integral port administration;
  - l) Port pilot services for inland navigation pursuant to the applicable laws;
  - m) Shipping companies engaged in commercial exploitation of vessels for inland and coastal navigation, excluding tourism cruises and exploitation of drills and devices for port construction, conservation and operation;
  - n) Supply of fuel and lubricants for ships, airplanes, and railway equipment; and
  - o). Telecommunications Concessionaire companies as provided by articles 11 and 12 of the Federal Telecommunications Law.

Under Article 8 of the FIL, a favorable resolution by the Commission is required for foreign investors to participate the following activities and companies to a percentage higher than 49%::

- I. Port services in order to allow vessels to conduct inland navigation operation, such as towing, mooring and barging.
- II. Shipping companies engaged in the exploitation of ships solely for high-seas traffic;
- III. Concessionaire or permissionaire companies of aerodromes for public service;
- IV. Private education services of pre-school, elementary, middle school, high school, college or any combination;
- V. Legal services;
- VI. Credit information companies;
- VII. Securities rating institutions;
- VIII. Insurance agents;
- IX. Mobile telephony;
- X. Construction of pipelines for the transportation of petroleum and its by-products;
- XI. Drilling of petroleum and gas wells; and
- XII. Construction, operation and exploitation of general railways, and public railroad services.

Under Article 9 of the FIL, a favourable resolution from the NCFI is required for foreign investment to participate, directly or indirectly, in a percentage higher than 49% of the capital stock of Mexican companies when the aggregate value of the assets of such companies at the date of acquisition exceeds the amount determined annually by the NCFI.

Relevant investment laws follow.

*Foreign Investment Law*

*General Law of Cooperative Companies*

*Nationality Law*

*Foreign Trade Law*

*Customs Law*

*Federal Labor Law*

*Commercial Notary Public Federal Law*

*Federal Economic Competition Law*

*Commercial Code*

*Commercial Companies General Law*

*Titles and Credit Operations General Law*

*Bankruptcy Law*

*Credit Institutions Law*

*Securities Market Law*

*Industrial Property Law*

(i) Some Regulated Sectors

*Energy*

*Petrochemicals and Natural Gas*

The Law Regulating Article 27 of the Mexican Constitution referring to petroleum, reserves to the Mexican State the “oil industry”. Since 1995, the transportation, storage and distribution of natural gas were opened to the private sector (by not considering them as part of the “oil industry”), including foreign participation, subject to prior authorization of the Energy Regulatory Commission (ERC). Foreign investors are permitted to construct, operate and own pipelines, installations and equipment for such purposes. Pursuant to the FIL, the drilling of oil and natural gas wells is subject to a limit of 49% limitation of foreign ownership, unless authorization is obtained to exceed such threshold.

*The Power Sector*

Articles 27 and 28 of the Mexican Constitution reserve to the Mexican State the supply of electricity power as a “public service,” which is considered a strategic activity. However, in 1992, the term “public service” was redefined in order to open the following areas for private investment up to 100%.

- a) self generation; when companies acquire, establish or operate a power generating facility to satisfy their own needs;
- b) co-generation; when electricity is generated by industrial processes using heat, steam or other energy sources;
- c) independent power production; where an enterprise (that generates over 30 megawatts) sales, after having won a public bid, its generated power to the ERC;
- d) export of electric power, derived from co-generation, independent production or small production;
- e) importation of electric power, by individuals or companies, exclusively to supply their own needs;
- f) production of electric power for emergency use arising from the interruption of the public service of electric power as required by the CRE; and

- g) small production (less than 30 megawatts).

The ERC is the regulator of the sector.

### *Telecommunications*

A concession granted by the Ministry of Communications and Transportation (Secretaría de Comunicaciones y Transportes, SCT) through a public bid is required to:

- a) use, profit from or exploit a frequency band in the national Area, except the free use spectrum and the official use spectrum;
- b) install, operate or exploit public telecommunication networks;
- c) occupy geostationary orbital positions and satellite orbits assigned to the country and exploit their corresponding frequency bands; and,
- d) exploit signal transmission and reception rights of frequency bands associated to foreign satellite systems that cover and which may provide services in the national Area.

Foreign investment may only participate up to 49% in such concessionaire enterprises. Foreign investment in mobile telephony services operators may exceed 49% with favourable resolution from the NCFI.

Mexico gives National Treatment, MFN, and Fair and Equitable Treatment in most of its FTAs and all of its BITs.

## **INVESTMENT PROTECTION**

### **(i) Conversion, Repatriation and Transfers (including any Balance of Payments Safeguards)**

Exchange rates policy will continue to be implemented under the floating regime introduced at the end of December 1994. The Bank of Mexico will intervene in the market, in order to avoid excessive daily fluctuations of the exchange rates due to speculative reasons.

There are no restrictions of remittances abroad of profits, royalties, dividends, and interest paid on loans, or capital repatriation of funds related to foreign investment.

Mexico permits all transfers relating to investments made under most FTAs and all BITs. Nevertheless, specific exceptions may apply in the following cases:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities;
- (c) criminal or administrative violations;
- (d) reports of transfers of currency or other monetary instruments; or
- (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

Further, Mexico includes in most of its international agreements a balance of payments' clause, whereby the country may temporarily restrict transfers in case of a serious balance of payments difficulty or of a threat thereof, provided such country implements measures or a programme in accordance with international standards, and as long the restrictions are imposed on an equitable, non-discriminatory and in good faith basis.

(ii) Expropriation and Compensation

Article 27 of the Mexican Constitution provides that expropriations shall only be for a public purpose (which modalities are expressly listed in the law) and through payment of compensation. According to the Expropriation Law, the amount of compensation is determined with reference to the fixed commercial value, which may not be less than the declared tax value of the property . The affected person may challenge the expropriation or the amount of compensation recurring to the administrative or judicial courts.

The compensation shall be covered when the expropriated property is transferred to the State. The term for the payment of compensation shall not exceed one year from the declaration of expropriation. The payment shall be done in national currency, or if it is so agreed, in kind.

Accurate information is not available concerning the number of cases of expropriation involving foreign investors under domestic law over the last three years.

(iii) IPR

The *Mexican Industrial Property Law* provides for the protection of industrial property through the granting of patents, trademarks, industrial designs, commercial names, utility models, regulation of industrial secrets, etc.

Mexico is currently a member of four international industrial property treaties administered by the WIPO, namely, the Paris Convention for the Protection of Industrial Property; the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration; the Patent Cooperation Treaty; and the Nairobi Treaty on the Protection of the Olympic Symbol.

The IMPI participates actively in a number of the WIPO's standing committees, including the following:

1. The Standing Committee on the Law of Trademarks, Industrial Designs and Models and Geographical Indications;
2. The Standing Committee on Information Technologies; and
3. The Standing Committee on Law of Patents.

In 2005, IMPI received a total of 2,213 administrative declaration applications for the lapse, expiration, cancellation and infringement of IPR, as well as for the imposition of provisional measures and infringement actions regarding copyrights. Out of the total of such applications 1,799 were settled.

In the same year 2,548 inspections visits were conducted; 1,205 ex-officio and 1,343 upon Party request.

For further information see <http://www.impi.gob.mx>

(iv) Dispute Settlement

A foreign investor shall have access to the same administrative and judicial recourses available to national investors. There are special recourses (investor-State arbitration) for foreign investors covered by FTAs and BITs to which Mexico is a party.

Mexico is a party to the United Nations Convention on the Enforcement of Foreign Arbitral Awards (New York Convention), the Inter-American Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Panama Convention) and has adopted in its Commercial Code the UNCITRAL Model Law on Arbitration.

Mexico is not a member of the ICSID Convention

## **INVESTMENT AND DEVELOPMENT**

The FIL does not condition investments to the compliance of performance requirements that distort international trade.

Mexico includes a prohibition on the imposition of performance requirements in most of its FTAs, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of a foreign investor such as: exporting given levels or percentages of goods or services; achieving given levels of domestic content; and purchasing or preferring local goods and services.

## **INVESTMENT PROMOTION AND INCENTIVES**

(i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

Mexico promotes FDI in its territory through the use of clear rules that channel foreign capital into the country's productive activities; and the negotiation of international agreements, which grant legal protection to investments.

BITs are currently being negotiated with strategic countries, and new instruments for investment promotion are being analyzed to be implemented shortly.

Our membership to the OECD, as well as the disciplines contained in FTAs guarantee the application of the highest international standards on a long-term basis.

In 1995, the Investor Relations Office (IRO) was created as a result of the increased relevance of enhanced disclosure of economic data, as well as the extended need of investors and analysts to develop a personal and ongoing dialogue with Mexican financial authorities. The IRO has been recognized by the IMF and IIF as a prototype of a successful sovereign investor relations programs. Through the IRO, Mexico observers are able to establish direct contact with its staff in order to address any information requirement or any basic concern regarding economic and financial data.

For further information see <http://www.apartados.hacienda.gob.mx/ori/ingles/flash/swf/index.html>

BANCOMEXT and its *Invest in Mexico* website offers information on Mexico and the opportunities for investment. It serves as an instrument for investment promotion and help investors to get information, inter alia, on the regulatory framework, best location, benefits and markets for enterprises.

Bancomext supports Mexican companies through credit instruments, financial services and trade information in order to strengthen their financial and commercial structure and promote the incorporation of national and foreign investors.

For further information see <http://www.bancomext.com/>

There is no “one stop facility for foreign investors.

## (ii) Incentives

The main investment incentives consist of duty free importation of inputs, machinery and equipment used to produce goods for export, conveniences for the acquisition of land in some states, access to risk capital under some programs available from development banks and federal and state training programs.

### *a) Decree to Promote the Manufacturing, Maquila and Service Export Industries (IMMEX Decree)*

Since 1 November 2006, benefits of both Maquila and PITEEX (Temporary Import Program for Producing Export Goods) Programs were joined in the IMMEX Decree (Decree to Promote the Manufacturing, Maquila and Service Export Industries) program as published in the Daily Gazette of the Federation on that date.

For further information see:

[http://www.deloitte.com/dtt/cda/doc/content/mx%20%28en-mx%29taxbulletin18\\_091106.pdf](http://www.deloitte.com/dtt/cda/doc/content/mx%20%28en-mx%29taxbulletin18_091106.pdf) (English); and

<http://www.siicex.gob.mx/SICETECA/Decretos/Programas/IMMEX/IMMEX.htm> (Spanish)

The main objective of the IMMEX programme is to provide manufacturing and export service companies with simplified procedures to realize export services, export goods services or industrial processes.

Benefits consist of temporary duty free importation of certain inputs, machinery and equipment to produce export goods and may stay in Mexican territory for the terms set up in the IMMEX Decree.

### *b) Foreign Trade Companies (ECEX)*

The Foreign Trade Companies (ECEX) Registration is a promotion instrument by means of which commercial companies may access international markets with administrative terms and development banking financial support.

Beneficiaries are companies whose activity is the commercialization of products abroad, and who meet the requirements described in the “Resolution for Establishing Foreign Trade Companies”, as published in the *Daily Gazette of the Federation* on 11 April 1997.

## Benefits

- Automatic issuance of the Highly Exporting Companies (*Empresas Altamente Exportadoras* — ALTEX) Certificate.
- 50% discount by Bancomext in the cost of non-financial products and services, as determined by such institution through its integral support program for these companies.
- The possibility of receiving financial assistance and support by Nacional Financiera for completing the company's projects, as well as specialized training services and technical assistance. This benefit will be granted to both ECEX companies and their suppliers.

### *c) High Exporting Companies (ALTEX)*

The High Exporting Companies (ALTEX) Program is a promotion instrument for exporting Mexican products, intended to support the operation of such entities with tax and administrative facilities.

#### Beneficiaries:

1. Country-resident individuals or companies who produce non-oil goods and who are capable of evidencing direct exports for two million dollars or for the equivalent to 40% of their total sales' worth within a one-year period;
2. Country-resident individuals or companies who produce non-oil goods who are capable of evidencing annual indirect exports equivalent to 50% of their total sales;
3. ECEX with an effective registration issued by the Ministry of Economy;
4. Direct and indirect exporters may meet the export requirement of 40% or two million dollars, by adding both types of exporting.

#### Benefits:

- Devolution of VAT favorable balances in a period of approximately five business days;
- Free access to the Commercial Information System, managed by the Ministry of Economy;
- Exemption of the second check requirement for export goods at the export customs station, whenever such goods have previously received clearance in an interior customs station, and
- Authority to appoint a customs agent for several customs and various products.

In order to have these benefits, this program's users must file with the corresponding Federal Public Administration Agencies, a copy of the ALTEX Certificate issued by the Ministry of Economy, and in case, the ratification of its duration.

### *d) Sector-specific Promotion Programs (PROSEC)*

With the aim of providing the productive sector with improved conditions in order for it to compete in various markets, as well as for enhancing supply conditions, the Ministry of Economy has designed and implemented production promotion programs and instruments. Their purpose is to support such sector by facilitating access to inputs, parts, components, machinery, equipment and other goods associated with their productive processes.

The Sector-specific Promotion Programs (PROSEC) are instruments intended for companies who produce certain types of goods, which allows them to import, with a preferential *ad valorem* tariff (General Import Tax), various goods to be used in the manufacturing of specific products, regardless of the fact that goods to be produced are assigned to export or to the domestic market.

*e) Import Tax Refund to Exporters (Drawback)*

The Program for Import Tax Refund to Exporters allows beneficiaries to recover the general import tax caused by imports of inputs, raw materials, parts and components, packing and bottles, fuels, lubricants, and other materials built into the exported product, or by the import of goods that are returned in the same condition, or goods to be repaired or altered.

*Beneficiaries:*

Country-resident companies who meet the requirements set forth in the Resolution that sets the Import Tax Refund to Exporters.

(iii) State Incentives

In order to attract foreign investment, some states confer incentives such as favourable prices on land, support for certain training expenses or infrastructure facilities such as industrial park facilities.

Since Mexico is a federal system; each State, within its competence, offers incentives that vary from place to place.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Regulations / institutional measures that limit capital exports or the outflow of foreign investment are outlined under “investment Protection”. There are no regulations / institutional measures that limit technology exports.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

(i) Regulations Relating to Personnel Management of Foreign Firms:

*Work Week and Minimum Wage*

- The *Labour Law* sets forth a maximum 48-hour workweek. Day shifts are eight hour long, while night shifts are seven hours long. However, workers usually work between 40 and 45 hours per week.
- There is a possibility to work overtime for two or three times the normal hourly wages per hour, depending on the corresponding number of hours. Double time is paid up to nine hours per week (three hours per day, three times per week) and any additional overtime is paid three times the normally hourly wages. Triple time is also provided for work on the seven legal holidays.

- After one year of continuous work, workers have the right to six working days of paid vacation, which is increased every year up to a maximum of 22 days. During the vacation period, workers are paid an extra minimum 25% of their normal wages as a vacation premium.
- Minimum wages are reviewed every year based on the official index of inflation and the worker's productivity growth. The resulting level cannot, by law, be lower than the minimum wage.

"A" Geographic Zone	P50.57
"B" Geographic Zone	P49.00
"C" Geographic Zone	P47.60

Source: the National Minimum Wage Commission, effective as of January 1, 2007

For up-to-date information see <http://www.conasami.gob.mx>

- When firing workers, the company must compensate them by paying three months wages plus 20 days per year of work with the company.
- When dealing with voluntary resignations, the company is only liable for a portion of the vacation premium and the corresponding Christmas bonus. However, if the employees has worked for over 15 years continuously, the severance settlement will be increased by 12 days of the last monthly wages paid, for each year of work with the company.
- Worker's incomes are established according to agreements regulated by the Federal Labour Law. The most common agreements are The "Collective Labour Contract" whose clauses are agreed upon between the union and the company and the "Individual Labour Contract", where these process take place between worker and the employer.
- The mandatory social benefits are the contributions made to the social security system, the housing fund and the retirement savings system, as well as paid vacations, the vacation premium and the year-end bonus ("aguinaldo"). In the case of a worker with one-year seniority these benefits account on average for a cost of 29% of the wages paid.
- The main domestic labor law which applies to foreign firms in the context of labour disputes/relations is the *Labor Federal Law*.
- For further information see <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>

A visa is required by foreign citizens who enter into Mexico with the purpose of learning about the different investment options, to make a direct investment or supervise it, to be the agents of foreign companies or to make commercial transactions.

To facilitate the residence of foreign investors, officers and technicians in Mexico, the authorities in Mexican consulates abroad are authorized to issue the corresponding visas.

The most usual visas are for “business visitor”, “investor visitor” and “professional visitor”. The characteristics of each visa are as follows:

#### I. Business Visitor

Purpose: To help foreigners to identify investment opportunities and to make direct investments.

Conditions: Letter of invitation issued by trade chambers, public agencies, companies, or financial institutions, and to produce evidence, by bank letter, of no less than 500 times minimum daily wages as monthly income.

Term: Up to one year: it can be renewed indefinitely for equal term periods.

For further information see <http://www.inami.gob.mx/paginas/tramitesrequisitos/221140.htm>

#### II. Investor Visitors

- Purpose: to help foreigners to supervise their direct investments.
- Conditions: To produce evidence of registration with the National Foreign Investment Registry, or documentation confirming an investment for a minimum of 26,000 times the minimum daily wage.
- Term: Up to one year. It can be renewed indefinitely for equal term periods.
- For further information see <http://www.inami.gob.mx/paginas/tramitesrequisitos/221150.htm>

#### III. Professional Visitors

- Purpose: To help in the practice of a remunerated activity of a company
- Conditions: The application for the corresponding officer or technician to enter the country must be submitted by the company interested in hiring those services.
- Term: Up to one year. It can be renewed up to four times for equal term periods.

All permits shall satisfy any other requirements established in the immigration laws and regulations.

For further information see <http://www.inami.gob.mx/paginas/tramitesrequisitos/2211a0.htm>

The following are restrictions on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members.

<b>Restrictions</b>	<b>Description</b>
Article 7 of the Federal Labour Law	<p>“In every enterprise or establishment, the employer shall employ at least 90% Mexican workers”.</p> <p>In the categories of technicians and professionals, the workers shall be Mexicans, except where there are none in a particular speciality, in which case the employer may employ foreign workers, in a proportion that does not exceed 10% of those of the speciality. The employer and the foreign workers shall be obliged to train the Mexican workers in such speciality.</p> <p>Doctors working for enterprises shall be Mexicans.</p>
Foreign Investment Law; Title I; Chapter II	Rendering of other professional and technical services set forth expressly by applicable legal provisions.

The following restrictions apply to appointments by foreign investors to senior management positions or the board of directors.

<b>Restrictions</b>	<b>Description</b>
Article 7 of the <i>Federal Labour Law</i>	<p>“In every enterprise or establishment, the employer shall employ at least 90% Mexican workers”.</p> <p>Directors, Managers and General managers are excepted from this Article.</p> <p>There are nationality restrictions for every sector. No more than 10% of the members of a cooperative production company may be foreigners. Foreigners may not have direction or general management positions in such enterprises.</p>
<i>Religious Associations and Public Cult Law</i> , Title II, Chapters I, II.	<u>For religious services</u> : The representatives of religious association must be Mexican nationals.
<i>Foreign Investment Law</i> ; Title I; Chapter III, Civil Aviation Law; Chapter I, III, IV and IX; among others	<u>For air transportation</u> : The president, at least two thirds of the board of directors and two thirds of top direction posts of such enterprises shall be Mexican nationals.

## COMPETITION POLICY

The Federal Economic Competition Law (FECL) was enacted on 23 June 1993, creating at the same time the Federal Competition Commission (FCC), as the agency in charge of enforcing the FECL. The principal objective of this new antitrust statute is to protect the process of competition in the Mexican market, and enhance economic efficiency.

The FCC was designed to operate as an autonomous -body of the executive branch within the Mexican Ministry of Economy. The President of Mexico appoints a panel of five commissioners, including the President, to form a plenary session with decisions made by majority vote. The Commission is empowered to:

- 1) Conduct investigations of competition violations initiated at the request of interested parties or by the FCC itself;
- 2) Issue administrative rulings and assess penalties for such violations;
- 3) Render advisory opinions regarding competition policy questions; and
- 4) Participate in the negotiation of international agreements regarding competition policy.

The FECL consists of 39 articles that set forth economic and legal regulations for all economic agents in Mexico. This includes all government agencies or entities, individuals, private companies, state owned companies or companies with government participation, associations, professional organisations, trusts and the like. Article 1 and 3 of the FECL state the general application of Mexico's antitrust policy.

The fourth paragraph of Article 28 of the Federal Constitution reserves several areas of economic activity, considered to be "strategic areas" for the State. Under the CL these particular areas are not considered to be monopolies. Nevertheless, any State enterprise is subject to the FECL outside the strategic sectors.

The FECL prohibits all absolute monopolistic practices, referred to as "per se" practices. According to the law, agreements among competitors to fix prices or quality, rig public bidding, divide distribution of goods or services, or allocate market shares violates article 9 of the law, regardless of the size of the agent involved, or the characteristics of the market.

The CL also forbids "relative practices", i.e. relative monopolistic practices that are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals,

Regarding merger control, the law's approach is basically preventative. There is a pre-merger or acquisition notification procedure to aid the FCC in detecting uncompetitive mergers.

For further information see <http://www.cfc.gob.mx/english/>



# NEW ZEALAND

## Acronyms

OIO	Overseas Investment Office
IPONZ	Intellectual Property Office of New Zealand
EOI	Expression of Interest

## INTRODUCTION

A key aspect of the New Zealand Government's growth strategy is the development of strong international linkages; this includes both outward and inward investment. New Zealand has a very welcoming and open attitude towards inward FDI, which is frequently reiterated in public statements by Government Ministers and officials. New Zealand welcomes and encourages foreign investment from all countries without discrimination. This is reflected in the nature of the Government's foreign investment policies.

In 2005, New Zealand undertook a major reform of its overseas investment screening regime. The introduction of the *Overseas Investment Act 2005* (the Act)<sup>34</sup> and the Overseas Investment Regulations 2005 (the Regulations) aimed to ensure that New Zealand's screening regime focused on assets of particular sensitivity to New Zealand: these assets are defined as "sensitive" within the Act. One effect of the law change is that most potential FDI, which is focussed on areas that are not defined as sensitive, requires no screening.

## SCREENING OF FOREIGN INVESTMENT

The *Overseas Investment Act 2005* disbanded the New Zealand Overseas Investment Commission and created the Overseas Investment Office (OIO), which is located within Land Information New Zealand. The OIO oversees New Zealand's foreign investment screening process. Further information, including links to the Act, can be found on the Land Information New Zealand website: [www.oio.linz.govt.nz](http://www.oio.linz.govt.nz)

### **What is screened?**

Investments in New Zealand that are made by an overseas person(s) are not screened unless the asset is defined as sensitive within the Act. Sensitive assets are divided into three broad categories:

- business assets or investments valued at over NZ\$100 million;
- land that is deemed as sensitive; and
- fishing quota.

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<sup>34</sup> All the Acts and Regulations referenced in this questionnaire can be found at [www.legislation.govt.nz](http://www.legislation.govt.nz)

Overseas investors intending to invest in sensitive assets must show that they have business acumen and experience, financial commitment, and are of good character. These conditions apply to all sensitive assets and in the case of business investments they are the sole criteria for granting approval.

(i) Business Assets

New Zealand has recently raised its screening threshold for non-land business investments to NZ\$100 million from NZ\$50 million. Investments in a 25% or more ownership or control interest in business investments, new business investments, and business investments that include the purchase of property that exceed this threshold will require the approval of the OIO. This threshold applies regardless of the nature of the investment. An application for approval can be lodged with the OIO. At the time of writing, New Zealand had not declined any applications to invest in non-land assets.

(ii) Sensitive Land

There are no blanket monetary or industry restrictions on the purchase of land. The only land that is screened is land categorised as being ‘sensitive’. The categories of sensitive land are detailed in schedule one of the Act. In summary, land may be sensitive because of its size, its nature, or the nature of adjoining land.

Screening thresholds vary depending on whether the land is smaller or larger than 5 hectares, and whether the land is farm land.

(iii) Fishing Quota

All investments in fishing quota or entities that own fishing quota by overseas persons are considered to be sensitive and are subject to controls.

**Relevant laws, regulations and administrative guidelines**

Citation	Summary
<i>Overseas Investment Act 2005</i>	<ul style="list-style-type: none"> <li>• Defines what land and business assets are sensitive</li> <li>• Establishes the process for obtaining consent to invest in sensitive assets.</li> <li>• Defines the criteria that must be met before such consent can be granted.</li> </ul>
Overseas Investment Regulations 2005	<ul style="list-style-type: none"> <li>• Defines how foreshore, seabed, river or lakebed should be treated.</li> <li>• Defines administrative procedures, fees, and exemptions.</li> </ul>
<i>Fisheries Act 1996</i>	<ul style="list-style-type: none"> <li>• Establishes the process for obtaining consent to invest in fishing quota.</li> <li>• Defines the criteria that must be met before such consent can be granted.</li> </ul>

### **Application procedure**

The time taken to process an application can vary greatly. Decisions on investments in business assets are normally processed within several weeks. Sensitive land applications are normally processed in less than eight weeks. Processing time is heavily dependant on the quality of the information provided by the investor. There is no basis on which an investor can expedite this approval process. The OIO will attempt to accommodate reasonable commercial needs but cannot guarantee to do so.

All approvals are subject to certain conditions, including:

- the information provided with the application must be correct;
- the investor must comply with the representations and plans submitted in support of the consent application; and
- a range of reporting and other general conditions.

In addition, specific conditions may be imposed to ensure a particular outcome where that outcome was relevant to the decision to grant consent.

The OIO consults with the applicant and, in appropriate cases, third parties before any decision is made. If the applicants disagree with the decision of the OIO (acting under delegation) or of the Ministers, it can be challenged by way of judicial review.

### **Statistics on Investment Screening**

*Total number of consents granted between 1 January 1999 and 31 May 2006 by type:*

	<b>Land</b>	<b>Fish</b>	<b>Business</b>	<b>Total</b>
1999	236	0	72	308
2000	213	2	26	241
2001	218	3	26	247
2002	231	0	16	247
2003	200	0	14	214
2004	143	0	15	158
2005	162	0	17	179
2006 (YTD)	51	0	7	58
TOTAL	1454	5	193	1652

*Total number of consents declined between 1 January 1999 and 31 May 2006 by type:*

	<b>Land</b>	<b>Fish</b>	<b>Business</b>	<b>Total</b>
1999	2	0	0	2
2000	7	6	0	13
2001	3	0	0	3
2002	9	0	0	9
2003	8	0	0	8
2004	11	0	0	11
2005	2	0	0	2
2006 (YTD)	1	0	0	1
<b>TOTAL</b>	<b>43</b>	<b>6</b>	<b>0</b>	<b>49</b>

## **SECTOR-SPECIFIC LAWS AND POLICIES**

New Zealand has aimed to create a simple and transparent investment regime by adopting very few sector specific laws. New Zealand has very little regulatory differentiation between different types of investment.

### (i) Foreign Investment in Business

#### *Telecommunications*

The Constitution of the Telecom Corporation of New Zealand Limited requires New Zealand government approval before the shareholding of any single overseas entity may exceed 49.9%. Further, at least half the board of directors are required to be New Zealand citizens.

#### *Financial reporting*

Under the *Financial Reporting Act 1993*, overseas companies operating in New Zealand are required to prepare audited financial statements on an annual basis. Overseas companies include companies or body corporate incorporated outside New Zealand, subsidiaries of companies or bodies corporate incorporated outside New Zealand, companies in which 25% or more of the shares are held or controlled by those companies, and persons not ordinarily resident in New Zealand.

#### *Banking*

There is no difference in treatment between New Zealand banks and banks with foreign ownership.

All banks are subject to prudential requirements relating to ownership. Ownership is one of the factors the Reserve Bank of New Zealand considers when it makes a decision on whether or not to grant bank registration. Once a bank is registered any significant changes in ownership require Reserve Bank approval.

Some retail deposit-taking banks and large banks (banks with liabilities net of related party funding in excess of NZ\$10 billion) are required to conduct their New Zealand operations in a New Zealand incorporated bank.

## *Casinos*

In considering licensing applications under the *Casino Control Act 1990 Act*, the Casino Control Authority must take into account “the extent to which the beneficial ownership of the casino will be vested in New Zealand citizens or persons ordinarily resident in New Zealand”.

## *International Airlines*

Domestic air services in New Zealand are unrestricted. The restrictions on foreign investors with respect to international air services are:

- (i) compliance with ‘substantial ownership and effective control’ expectations. Under many of New Zealand’s bilateral Air Services Agreements, New Zealand airlines can be refused authorisation to operate if they are not “substantially owned and effectively controlled” by nationals of New Zealand; and
- (ii) foreigners may own no more than 49% of New Zealand international airlines (before September 1996, the limit was 35%), provided that no more than 35% of the shares are owned by foreign airlines or airline interests in aggregate, or 25% by a single foreign airline or airline interest. These limits apply to all international airlines designated by the New Zealand Government. There are, however, separate arrangements for airlines operating within the Australian-New Zealand Single Aviation Market only.

## *Producer and Marketing Boards*

The *Primary Products Marketing Act 1953* allows for the establishment of statutory marketing organisations with monopoly or lesser powers over the exporting of products derived from:

- beekeeping;
- fruit growing;
- hop growing;
- deer farming or game deer; and
- fur bristles or fibres grown by goats.

More favourable treatment may be afforded to New Zealand nationals and permanent residents in respect to ownership of these organisations.

## *Fishing*

The *Overseas Investment Act 2005* requires that any acquisition by an overseas person, or an associate of an overseas person, of an interest in fishing quota will require consent. Consent is also required if a 25% ownership or control interest is acquired in a company that owns or controls fishing quota.

Under the *Fisheries Act 1996*, foreign fishing vessels or fish carriers are required to obtain the approval of the Minister of Fisheries before entering New Zealand internal waters. If the Minister of Fisheries considers that the vessel has undermined international conservation and management measures he or she may deny the vessel approval to enter New Zealand internal waters.

## *Shipping*

New Zealand registration of vessels engaged in maritime transport activities is limited to New Zealand nationals or to enterprises (regardless of ownership) incorporated in New Zealand.

### (ii) Foreign Investment in Land

New Zealand screens purchases of sensitive land. An investment in sensitive land is the acquisition by an overseas person of any interest in sensitive land or rights or interests in securities that result in the overseas person having a 25% or more ownership or control interest in an entity that owns or controls an interest in sensitive land. New Zealand does not distinguish between ownership of land for commercial or residential uses.

Sensitive land is specifically defined within the Act. A few select **examples** of sensitive land include:

- non-urban land of over five hectares;
- land on offshore Islands;
- any foreshore, seabed, and the bed of a river or a lake;
- land that is over 0.4 hectares and adjoins foreshore, seabed, and the bed of a river or a lake; and
- land or land that adjoins land that is subject to a heritage order or is classed as an historic place and is over 0.4 hectares;

For more details on what constitutes sensitive land, investors should consult schedule one of the *Overseas Investment Act 2005*.

The prospective investor must show either:

- that they intend to reside in New Zealand indefinitely; or
- how the investment will, or is likely to, benefit New Zealand. The factors for assessing this are specified within the Act and include a variety of economic, environmental, and qualitative factors.

In certain circumstances, the Crown has the right to acquire at an agreed price any seabed, foreshore, riverbed and lakebed that is included in land sold to an overseas person. This process is managed by the OIO and is controlled by the Regulations.

Farm land must be advertised for sale or acquisition on the open market to New Zealanders. Farm land is defined as land used exclusively or principally for the purpose of agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry or livestock.

## INVESTMENT PROTECTION

### Conversion, Repatriation and Transfers

The New Zealand dollar has floated freely since March 1985. Since the exchange rate was floated, the Reserve Bank has not intervened directly in the foreign-exchange market to influence the value of the dollar. There are no exchange controls on foreign-exchange transactions undertaken in New Zealand, either by New Zealand residents or non-residents.

New Zealand has FTAs that guarantee the repatriation of funds for investments covered by agreements with Thailand, Singapore, Chile and Brunei. The transfer articles in these agreements are subject to additional balance of payments safeguards.

## EXPROPRIATION AND COMPENSATION

### (i) Domestic laws, regulations and policies

Private property can be expropriated for public purposes in accordance with established principles of international law. Due process rights are established and respected, and prompt, adequate and effective compensation (under just terms) is paid.

The provisions of the IPPAs in place between New Zealand and China, and New Zealand and Hong Kong, China cover investments by their citizens.

### (ii) Recent cases

Over the last three years, there have been no cases of expropriation involving foreign investors under domestic law.

### (iii) IPR

New Zealand law protects patents, trademarks, designs, copyrights, geographical indications and integrated circuit layout rights. New Zealand is a member of the WTO, the TRIPS, the WIPO, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, and the Patent Cooperation Treaty. New Zealand is a *de facto* member of the [Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms 1971](#).

The Intellectual Property Office of New Zealand (IPONZ) is the New Zealand government agency responsible for registrations of patents, trademarks and designs. Contact details for IPONZ are: Tel: 64 3 962 2607; Fax: 64 4 560 1691; or (<http://www.iponz.govt.nz>). For plant variety rights, contact the Plant Variety Rights Office: Tel 64 3 962 6201 Fax: 64 3 962 6202. For copyright matters contact the Intellectual Property Policy Group, Ministry of Economic Development: Tel 64 4 472 0030; Fax 499 1791; or at (<http://www.med.govt.nz/>).

#### (iv) Dispute Settlement

There are a variety of dispute settlement procedures available in New Zealand, all of which are equally available to New Zealanders and non-New Zealanders. Investors and potential investors can appeal decisions of the OIO to the High Court of New Zealand. They can also seek judicial review of ministers' decisions and have access to non-litigious methods of dispute resolution.

New Zealand's statutory arbitration procedures are contained in the *Arbitration Act 1996*, which is closely based on the UNCITRAL Model Law on Arbitration. The Arbitration Act encourages the use of arbitration as a way of resolving commercial and other disputes, and promotes the consistency of New Zealand's arbitral regime with UNCITRAL Model Law on Commercial Arbitration. Provision for the arbitration and mediation of disputes has also been made in the *Employment Relations Act 2000* and the *Resource Management Act 1991*.

Several private dispute resolution organisations are now active in New Zealand, including the Arbitrators' and Mediators' Institute of New Zealand. Both organisations can provide lists of available mediators.

New Zealand is a party to the ICSID Convention, which is implemented through the *Arbitration (International Investment Disputes) Act 1979*.

No state-to-state or investor-to-state disputes have been taken by, or against, the New Zealand government in the last three years.

## **INVESTMENT AND DEVELOPMENT**

New Zealand does not impose performance requirements when granting approval for foreign investments.

## **INVESTMENT PROMOTION AND INCENTIVES**

### (i) Investment Promotion Agencies

Investment New Zealand is New Zealand's national investment promotion agency. It is a specialist unit within New Zealand Trade and Enterprise. Investment New Zealand actively assists international corporate investors to:

- Relocate their businesses to New Zealand;
- Establish greenfield operations; and
- Invest in and work with New Zealand companies in global ventures.

More information on Investment New Zealand can be found at <http://www.investmentnz.govt.nz/>

(ii) Incentives

New Zealand operates a Strategic Investment Fund (SIF) programme to develop links between prospective major investors and major investment opportunities in New Zealand, as well as to support New Zealand businesses to develop and manage strategic investment proposals. Three types of assistance are available under the SIF: feasibility study grants, guarantees of funding for the implementation of significant projects, and cash grants. The qualifying criteria are primarily directed towards correcting market failures and obtaining broad "spillover" type benefits for the wider economy.

New Zealand has no free trade zones or special investment areas.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

New Zealand does not impose restrictions on the repatriation of capital and earnings by foreign investors related to foreign investment. However, individuals passing through international airports must report cash, or cash equivalents, of \$10,000 (New Zealand or foreign currency equivalent). There is no restriction on any larger amounts that are transferred through the banking system.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

(i) Regulations relating to personnel management of foreign firms

New Zealand law does not discriminate between foreign and locally owned enterprises. Accordingly, a foreign firm employing New Zealand workers has the same legal rights and obligations in relation to conditions of employment and related matters as any local firm in a similar situation.

All employers, including foreign firms, wishing to employ people in New Zealand (even if they are non-New Zealand workers) must comply with the relevant New Zealand employment and immigration laws.

*The Employment Relations Act 2000* describes the basis on which people are employed in New Zealand. Compliance generally includes:

- paying employees no less than the appropriate adult or youth minimum wage;
- meeting holiday and special leave requirements;
- meeting health and safety obligations; and
- only employing people who have the authority to work in New Zealand.

Further information is available at <http://www.dol.govt.nz>

### *Minimum Wage*

All employees aged 16 years or more must be paid the statutory minimum wage. For a person aged 16 or 17 years old, the minimum hourly wage is \$8.20, and for a person who is aged 18 or over, the minimum wage is \$10.25. On 1 April 2007 these rates will increase to \$9.00 an hour for a person aged 16 or 17 years old and \$11.25 an hour for a person who is aged 18 or over.

The statutory minimum wage does not apply to:

- people who hold an exemption; or
- people undergoing training through a recognised industry training organisation, undertaking at least 60 credits per year.

People doing recognised training will be paid the minimum training wage, which is equivalent to the minimum youth pay rate above.

### *Board and Lodging*

If an employee is provided with board and lodging, a deduction of 15% for board and 5% for lodging can be made by the employer.

### *Holiday Entitlements*

Under the *Holidays Act 2003*, all employees are entitled to a minimum of three weeks annual holidays. On 1 April 2007 this holiday entitlement will change, entitling all employees to four weeks annual holidays.

There are 11 public (also known as statutory) holidays provided under the *Holidays Act 2003*. All employees are entitled to a paid day off on a public holiday if it would otherwise be a working day for them.

### *Anti-discrimination*

An employer cannot pay men and women different pay rates for doing the same or substantially similar work if the only difference is their sex (*Equal Pay Act 1972*).

In addition, under the *Human Rights Act 1993*, an employer cannot discriminate in hiring or firing, or training or promoting because of the employee's colour, race, ethnic or national origins, sex (including pregnancy or childbirth status), marital or family status, age, disability, religious or ethical belief, political opinion, employment status, or sexual orientation.

Under the *Employment Relations Act 2000*, employers cannot discriminate on those same grounds or on the grounds that a person has been involved in union activities, in relation to terms of employment, conditions of work, fringe benefits, opportunities for training, promotion or transfer, dismissal, retirement, or by subjecting an employee to detriment.

### *Wages*

Employers must keep wages and time records for each employee for six years, which employees and their representatives have the right to see.

### *Employment Agreements*

Every employee must have a written employment agreement. It can be either an individual agreement or a collective agreement. There are some provisions that must be included in employment agreements by law. These are:

- parties to the agreement (employer and employee's names);
- position (position held by employee);
- duties (what the position entails i.e. job description);
- place of work;
- working hours;
- types of pay;
- holidays;
- steps for resolving employment relationship problems; and
- declaration (signature of employer and employee).

(ii) Labour laws applying to foreign firms for labour relations and/or disputes

*Employment Relations Act 2000*

*Parental Leave and Employment Protection Act 1987*

*Minimum Wage Act 1983*

*Wage Protection Act 1983*

*Holidays Act 2003*

*Equal Pay Act 1972*

*Human Rights Act 1993*

*Health and Safety Act 1992*

*Dismissal*

If the employment relationship breaks down there are certain processes that employers and employees follow.

Both employers and employees are responsible for trying to resolve a problem through discussion. Union members can ask their union, and employers can ask their employers' association, to approach the other party for them.

If an employee believes they have a personal grievance, they must raise it with their employer within 90 days of the action complained of, or the date they became aware of it, whichever is the later. Personal grievances can be pursued for:

- unjustifiable dismissal;
- unjustifiable action which disadvantages the employee;
- discrimination;
- sexual harassment;
- racial harassment; and/or
- duress over membership of a union or other employee organisation.

#### *Labour Inspectors*

Labour Inspectors are responsible for the enforcement of certain employment relations laws such as annual leave, sick leave, parental leave, public holidays and minimum pay. If it appears that an employer has breached any of these laws, employees can ask a Labour Inspector to investigate the matter on their behalf, or they can take action themselves.

#### *Mediation Service*

The Department of Labour provides mediation services to help people resolve their employment relations problems quickly and effectively. Assistance can be provided in a range of ways from provision of information, facilitation, educational events or programmes, or mediation.

#### *Employment Relations Authority*

The Employment Relations Authority is an investigative body that operates in an informal way. It looks into the facts of a dispute and makes a decision based on the merits of the case, not on legal technicalities.

#### *Employment Court*

Anyone dissatisfied with the Authority's determination can take the dispute to the Employment Court for a full judicial hearing. This is not an appeal but a full judicial hearing of the original problem.

#### (iii) Permits/entry visa requirements for non-resident staff of foreign firms

There are several immigration categories (both temporary and residence) under which non-resident staff of foreign firms may apply to work in New Zealand. These include:

- **Visitor policy** – Business visitors who are not considered to be undertaking employment may be issued with a visitor's permit, provided that they intend a stay in New Zealand for no longer than three months in any one year. Eligible business visitors include: representatives on official trade missions; sales representatives of overseas companies; overseas buyers of New Zealand goods or services; and people involved in business consultations and negotiations to buy or sell enterprises.
- **General Work Policy** – General work policy allows New Zealand employers to recruit temporary workers from overseas to meet particular or seasonal worker shortages that cannot be met from within New Zealand. To be issued with a work visa under the General Work Policy applicants must provide evidence of an offer of employment:

- in an occupation on the Immigration New Zealand Immediate Skill Shortage List;
  - from a New Zealand employer with approval in principle from Immigration New Zealand for recruitment of the applicant; or
  - with a supporting case from a New Zealand employer establishing that there are no New Zealand citizens or residents suitably qualified by training and experience who are available.
- **Specific purpose or event** – The objective of this policy is to facilitate entry to New Zealand for a specific purpose or event for which the applicant has demonstrated expertise likely to benefit individuals and/or New Zealand, and where there is no risk of a negative impact on opportunities for New Zealanders. Examples of applicants who are considered to be coming to New Zealand for a specific purpose or event include:
    - senior or specialist business people on short-term secondments in a substantial New Zealand company or a subsidiary of an overseas company;
    - a business person seconded to New Zealand as an intra-corporate transferee to take up a position in a multinational company as an executive, senior manager or specialist personnel; and
    - business people wishing to undertake business activities in New Zealand and who have genuine reasons to be in New Zealand for a period/s exceeding three months in any one year.

Partners and dependent children of principal applicants in this category may be issued with multiple journey visitors' visas authorising permits current for the same period as the principal applicant's permit. Dependent children may also be issued with student visas, provided that they meet standard student policy requirements.

- **Private work exchanges** – Immigration New Zealand formally approves the terms and conditions of approved private exchange schemes. Responsible organisations must satisfy Immigration New Zealand that appropriate arrangements have been made for the accommodation, maintenance and welfare of the exchange participants and any accompanying dependants. The most common forms of exchange are entry for employment, for study or training, or for cultural/social/artistic exchanges.
- Exchanges must be reciprocal in terms of both the number of foreign and New Zealand exchange participants each year, and the granting of permission for New Zealand participants to visit other countries for equivalent periods, under similar terms and conditions. The maximum length of stay permitted for participants is 12 months.
- **Skilled Migrant Category** – the objective of the Skilled Migrant Category is to provide for the grant of residence to people who demonstrate that they have skills to fill identified needs and opportunities in New Zealand.

A person applying for residence under the Skilled Migrant Category first completes an Expression of Interest (EOI). EOIs which meet prerequisites for health, character, English language and age, and also meet or exceed a minimum point score, are entered into the EOI pool. EOIs with total points over the current selection threshold are drawn from the pool and invited to apply for residence. Applicants can gain EOI points for skilled work experience, qualifications and a job or offer in New Zealand (particularly in an area of skill shortage).

- **Employees of Relocating Businesses Category** – this category assists in promoting New Zealand as a place in which to invest and locate business. It does this by facilitating the granting of residence to employees of businesses relocating to New Zealand, who do not qualify for residence under any existing categories.

Principal applicants in the Employees of Relocating Businesses category are required to demonstrate that: they are a key employee of a relocating business, and the relocation of the business is supported by New Zealand Trade and Enterprise.

(iv) Restrictions on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members

Immigration restrictions are described above. That is, New Zealand employers cannot recruit temporary workers from overseas while there are New Zealand citizens or residents available to work who are either suitably qualified by training and experience, or could be readily trained.

All applicants intending a stay of more than 12 months must demonstrate that they have an acceptable standard of health. This requirement also applies to the principal applicant, partner and dependants.

In addition, residence applicants and temporary entrants intending a stay of more than 24 months must demonstrate that they meet character requirements.

Applicants under the skilled migrant and business immigration policies for residence must meet a minimum English language requirement. Non-principal applicants in those categories must either meet a minimum English language requirement or pre-purchase English for Speakers of Other Languages tuition, to be taken up upon arrival in New Zealand.

(v) Senior Management/Boards of Directors Restrictions

The *Companies Act* 1993 regulates the formation, registration and winding-up of companies. The Act further provides for the appointment, duties and powers of directors. The *Companies Act* does not contain provisions that require a person to have residence or citizenship in/of New Zealand in order to be a director of a New Zealand company. However, in a very limited range of instances there may be requirements for residence and/or citizenship in the legislation that establishes or regulates specific companies or areas. For example, New Zealand requires that at least half of the board of directors of Telecom New Zealand are New Zealand citizens.

## **GOVERNMENT PROCUREMENT**

In New Zealand's state sector management context, chief executives are responsible and strictly accountable for the efficient and effective operation of their agencies, and have substantial managerial discretion in operational matters such as procurement.

However, mandatory procedural rules have recently been implemented to ensure internationally open and competitive procurement by core government departments. The Government expects its departments, and encourages other public sector agencies, to be guided in their procurement by the following principles:

- best value for money over whole of life;
- open and effective competition;
- full and fair opportunity for domestic suppliers;
- improving business capabilities, including e-commerce capability; and
- recognition of New Zealand's international obligations, including FTAs, and New Zealand's global trade policy interests in open and transparent government procurement markets.

The Government has also endorsed the APEC Non-Binding Principles on Government Procurement i.e. transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination.

Although New Zealand has unilaterally removed barriers to foreign access to its central government procurement markets, there are also trade commitments in government procurement to Australia, Singapore, Chile and Brunei.

Further information on government procurement can be found at [www.procurement.govt.nz](http://www.procurement.govt.nz) and [http://www.apec.org/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.html](http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html) or queries can be directed to [procurement@med.govt.nz](mailto:procurement@med.govt.nz).

## COMPETITION POLICY

New Zealand's primary competition law is contained in the *Commerce Act* 1986<sup>35</sup>. The purpose of the Act is to promote competition in markets in New Zealand for the long-term benefit of consumers within New Zealand.<sup>36</sup>

New Zealand's competition policy framework is based on economy wide in principle prohibitions on conduct and arrangements that substantially lessen competition. The approach is to rely on general rules that apply across all sectors as much as possible. This generic approach has been supplemented with industry specific regulation where required. Examples where industry specific legislation has been implemented include the *Dairy Industry Restructuring Act* 2001, the *Electricity Reform Act* (and Part 4A of the *Commerce Act*) and the *Telecommunications Act* 2001.

Part II of the *Commerce Act* prohibits certain restrictive trade practices, including:

- section 27, which prohibits contracts, arrangements or understandings that have the purpose or effect of substantially lessening competition;
- section 29, which prohibits contracts, arrangements or understandings containing exclusionary provisions;
- section 30, which prohibits contracts, arrangements or understandings between competitors

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<sup>35</sup> The Act was substantially amended in 2001 to enhance competition thresholds and strengthen deterrents against anti competitive behavior.

<sup>36</sup> Also of importance is *The Fair Trading Act* 1986. *The Fair Trading Act* was developed with the *Commerce Act* to encourage competition and to protect consumers from misleading and deceptive conduct and unfair trading practices. The Act applies to all aspects of the promotion and sale of goods and services - from advertising and pricing to sales techniques and finance agreements.

that lead to prices being fixed;

- section 36, which prohibits a person that has a substantial degree of market power in a market from taking advantage of that power for exclusionary purposes. A similar prohibition applies to persons taking advantage of market power in trans-Tasman markets (s36A); and
- sections 37 and 38, which prohibit suppliers maintaining resale prices at which goods may be sold by other businesses.

Part III of the *Commerce Act* prohibits business acquisitions that have, or would be likely to have, the effect of substantially lessening competition in a market.

Part IV of the *Commerce Act* provides for regulatory control of goods or services where competition is limited and control would benefit acquirers. Part 4A of the Act includes specific provisions for targeted control of large electricity lines businesses.

In limited circumstances, exclusions from New Zealand's competition law can be included in other laws.<sup>37</sup> Exclusions generally arise where the promotion of competition will not lead to efficient outcomes or where other public policy goals support limitations on the Act. The *Commerce Act* will take precedence unless the other law or regulations specifically authorises or exempts the contravening conduct. For example, arrangements relating to international carriage of goods by sea are exempt from Part II of the *Commerce Act*.

Part V of the *Commerce Act* provides for the Commerce Commission, on a case-by-case base, to specifically authorise restrictive trade practices (excluding section 36) and business acquisitions that may be in breach of the Act. An authorisation is a determination by the Commission that the public benefits of the acquisition outweigh the detriments from the lessening of competition that would be likely to result. The Commission also has the ability to grant clearances in relation to business acquisitions that may breach the *Commerce Act*.

The Commerce Commission is New Zealand's primary competition regulatory agency. The Commission is an independent statutory body with predominantly adjudication and public enforcement functions (although other parties may also take private litigation). The Ministry of Economic Development is responsible for developing and advising the government on competition policy.

#### Additional information

More information about New Zealand's competition regime can be found on the following websites:

- Commerce Commission - [www.comcom.govt.nz](http://www.comcom.govt.nz).
- Ministry of Economic Development - [www.med.govt.nz](http://www.med.govt.nz)

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<sup>37</sup> The relationship between competition law and other laws is specified in section 43 of the *Commerce Act*.

# PAPUA NEW GUINEA

## Acronyms

BPNG	Bank of Papua New Guinea
CAA	Civil Aviation Authority
ICCC	Independent Consumer and Competition Commission

## INTRODUCTION

Papua New Guinea (PNG) encourages and welcomes FDI. It has an open and transparent investment environment. The Government of PNG has recently developed a long-term National Investment Policy which builds on the considerable progress the Government has made to curtail the regulatory and administrative requirement. The National Investment Policy aims to provide the transparency, equal treatment and consistency required by foreign companies, to enable them to make medium-term strategic decisions to invest in PNG.

The Government in its drive to promote investment has enacted enabling legislation to complement the National Investment Policy to create conducive investment environment. Some of the undertakings include implementation of the World Bank's Structural Adjustment Program on Privatization of State Owned Enterprises and Market Deregulation of State owned enterprises monopolies and Financial Sector Reform, Tariff Reform and the development of a Medium-term Development Strategy that is aimed at providing the basic infrastructure.

The Government, in line with its commitment to its WTO obligations (and taking account of APEC's investment liberalisation and facilitation objectives), will continue to undertake necessary reform to ensure that the liberalization process progresses in a sustainable manner.

## SECTOR-SPECIFIC LAWS AND POLICIES

### (i) Banking

Banking in PNG is covered under the *Banks and Financial Institutions Act* (2000). It is an offence to carry on "banking business" in PNG without being authorised or specifically exempted by Bank of Papua New Guinea (BPNG). Banking business, is defined in the Act as (a) the business of taking money on deposit and using that money to lend to others and to finance any other activity of business; and (b) such other financial activities prescribed by the regulations for the purposes of this definition.

(ii) Civil Aviation

The *Civil Aviation Act* (2000) created the Civil Aviation Authority (CAA), which replaced the Office of Civil Aviation. The CAA was given a separate board and placed under the Department of Transport and Civil Aviation. It provides most of all aviation services in PNG, including air safety and airport services. CAA is also in the process of being corporatised and relevant assets are being transferred to it.

(iii) Domestic Services

There are five airlines operating in PNG namely Air Nuigini, Airlines of Papua New Guinea, Regional Air, National Jet and Hevi Lift, in addition to a number of small charter companies that fly to the remotest airstrips in the country. Although, there is some competition on some domestic sectors, Air Nuigini is the dominant service provider and the sole provider on most routes.

(iv) International Services

Air Nuigini provides international services between Port Moresby and Manila, Honiara, Tokyo, Singapore, Brisbane, Cairns and Sydney, the latter routes being under code-sharing arrangements with Qantas. It also provides most of the domestic services.

Airlines PNG competes with Air Nuigini in the Cairns/Port Moresby sector and on that Port Moresby/Brisbane return route. Air Nuigini is state-owned while Airlines PNG is privately-owned.

PNG has an “open skies” policy.

(v) Shipping

A comprehensive review has been undertaken by the Government of PNG in the domestic shipping industry with a view to identifying regulatory impediments and competition constraints.

(vi) Mining & Petroleum

Foreigners may own 100% of equity, however, if the Government of PNG participates, it can take equity up to a maximum of 30% in Mining and 22.5% in Petroleum. In all cases, if the Government of PNG does not participate, the foreign company takes up 100% equity of which 2% will be negotiated for the Landowner benefits.

(vii) Telecommunications

Telikom PNG Limited is owned by the PNG Government. An attempt was made to privatize Telikom PNG Limited however it was unsuccessful. The Government established the Independent Consumer and Competition Commission (ICCC) and steps have been undertaken to introduce competition in the mobile phone sector. The ICCC was given the task of selecting two additional

licensees to provide mobile services. The process is now complete and the successful bidders have been announced. Mobile phone competition commenced in March 2007.

To ensure that there will be fair competition in the mobile sector, reviews were conducted by the Government on ways to prevent Telikom from misusing its market power arising from incumbency and control of the fixed line network. These include examination of access rules with a view to implementing a code of conduct, accounting separation between telikom's fixed lines and mobile services and reworking of the regulatory contract.

## **INVESTMENT PROTECTION**

### **(i) Expropriation and Compensation**

The Government of PNG guarantees that the property of a foreign investor will not be nationalized or expropriated, except in accordance with the law. In such cases compensation will be paid. The *Investment Promotion Act* (1992) provides for expropriation and compensation. PNG has entered into bilateral investment promotion protection agreements with some countries and issues of expropriation and compensation are covered.

### **(ii) Protection from Strife and Similar Events**

The Government under the similar arrangement as in Expropriation and Compensation would accord similar treatment to foreign companies, in the event they lose their assets as a result of war, civil disturbances etc. The Government through bilateral IPPAs with other countries provides for the protection of investors from these countries.

Disputes can also be settled in the normal court of law provided evidence of losses are substantiated and the judicial system can expedite the case in fairness.

### **(iii) Intellectual Property (IP) Rights**

PNG became a member of the Patent Cooperation Treaty in 2002 and has in place Intellectual Property Legislation to protect IP owners. The legislation covers, copy-right & related rights, trade marks, including service marks, industrial design, patents, layout-designs (topographies) of integrated circuits and undisclosed information, including trade secrets.

PNG's IP law is consistent with WTO TRIPS Agreement and other International IP Convention & Treaties, of which PNG is a member and signatory to such as the Paris Convention for the Protection of Industrial Design and the Berne Convention for the Protection of Literary and Artistic Works (copyright), etc.

The IP Legislation is the responsibility of the Intellectual Property Office of PNG under the Investment Promotion Authority, in conjunction with the Attorney General Department and National Cultural Commission.

These agencies can be found at:

Intellectual Property Office of PNG <http://www.ipa.gov.pg/intellectual%20properties.htm>  
Investment Promotion Authority <http://www.ipa.gov.pg/>  
Attorney General's Department <http://www.lawandjustice.gov.pg/www/html/90-the-attorney-general.asp>

National Cultural Commission  
P.O. Box 7144 Boroko, NCD  
Papua New Guinea  
Tel: (675) 323 5111/ (675) 323 119  
Fax: (675) 325 9119  
Email: [culture@daltron.com.pg](mailto:culture@daltron.com.pg)

(iv) Dispute Settlement

The Investment Promotion Authority administers the *Investment Promotion Act* in respect of the *Multilateral Promotions Act* in respect of the Multilateral Investment Guarantee Agency and the International Center for Settlements of Investment Disputes.

The *Investment Dispute Convention Act* seeks to encourage greater flows of international investment by providing facilities for the conciliation and arbitration of disputes between Government and Foreign Investors.

## **INVESTMENT AND DEVELOPMENT**

(i) Performance requirements

There are no performance requirements that limit trade and investment in PNG.

*Other policy measures affecting inward foreign investment*

PNG does not use policy measures that would affect foreign investment in the country. The policy is basically to encourage foreign investment into the country to achieve economic growth and development. The Government is doing this by removing barriers that impede trade and investment in the country. The Government has further established a National Working Group on removing Impediments to Business and the Consultative Implementation and Monitoring Council to address policy and structural issues affecting the private sector and civil society in PNG. Substantial progress has been made in removing impediments to business, but challenges remain, particularly in areas such as telecommunications, transport and other infrastructure.

(ii) Investment Promotion and Incentives

The agency responsible for Investment Promotion is the Investment Promotion Authority. Its address is:

Investment Promotion Authority  
PO Box 5053  
BOROKO  
Level 3, Credit House  
Cuthberston St Port Moresby  
Website: [www.ipa.gov.pg](http://www.ipa.gov.pg)

(iii) Free Trade Zones or 'special investment areas'

PNG has some Free Trade zones. Information is available from the Investment Promotion Authority <http://www.ipa.gov.pg/>

(iv) Income Tax Incentives for Business and Investment

- Export Income exemption for manufacturing;
- Double deduction for staff training (all industries);
- Export market development deduction;
- Accelerated and flexible depreciation (all industries);
- Tax deductibility of certain agricultural development expenses;
- Tax deductions for agricultural companies;
- Rural development incentives;
- 150% income tax deduction for expenditure on R&D;
- 150% deduction for expenditure on agricultural extension;
- concessional tax rate on income for new agricultural activities;
- primary production losses;
- general infrastructure tax credit;
- extra 0.25% infrastructure tax credit for agriculture;
- 1.25% credit for expenditure on the Highlands highway;
- tax holiday for mining;
- tax relief for agricultural R&D;

- concessional tax rate on income from new investment in agriculture;
- reduction of tariff rate on agricultural equipment;
- reduction for excise on diesel;
- dividends are tax free;
- accelerated depreciation to 55% in tourism sector;

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Foreign Investors are allowed to remit earnings overseas, repatriate and remit amounts necessary to meet payments of:

- principle, interest and service charges; and
- similar liabilities on foreign loans and the cost of foreign obligations approved by the state.

Commercial banks may approve applications by foreign investors, (other than mining and petroleum companies) to borrow foreign currency off shore, within certain prescribed limits. The BPNG deals with all exchange controls relating to the mining, petroleum and forestry sectors.

Foreign companies may borrow domestically up to US\$16,500 in the first two years of operation. They may borrow sums greater than US\$16,500 if the lending banks facility is supported by an overseas bankers guarantee from a bank of international standing. After two years, a company may borrow up to twice the non-resident shareholders fund, defined as retained profits, paid-up share and capital and overseas borrowing. Such overseas borrowing is reviewed annually.

## **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

PNG has recently signed up to the APEC Business Travel Card. The administrative process is being instituted currently to implement the commitment.

PNG welcomes people from overseas and the Department of Foreign Affairs & Migration facilitates entry, offering a variety of multi-entry visas and which are normally valid for three years. This permit allows long-term employment. Applicants are required to obtain work permits from the Department of Labour and Employment.

The Immigration section of the Department of Foreign Affairs & Immigration will issue residency or employment visas to:

- Foreign Company Directors or Shareholders provided they can produce an IPA Company Certificate of Incorporation in the name of the Company concerned; or
- Foreign owners of a business provided they can produce an IPA Company Certificate of Incorporation in their own name; and
- They must also provide, produce proof of the registration of the company or business as the case may be.

## GOVERNMENT PROCUREMENT

The Government procurement framework in PNG is governed by the *Public Finance (Management) Act*, Regulations, and Financial Instructions. The Central Supply and Tenders Board was established by the Government to control and regulate the purchase and disposal of property and stores and the supply of works and services.

The Government Procurement Manual outlines the procurement policy framework and articulates the Government's expectations for all departments and agencies (agencies) subject to the *Public Finance (Management) Act* and the Financial Instructions, and their officials, when performing duties in relation to procurement.

The main objective of PNG Government procurement is to obtain Value for money in the acquisition of works, goods and services using ethical, transparent processes and promoting open and effective competition.

For complex civil and building works, care is undertaken to ensure "whole of life" costs are considered.

Further information may be found at:

<http://www.cstb.gov.pg> and <http://www.finance.gov.pg>

## COMPETITION POLICY

PNG established the Independent Consumer and Competition Commission (ICCC) in 2002. The objectives and functions of the ICCC are highlighted in the *Independent Consumer and Competition Commission Act* (the ICCC Act) and the *Prices Regulation Act*. The laws consist of rules against certain types of anti-competitive conduct (the competitive conduct rules) and laws relating to prices.

The ICCC Act prohibits contracts, arrangements or understandings that have the purpose or effect or likely effect of substantially lessening competition in a market. That prohibition applies both to making contracts, arrangements or reaching understandings and also to those who would give effect to such a contract, arrangement or understanding that has already been made or reached.

The Act also prohibits covenants over land that have the purpose or effect or likely effect of substantially lessening competition in a market. The prohibition extends to requiring someone to give a covenant, giving one yourself or seeking to enforce the covenant.

Exclusionary provisions such as primary boycotts are agreements between competitors that will prevent or limit their dealings with a particular person or class of persons, where the person who is the target of the boycott is a competitor of one or both of those who agree not to deal with him. These dealings are likely to lessen competition in the market and ICCC prohibits such dealings.

Price fixing agreements between competitors are also prohibited under the Act because they are deemed to have the purpose, effect or likely effect of substantially lessening competition. Price fixing agreements are defined broadly to include contracts, arrangements or understandings that have the purpose or effect or likely effect of fixing, controlling or maintaining the price for goods or services or any discount, allowance, rebate or credit. There are however, some exceptions to price fixing prohibition. Firstly, agreements between the parties to a joint venture, to market the joint venture's products at fixed prices. Secondly, there is an exemption from the price fixing prohibition

for a large group of retailers who wish to have uniform recommended prices for products. It should be noted, however, that these must be recommendations only, not an enforced price. A third exception to the price fixing prohibition allows competitors, for example retailers who are members of a buying group, to collectively acquire goods at the same price and to jointly advertise the price at which they will then sell those goods.

Taking advantage of market power is also an anti-competitive market behavior and may apply in a case where a person or company has a substantial degree of power in a market. They are prohibited from taking advantage of that power for anti-competitive purposes which are to restrict the entry of a competitor into that market or another market, to prevent or deter someone from engaging in competitive conduct, or to eliminate a competitor.

It should be noted that this prohibition only applies to the most powerful firms in the market — in order to breach this prohibition, the firm must have a substantial degree of power in that market and take advantage of that power for any one of the anti-competitive purposes discussed here. An example of someone taking advantage of their market power may be where a new competitor enters the market which is dominated by one large company, which immediately and drastically reduces its price for the product which its new competitor is selling, to a price below production cost, with the intention of forcing the new competitor out of the market, at which stage the dominant market player can again raise its price to a high level.

Resale price maintenance, the practice of a supplier requiring its retail customers not to sell its products below a certain price, is also prohibited. Thus, a manufacturer cannot insist that its retailers do not sell the manufacturer's products for less than a certain price. Resale price maintenance would also apply where a manufacturer threatens to refuse to supply a retailer who was discounting the manufacturer's products while others were not.

The acquisition of assets and shares of a business that would have the effect or likely effect of substantially lessening competition in a market are prohibited by the Act. While this prohibition relates to the structure of the market rather than to behavior in that market, it is however, prohibited by the Act. Mergers between competitors, or the acquisition of one competitor could have serious anti-competitive consequences as can price fixing arrangements or arrangements that substantially reduce competition. Thus, those anti-competitive acquisitions are also prohibited.

Further information is available at

<http://www.iccc.gov.pg>

## PERU

### Acronyms

ATPDEA	<i>Andean Trade Promotion and Drug Eradication Act</i>
CETICOS	Centers of Export, Transformation, Industry, Commercialization and Services
CONSUCODE	The Government Procurement Council
IIA	International Investment Agreement
INDECOPI	National Institute for the Defense of Competition and Protection of Intellectual Property
MIGA	Multilateral Investment Guarantee Agreement
OPIC	Overseas Private Investment Corporation
OSIPTEL	The Supervising Organisation for Private Investment in Telecom
SUNAT	Peru's Taxation Agency
ZOFRATACNA	Tacna Duty-free Zone

### INTRODUCTION

Within the context of Peru's economic objectives oriented to foster sustainable development to improve the welfare of its people, foreign investment is welcomed to develop the high productive potential and the comparative and competitive advantages of Peru.

Peru offers an open Foreign Investment Regime based on core international principles, an open and deregulated economy involved in the globalization process, modern competition policies, relaxed labor regulations and a simplified tax regime. Peru promotes private domestic and foreign investment, given the important role it plays in the country's economic development.

The legal framework governing foreign investment in Peru is based on national treatment. Foreign investments are allowed, without restriction, in the most economic activities; just few services establish specific restrictions (e.g. mass media, air transportation, and land transportation are reserved for domestic investors or majority domestic share is required). No prior authorization is required for foreign investments; acquisition of domestic investors' shares is fully allowed, through stock exchange or other mechanism. Except for a constitutional exclusion of resources' ownership of various kinds within 50 kilometers of Peru's international borders, FDI is welcomed in every geographical area of the country. Nevertheless, this exclusion can be waived by decree on a case-by-case basis.

Peru is fully compliant with its WTO commitments. In that sense, no selection mechanism or performance requirement is applied to or demanded of foreign investment. In cases where

investments enjoy benefits coming from the subscription of legal stability agreements with Peru, requirements are the same as those established for domestic investors.

The legal framework provides a regime to guarantee the stability of important investment rules and bilateral and multilateral instruments consolidates a stable and predictable investment climate. Peru is a member of the Multilateral Investment Guarantee Agreement (MIGA) of the World Bank, ICSID, and UNCITRAL.

Regarding favorable changes on investment matters during recent years, it is worth mentioning the following measures approved by Peru's Government:

- In order to consolidate the negotiation of International Investment Agreements as part of Peru's investment policy, in January 2003 the Government established a Negotiating Commission led by PROINVERSION and composed of representatives from the Ministry of Trade, Ministry of Foreign Affairs and Ministry of Economy and Finance. New guidelines with high international standards on investment treatment and protection as well as fair transparency principles have been approved.. Existing bilateral treaties are being reviewed in order to determine whether they meet with the new standards. Peru is looking to expand its network of BITs using a prototype similar to that of the NAFTA economies. A Foreign Investment Promotion and Protection Agreement was signed with Canada in November 2006.
- Negotiations for the FTA with the United States ended in December 2005 and the Congress approved it on 27 June 2006. The approval from the US Congress is expected for the current year. The purpose of the FTA with the USA is to turn temporary preferential treatment granted to Peru, Colombia, Ecuador and Bolivia through the *Andean Trade Promotion and Drug Eradication Act* (ATPDEA) into permanent benefits. Other concomitant goals includes the consolidation of trade policy reforms launched in the 1990s, attraction of investment, open access to US markets in the service sector, the consolidation of government procurement areas and the enhancement of efficiency and growth. The FTA will set new standards for trade in goods and services, and will enhance protection of investments, laying the institutional foundation for further agreements with other economic groups, including the European Union.
- Negotiations for an FTA with Chile, has been concluded including an Investment Chapter upgrading of investment provisions included in a previous BIT. Negotiations for similar FTA with Mexico, Thailand and Singapore are expected to be concluded soon.
- Peru has just initiated the negotiations for an FTA with the EFTA and similar negotiations with Canada have also been launched.
- In August 2003, the Peruvian Government enacted Law N° 28059, the *Framework Law of Decentralized Investment*. The purpose of this law is to decentralize investment promotion activities, and to improve the performance of regional agencies promoting private investment. There isn't specific preference to any sector, as the law's scope includes all economic sectors.
- New liberalization measures on sectoral investment include Law N° 28278, *Law of Radio and Television* approved in July 2004 by Peru's Government. This law extends foreign investment participation in television and radio companies. Article 24° of Law N° 28278 introduced significant changes compared to past legislation, which reserved this sector for domestic investors. The law permits foreign participation up to 40% of a company's equity.

## SCREENING OF FOREIGN INVESTMENT

No screening mechanism is applicable to foreign investment in Peru.

## SECTOR SPECIFIC LAWS AND POLICIES

### (i) Constitutional Principles

Peru's Constitution includes provisions on essential principles to guarantee a favourable juridical framework for the development of private investment in general, and foreign investment in particular. Some of them are:

- (i) free private initiative exercised in a social market economy and economic pluralism;
- (ii) freedom of work and to engage in business, trade and industry;
- (iii) definition of the subsidiary role of the Government in the economic activity;
- (iv) free competition and prohibition of all restrictive practices and of the abuse of dominant or monopolistic positions;
- (v) freedom to engage workers;
- (vi) powers of the Government to establish guarantees and grant securities by means of contract law;
- (vii) national treatment;
- (viii) the possibility to submit controversies arising from a contractual relationship with the Government to national or international arbitration;
- (ix) freedom to hold and dispose of foreign currency; and
- (x) inviolability of property and establishment of exceptional causes that empower expropriation subject to a fair-value indemnity; application of equal treatment on taxation matter; and the express acknowledgement that no tax may have confiscating effects.

### (ii) Foreign Investment Promotion Law (Legislative Decree N° 662)

The *Foreign Investment Promotion Law*, which came into effect in August 1991, is the cornerstone of a sound legal framework that establishes clear rules and the necessary security for the development of foreign investment in Peru.

The Law recognizes the following basic rights of foreign investors:

- Right to receive national treatment.
- Freedom to conduct commercial and industrial activities and to perform any import and export operations.

- Right to remit abroad profits or dividends, subject to prior payment of the corresponding taxes.
- Right to use the most favorable exchange rate existing in the market for any exchange operation.
- Right to free re-exportation of invested capital, in case of the sale of shares, reduction of capital or total or partial liquidation of investments.
- Non-restricted access to domestic loans, under the same conditions as for domestic investors.
- Free acquisition of technology and free remittance of royalties.
- Freedom to acquire shares of domestic investors.
- Possibility to acquire insurances for investments.
- Possibility to benefit from a Legal Stability Regime, through the conclusion of Stability Agreements with the Government.

There is no minimum size of investment restriction on FDI. No restrictions apply exclusively to foreign investors as to the degree of ownership interest or management control that they may exercise in any form of investment.

(iii) Private Investment Growth Law (Legislative Decree N° 757, 1993)

This Law complements the general legal framework for the treatment of foreign investment. The provisions are intended to encourage the growth of investments in every sector of the Peruvian economy. This Law eliminates all privileges in favour of the Government in economic activity by eliminating monopolies in production and commercialization of goods and services.

Every enterprise has the right to organize and develop its activities under the form it deems convenient. All legal statutes providing for production patterns or productivity levels prohibiting or imposing the use of consumables or application of technical processes based on the type of the economic activity performed by them, their installed capacity or any other similar economic factor were revoked by this law, except for those relating to industrial hygiene and sanitation, environmental protection and health.

(iv) Legal Stability Agreements

Empowered by the Political Constitution, and under the *Foreign Investment Promotion Law* and the *Private Investment Growth Law*, Peru guarantees legal stability for foreign investors and for the enterprises where they invest, through the subscription of agreements with contract law status, and abides by the general provisions on contracts established in the Civil Code.

- Guarantees granted by Peru to Foreign Investors:
  - Equal treatment, by which the Peru's legislation does not discriminate against investors participating in enterprises, due to their status of foreign person.

- Stability of the Income Tax System in force when the agreement is concluded.
- Stability of the system of free availability of foreign currency and remittance of profits, dividends and royalties.
- Guarantees granted by the Peru for Enterprise receiving the investment:
  - Stability of the systems of labor engagement in force when the agreement is concluded.
  - Stability of the system of export promotion applicable when the agreement is concluded.
  - Stability of the Income Tax System
- Who may subscribe Legal Stability Agreements?
  - Investors and enterprises receiving the investment, in the case of new enterprises or in the case of increasing capital stock of the enterprises already established. Also in the case of investors participating in the privatization process and the enterprises involved in such process, which fulfil the following requirements:
- Investment commitment by Foreign Investors. The investor shall fulfil one of the following investment commitments:
  - To make, in a two-year term, capital contributions for an amount not under US\$5 million in any economic activity, except mining and hydrocarbon sectors;
  - To make, in a two-year term, capital contributions not under US\$10 million in the mining and hydrocarbon sectors;
  - To acquire more than 50% of shares of an enterprise participating in the privatization process; or
  - To make capital contributions in a concession contract.
- Requirements for the Receiving Enterprise:
  - One of its shareholders shall have concluded the corresponding Legal Stability Agreement.
  - In case tax stability is requested, contributions shall account for 50% increase in relation to the total amount of capital and reserves, and shall be destined for the expansion of the production capacity or for the technological development of the enterprise.
  - The case of transfer of more than 50% of shares of an enterprise participating in the privatization process.
  - The case of an enterprise involved in a concession contract.

The term of Legal Stability Agreements is 10 years, and may be only modified by common agree between the parties. In case of concessions, the term of the legal stability agreement shall extend to the term of the concession.

(v) International Investment Agreements (IIAs)

Peru promotes the negotiation of IIAs as a complement to its domestic legal framework. International Investment Agreements, including not only the traditional BITS, but the broader investment chapters in the FTAs, are part of the investment policy in Peru

In the bilateral field, Peru has concluded agreements on promotion and reciprocal protection of investments, by which Peru vows to respect and grant national treatment to foreign investors. Since 1994, Peru has concluded 29 bilateral agreements. Besides, Peru has concluded a Financial Agreement on incentives for Overseas Private Investment Corporation (OPIC) investments.

New guidelines for the negotiation of IIAs were approved some years ago, including high international standards on investment treatment and protection as well as fair transparency. According to a negative list approach in market access, National Treatment and Most Favoured Nation Treatment are granted in all the phases of the investment, including the establishment. Provisions regarding the prohibition of performance requirements and clarifications on concepts like fair and equivalent treatment and indirect expropriation are also included. A detailed section on the investor – State dispute settlement is also considered, looking for more certainty. Existing bilateral treaties are being reviewed in order to determine whether they meet with the new standards. Peru is looking to expand its network of BITS.

(vi) International Investment Treaties signed by Peru

COUNTRY	STATUS	COUNTRY	STATUS
ARGENTINA	IN FORCE	KOREA	IN FORCE
AUSTRALIA	IN FORCE	MALAYSIA	IN FORCE
BELGIUM	APPROVED	NETHERLANDS	IN FORCE
BOLIVIA	IN FORCE	NORWAY	IN FORCE
CANADA	SIGNED	PARAGUAY	IN FORCE
CHILE	IN FORCE	PEOPLE'S REPUBLIC OF CHINA	IN FORCE
COLOMBIA	IN FORCE	PORTUGAL	IN FORCE
CUBA	IN FORCE	RUMANIA	IN FORCE
CZECH REPUBLIC	IN FORCE	SINGAPORE	IN FORCE
DENMARK	IN FORCE	SPAIN	IN FORCE
ECUADOR	IN FORCE	SWEDEN	IN FORCE
EL SALVADOR	IN FORCE	SWITZERLAND	IN FORCE
FINLAND	IN FORCE	THAILAND	IN FORCE
FRANCE	IN FORCE	UNITED KINGDOM	IN FORCE
GERMANY	IN FORCE	UNITED STATES OF AMERICA/1	APPROVED
ITALY	IN FORCE	VENEZUELA	IN FORCE

1/ Investment Chapter in the FTA

## INVESTMENT PROTECTION

(i) General

Peru's legal framework provides high protection standards for foreign investment covering matters of transfer, expropriation and compensation, IPR and settlement of disputes.

No prior authorization is required for foreign exchange operations. Every individual or corporate body is entitled to remit abroad or keep foreign currency in Peru. Convertibility or transfer of funds related to foreign investment is free.

According to current legislation, foreign investors are entitled to remit abroad the following, without prior authorization:

- the full amount of their capital generated from investments registered with the competent agency (PROINVERSION), including the sale of shares, participation of rights, capital reduction or partial or total wind-up of the companies; and
- the full amount of verified dividends or net profits generated from their investments, as well as the payment for the use or usufruct of goods physically located in the country and registered with the domestic competent agency.

There is no restriction on the repatriation of funds related to foreign investment. Repatriation of profits, dividends, royalties, loan payments and liquidation do not require specific previous authorization. The foreign investment law gives specific assurances to investors in relation to convertibility and repatriation, in particular:

- free remittance abroad of profits, proceeds of asset disposals, royalties and payments for the use of technology; and
- access to the most favorable exchange rate for currency conversions for inward and outward remittances.

The IIAs signed by Peru grant investors protection against eventual non-commercial risks, such as State measures that may affect, without justification, the ownership of their investment or the normal management and exploitation of it. IIAs establish compensation in cases where an action or measure with expropriation effect is taken.

Likewise, IIAs signed by Peru guarantee that all transfers relating to a covered investment be made freely and without unjustified delay. Nevertheless, Peru holds the faculty to keep the security, solvency and integrity of its financial system through the equitable, non-discriminatory and good faith application of certain measures.

## (ii) Expropriation and Compensation

The Political Constitution of Peru, approved in 1993, guarantees property rights for foreigners and Peruvian nationals. It sets forth that no person can be deprived of their property except by reason of national security or public need, expressly declared by Law, and after payment in cash of a fair-value indemnity including redress for any possible damages. An action can be filed with the Judiciary to contest the value assigned to the property by the Government in an expropriation procedure. Complementary actions have been established in the *General Law of Expropriations* approved in May 1999.

No case of expropriation of foreign investment has been produced during the last five years. In August 1993, the Peruvian government concluded a Compensation Agreement for 7 years with the American International Group-AIG, for the expropriation of BELCO assets, which occurred before 1990.

IIAs protect against direct expropriation and indirect expropriation having an effect equivalent to nationalization or expropriation, including tax measures that may have confiscating effects. Compensation mechanisms for losses in case of armed conflict or civil war are taken under national treatment.

(iii) Intellectual Property Rights

Legislation in force protects domestic or foreign intellectual and industrial property rights. Article 2, item 8 of the Political Constitution sets forth that every person has the right to freedom of intellectual, artistic, technical and scientific creation, as well as to the property of those creations and their product. In addition, complementary provisions focused on protection of intellectual property have been given. As to industrial property, Legislative Decree N° 823 is aimed at regulating and protecting the constitutive elements of intellectual property and invention patents. The protection of copyright is given through Legislative Decree N° 822 — *Law on Copyrights*.

Contracts for the use of technology, patents, trademarks or another element of intellectual property of foreign origin, technical assistance, basic and detailed engineering, management and franchising are freely negotiated between the parties and further registered with the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). The remittance of royalties is freely made through the domestic financial system, prior payment of the corresponding taxes.

Peru adheres to the Paris Convention for the Protection of Industrial Property and the Inter-American Convention for the Protection of Trademarks and Commerce of Washington.

(iv) Dispute Settlement

Foreign investors can access local courts for disputes, under the same conditions as domestic investors. Peru encourages arbitration as a way to facilitate the settlement of disputes through the *Law of Arbitration*, approved by Law N° 26572.

The Government, its branch offices, Central, Regional and Municipal Governments, and other persons subject to public law, as well as the companies managed by the Government, shall be authorized to submit to Peruvian or international arbitration all controversies relating to their goods and obligations. Peru is entitled in conformity with Peruvian laws or international treaties in which Peru is a signatory country, provided any such controversies arise from their relationship with a company subject to private law or under a contract.

Peru is a signatory to the ICSID Convention and to UNCITRAL. Currently there are four claims against Peru's Government:

- Lucchetti (treaty claim)

This arbitration began in 2001. The dispute involved the Claimant's failure to comply with the laws governing construction and operation of a pasta plant on land adjacent to *Pantanos de Villa* wetlands and with applicable environmental regulations. Now, the Chilean firm and its Peruvian subsidiary are seeking to annul the tribunal's decision that the dispute is out of its jurisdiction. The request for annulment was registered by ICSID on 1 July 2005.

- Duke Energy International Peru Investments N° 1, Ltd. (contractual claim)

The arbitration began in October 2003. In February 2006 the tribunal determined that the dispute submitted by the claimant is within its jurisdiction. The parties will present their memorials on the merits. The dispute is about the alleged breach of a legal stability agreement by a tax measure.

- Aguaytia Energy LLC (contractual claim)

The request for arbitration was registered in May 2006. The claimant is alleging the breach of a non-discrimination guarantee included in a legal stability agreement.

- Tza Yap Shum (treaty claim)

The request for arbitration was registered in February 2007. The claimant alleges breach of fair and equivalent treatment as well as of expropriation obligations content in the BIT between Peru and China, regarding tax measures applied by the Peruvian tax authority.

Peru has also ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter American Convention on International Commercial Arbitration.

## INVESTMENT AND DEVELOPMENT

Peru has removed performance requirements in harmony with its commitments under TRIMs.

IAs recently negotiated, like the investment chapters in the Agreements negotiated with the USA and Chile, include a commitment clause about that matter.

Peru's foreign investment regime does not include measures affecting foreign investment in the field of environment or sustainable development, or affecting children or indigenous persons.

## INVESTMENT PROMOTION AND INCENTIVES

### (i) General

PROINVERSION is the Peruvian State Agency in charge of elaborating, proposing, and executing national policy on private investment in harmony with the Government's economic plans and integration policy

PROINVERSION's scope of action includes promoting concession granting among its investment promotion responsibilities, such as developing public-private partnerships, asset sales or fostering joint ventures or management agreements for State-owned interests or property. PROINVERSION is responsible for encouraging both local and foreign **private investment**, in order to foster competitiveness and sustainable development in Peru to improve the welfare of Peruvian people; it provides information and guidance concerning the possibilities for investing in Peru, solves inquiries and organizes the agenda of visiting potential investors to Peru. PROINVERSION also advises and assists investors on the procedures for investing, promotes local business initiatives among foreign potential investors, and taps alternative foreign funding sources for local investments.

Additionally, PROINVERSION proposes and executes policies on foreign investment. It signs agreements to provide State-backed guarantees to investors on the stability of basic rules governing their investments, identifies obstacles to investment, and proposes measures to remove them. This is possible because PROINVERSION's Board includes seven Ministers of State in the production and investment fields: the Prime Minister, Ministry of Economy and Finance, Ministry of Foreign Trade

and Tourism, Ministry of Housing and Construction, Ministry of Production, Ministry of Energy and Mining, and the Ministry of Transportation and Communications), and because PROINVERSION has signed cooperation and assistance agreements with several Regional and Local Governments.

PROINVERSION’s strategy seeks to assist in the socioeconomic development in large projects’ areas of influence through different mechanisms. To do so, it coordinates work by various government agencies.

Nonetheless, its work hinges on a true interest in developing a specific project of a relevant magnitude by a large corporation or consortium.

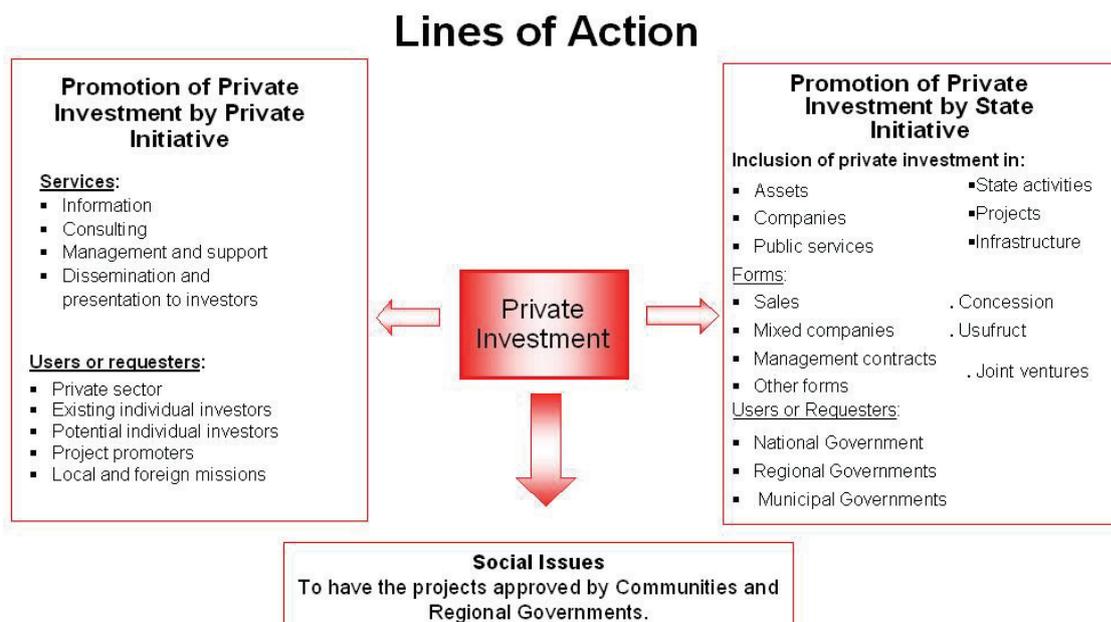
PROINVERSION seeks to strengthen new high productivity poles or cities with acknowledged competitive capacities through such private investment shocks.

The strategy starts with identifying an investment opportunity and carrying out the corresponding study to more efficiently lure private investment. Once our board of Directors approves the process, we contact potentially interested investors to present the project.

At the same time, PROINVERSION launches projects in coordination with several executing units to persuade local populations to support the project’s execution by creating the capacities new investors may need, ranging from improving basic utility infrastructure to training the local population so that they can be employed by the future company, and to creating a network of potential goods and services suppliers for the company or its employees.

In this sense, PROINVERSION is a strategic partner for the development of **foreign and domestic** private investments in Peru.

A sample of PROINVERSION’s services to investors and promoters can be found at [www.proinversion.gob.pe](http://www.proinversion.gob.pe)



Proinversion does not have a One Stop Shop for investor's formalities. Although, Proinversion is making joint efforts with international organizations like FIAS and Peruvian agencies to identify and remove administrative barriers in order to promote administrative efficiency for formalities related to investments in Peru.

(ii) Investment Incentives

*Anticipated Recovery of VAT Regime*

This regime allows the refund of tax paid on imports and/or domestic acquisitions of capital assets carried out by individuals or corporate bodies engaged in the production of goods and services destined to be exported or whose sale attracts VAT, provided they have not yet started their commercial activities.

On the other hand, companies that sign contracts with the Government, under sectoral laws for the development, exploration and/or exploitation of natural resources, and those that conclude concession contracts with the Government for the development of infrastructure works and public utilities are entitled to enjoy the Anticipated Recovery System of VAT, with respect to imports and domestic acquisition of goods, services and construction contracts required for the execution of the project matter of the contract. Companies that fulfill the requirements to enjoy this benefit shall be qualified by means of Supreme Resolution.

These legal norms have been recently amended by new provisions expanding the benefits of the regime to any project, regardless the use or not of natural resources, involving an investment of at least US\$ 5 million. These norms will enter into force upon approval of their Regulations.

*Agriculture Sector Incentives*

Peru has declared that investment in and development of the agricultural sector shall have the highest priority. Thus, it has devised incentives applicable to individuals or corporate bodies that develop cultivations and/or breeding, except for the forestry industry. Likewise, individuals or corporate bodies carrying out agribusiness activities may also enjoy those incentives, provided they mainly use agro-farming goods directly produced or acquired by people developing and/or breeding activities in zones where such goods are produced, outside Lima Province and the Constitutional Province of Callao. However, agribusiness activities related to wheat, tobacco, oleaginous seeds, oils and beer are excluded.

- Tax Benefits
  - Income tax shall be determined by applying 15% rate over the net income.
  - Corporate bodies may depreciate 20% per year, the amount invested in hydraulic infrastructure and irrigation works.
  - During the pre-production stage and for a maximum term of 5 years, individuals or corporate bodies may request a refund of the VAT paid for the acquisition of capital goods, inputs, services and construction contracts, according to the amounts, terms, coverage, conditions and procedures established in the Regulations.

- Labor and Social Security Regime
  - Employers of the agriculture sector are entitled to hire personnel for indefinite or definite terms. If the latter, the terms of the contract shall depend on the agriculture activity to be developed. Accumulative working hours may be established due to the special nature of work provided the number of working hours during the term of the contract does not exceed, on average, the maximum limits set forth by Law. Overtime payments shall be granted only when such average is surpassed.
  - A special labor and social security regime, with the following characteristics, has been created: A four-hour working day, vacations of 15 calendar days, compensation equivalent to 15 days' salary per worked year (180 salaries maximum). Monthly contribution to Health Insurance system for workers engaged in agriculture activity, borne by the employer, shall be 4% of each worker's monthly wage.

#### *Aquaculture Sector Incentives*

The Government promotes aquaculture, which includes organized and technical cultivation of hydrobiological species in a selected, controlled, natural, conditioned or artificial environment; in partial or complete biological cycle; in sea, continental or salty waters. Aquaculture also includes research and primary processing of products resulting from such activities.

- Tax Benefits
  - Individuals and corporate bodies engaged in aquaculture activities shall pay a 15% rate over the net income for purposes of Income Tax.
  - Tax benefits shall be in force up to 31 December 2010, and shall be applied without prejudice on any other tax benefit granted to promote economic activities in specific zones of the country. These specific benefits shall be in force according to the relevant legislation.
- Labor and Social Security Regime
  - The terms for the aquaculture sector are identical to those for agriculture (above).

#### *Amazon Region Law*

With the aim of encouraging sustained and integral development of the Amazon Region, special tax conditions have been established in order to favor private investment:

- For Income Tax purposes, the Amazon Region comprises the departments of Loreto, Madre of Dios, Ucayali, Amazonas and San Martín, as well as some provinces in adjacent departments, as indicated in Law 27037.
- The aforementioned law sets up a special regime for Income Tax on the condition that requirements pursuant to Supreme Decree 103-99-EF are complied with, one of which is that the domicile of the taxpayer's home office, its registration in Public Records and his assets and/or production are located and carried out in the Amazon Region, in a percentage no less than 70% of his total assets or production.
- A 10% rate shall be applied for Third Category Income Tax purposes by taxpayers located in the Amazon Region who are mainly devoted to economic activities such as: lumber extraction, farming, aquaculture, fishing, tourism as well as manufacturing activities related to

processing, transformation and trading of primary products derived from the aforementioned activities provided they are carried out in the region.

- By exception, taxpayers located in the departments of Loreto, Madre de Dios and the districts of Iparia and Masisea in the province of Coronel Portillo and the provinces of Atalaya and Purús in the department of Ucayali, who are mainly devoted to the activities detailed in previous paragraph, shall apply a 5% rate for the purposes of Third Category Income Tax.
- Taxpayers in the Amazon Region that are mainly engaged in agricultural activities and/or transformation or processing of products qualified as native crops and/or alternate crops for that environment, shall be exempted from Income Tax.
- For purposes of stipulations in the previous paragraph, products considered as native and/or alternate crop are: yucca, soja, arracacha, uncucha, urena, palmito, pijuayo, aguaje, anona, caimito, carambola, cocona, guanabano, guayabo, marañón, pomarosa, taperiba, tangerine, grapefruit, zapote, camu camu, cat ' s claw, annatto tree, rubber, pineapple, sesame seed, chestnut, jute, barbasco, coarse cotton, garaná, macadamia and pepper.
- In the case of oil palm, coffee and cacao, the benefit referred to in paragraph 4.5 above shall be applicable only to the agricultural production. Transformation or processing companies for these products shall apply a 10% rate as Income Tax, if they are located in the zone indicated in paragraph 4.1 or a 5% rate if they are located in the zone indicated in paragraph 4.4.

(iii) Special Zones

(a) Centers of Export, Transformation, Industry, Commercialization and Services (CETICOS).

CETICOS are geographical areas duly delimited with custom primary zone status and special treatment, destined to generate development poles through industrial, maquila, and assembling or storage activities. CETICOS are located in Paita, Ilo and Matarani cities. Agribusiness and agro-exporting activities could be developed at CETICOS. Agribusiness activity is primary transformation of agrofarming products produced in the country. Said transformation must be carried out at CETICOS.

- Tax Benefits:
  - Companies engaged in industrial, maquila or assembling activities, established or set up in the CETICOS, until 31 December 2012, are exempt from Income Tax, VAT, Excise Tax, Municipal Promotion Tax, as well as from any other tax, fee, contribution levied by the Central Administration, even those tributes that require express exempt regulation.
  - Entry to CETICOS of goods unloaded in Ilo, Matarani and Paita ports are not levied for Custom Duties, VAT, Municipal Promotion Tax, Excise Tax or any other tribute levied on importation.
  - Entry of domestic goods and rendering of services coming from Peruvian territory to Ilo, Matarani and Paita CETICOS shall be considered to be exportation. In the case of definite exportation, regulations on simplified refund of Custom Duties and VAT, as well as any other tax regulation related to exportation, shall apply.
  - Entry of goods from abroad, through any Customs of the Republic, destined to CETICOS, provided those goods are to be destined to the re-shipment to abroad or

foreign goods that once transformed at the Centers are to be exported abroad. The entry of goods through Customs under a jurisdiction different to any CETICOS, shall be made under the Transit Customs Regime.

- Goods produced by users of CETICOS may enter the rest of Peru’s territory under the Regimes of Temporary Admission, Temporary Importation and Replacement of Raw Materials and Input.
- Incomes derived from the re-sending abroad of foreign goods are exempt from Income tax.

Entry of goods to the rest of Peru’s territory coming from CETICOS are subject to custom duties, VAT, Excise Tax, Municipal Promotion Tax, and other pertaining import tributes.

(b) Tacna Duty Free Zone (ZOFRATACNA)

ZOFRATACNA was created to contribute to the sustainable socio-economic development of the Tacna Department. There, industrial, agribusiness, assembly and service activities can be carried out. Also included are storage or distribution, disassembly, packaging, packing, marking, labeling, division, exhibition and sorting of merchandise, among others. Additionally there can be activities such as mining machinery, motor and equipment repair, reconditioning and/or maintenance, among others, according to a list approved by a Ministerial Resolution from the Ministry of Production in coordination with the Ministry of Economy and Finance.

- Tax Benefits

- Operations arranged between Duty Free users are free from the General Sales Tax and from the Municipal Promotion Tax.
- Entry and exit of merchandise from and to third countries will be made through the Ilo and Matarani ports, the Tacna Airport, the Santa Rosa Customs Agency and the Peruvian Dock in Arica. Entry and exit of merchandise through different sites than those mentioned above will be made under the transit regime subject to bail submission.
- Exit of merchandise aimed at the rest of Peru’s territory may have recourse to any of the customs regimes, operations and destinations pointed out in the General Customs Law.
- ZOFRATACNA may receive merchandise coming from abroad, the rest of Peru’s territory, the Extension Zone and the CETICOS. Similarly, it may remit merchandise abroad, to the rest of Peru’s territory, the CETICOS, the Extension Zone and the Tacna Commercial Zone.
- As an exception, re-entry of merchandise to ZOFRATACNA coming from the Commercial Zone will be authorized and it will not generate any refund of the Special Tariff paid. The ZOFRATACNA Management Committee will authorize said re-entry and will report to SUNAT (Peru’s taxation agency).
- Entry, exit and transportation of merchandise through the country’s customs, to and from ZOFRATACNA, as well as the transportation of merchandise from ZOFRATACNA to and from the CETICOS and Extension Zones, will be authorized by SUNAT.
- Shipment documents must declare that the merchandise are bound for ZOFRATACNA.

- Entry of domestic goods and supply of services coming from the rest of Peru's territory to ZOFRATACNA will be considered as a definitive or temporary export, whichever is appropriate. If it is definitive, regulations regarding simplified restitution of Customs Duties and General Sales Tax will be applied, as well as any other to be approved concerning taxation issues in connection with exports. If it is temporary, at re-entry of the merchandise resulting from passive perfecting to the rest of Peru's territory, import taxes will be calculated on the value added.
- Domestic goods entering ZOFRATACNA for assembly purposes may not be nationalized again, but shall be transformed or used in the developed activities or exported.
- Foreign machinery and equipment, tools and spare parts imported to ZOFRATACNA will benefit from a special regime of tariff, duty and other taxes on imports payment suspension. This special regime encompasses those goods that stay in the service of activities developed within the ZOFRATACNA

(iv) Agreements to prevent double taxation

In order to solve problems derived from international double tax burden, Peru is pursuing bilateral negotiations to enter into "Agreements to prevent Double Taxation". To date, agreements with Sweden, Chile and Canada have been entered into.

For investments made among member countries of the Andean Community, there is the regime contained in Decision 578 issued by this organization.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

There are no legal/institutional impediments to the movement of capital and technology.

## **LABOR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

Peru's legislation sets forth different modalities of hiring, including fixed-term contracts of temporary, occasional and for specific work or service. Hiring of foreign personnel is based on Legislative Decree N° 689, which sets forth that local companies are entitled to hire foreigners up to 20% of their work force, provided that their salaries do not exceed 30% of the total wages paid by the company. Employers shall be exempt from the limiting percentage in the case of highly skilled technical and professional personnel. Workers may freely remit their after-tax salaries abroad.

Specific restrictions on personnel managerial aspects are established according to sectoral regulations:

### *Fishing*

- The owners of foreign-flagged fishing vessels that operate in Peruvian jurisdictional waters must hire a minimum of 30% of Peruvian crew.

### *Maritime Transportation*

- The chairman of the board of directors, a majority of the directors, and the General Manager of maritime transportation companies must be Peruvian nationals and resident in Peru.
- Peruvian-flagged vessels must have a Peruvian captain and the crew must have at least 80% of Peruvian nationals authorized by the “Dirección General de Capitanías y Guardacostas”. In exceptional cases where no Peruvian qualified captain with experience in the respective ship is available, a foreign national may be authorized to serve as captain. Only a Peruvian national may be a licensed harbor pilot.

### *Port Services*

- Only a Peruvian national may register in the Registry of Port Workers

### *National Commercial Aviation*

- At least half plus one of the directors, managers and persons who control or manage a domestic commercial aviation company must be Peruvian nationals or have permanent domicile or be normally resident in Peru.

### *Audio Visual Production*

- Any domestic artistic audiovisual production must be comprised at least of 80% of Peruvian national artists. Such artists shall receive no less than 60% of the total payroll for wages and salaries paid to artists.

### *Advertising*

- Commercial advertising produced in Peru, must have at least 80% of Peruvian national artists. Such artists shall receive no less than 60% of the total payroll for wages and salaries paid to artists. The same percentages shall govern the work of technical personnel involved in commercial advertising.

### *Radio and Television Production*

- Free over-the-air radio and television broadcast companies must dedicate at least 10% of their daily programming to Peruvian folklore and music and to series or programs produced in Peru on Peruvian history, literature, culture or current issues with artists hired in the following percentages:
  - A minimum of 80% of Peruvian national artists.
  - Peruvian national artists shall receive no less than 60% of the total payroll for wages and salaries paid to artists.
  - The same percentages established in the preceding paragraphs shall govern the work of technical personnel involved in artistic activities.

Workers cannot be fired unilaterally and arbitrarily by an employer. Compensation for arbitrary firing. The amount paid shall be one and a half remunerations per each year worked up to 12 remunerations. Nevertheless, it shall be considered that some kind of contracts, such as part-time contracts or contracts for specific tasks, shall be excluded from this protection.

Workers have the right to be ensured with the Social Health Insurance (ESSALUD). The employer shall contribute to ESSALUD a rate equivalent to 9% of workers' income and to be affiliated with the National Pension System (NPS) or to the Private Pension System (PPS). In the first case, workers shall contribute 13% of its wage; and, in the second, approximately 10% to the Pension Fund Private Manager he had chosen. Life insurance hired by the employer once the worker has a continuous 4-year labour period.

Compensation for Time of Service (CTS), considered a social benefit as prevision for contingencies derived from work stoppage. CTS payment shall be made twice a year, in May and November.

Vacation period: 30 days for each year full worked. Bonus: 2 bonus per year, in July and December, equivalent to one monthly wage each bonus. Company's profit sharing: Percentage of participation runs from 5% to 10% of a company's net income, according to the economic activity in which the company is engaged in. Companies with no more than 20 workers are not compelled to share profits between their workers.

The Minimum Vital Wage (minimum amount that a worker must receive from his employer) is S/.500 (Five hundred and 00/100 nuevos soles) equivalent to US\$ 155 (One hundred and five and 00/100 US dollars). Minimum bases used to apply certain percentages can not be lower than the minimum vital wage in force.

Labor controversies or disputes that may rise between the employer or worker initially may be submitted to a conciliation process. In case, a solution is not reached by this process, controversies may be submitted to the courts where specialized tribunals solve them.

Applicable legislation is contained in the *Unique Arranged Text of Legislative Decree N° 728*, approved by Supreme Decree N° 002-97-TR; *General Law on Labor Surveillance*, approved by Legislative Decree N° 910, and, *Process Labor Law*, approved by Law 26636.

Peru's migration laws recognise the existence of different migratory status, which allows foreigners to carry out several activities:

- **Business** — foreigners are allowed the entry and sojourn up to 90 days, which can be extended by 30 days only. In this case, foreigner cannot receive any income from a source in Peru; nevertheless, he may enter into contracts or make transactions. This kind of visa is temporary.
- **Worker** — foreigners are allowed to stay in Peru with the purpose of carrying out labor activities, as a result of labor contracts. The time authorized for living in Peru depends on the extension of the contract. Previous approval from the Labor Ministry. In this case, the visa is a residence visa.
- **Freelance** — foreigners are allowed to live indefinitely in Peru to make investments, receive any income or to operate as free lance labor. The visa is a residence visa.

## GOVERNMENT PROCUREMENT

Government procurement legislation provides fair and simple administrative procedures, especially for small business.

In March 2001, The Prime Minister's Office approved a legal by arranged text in order to simplify, unify and improve regulations for government procurement in Peru.

In May 2002, Peru's Government approved the Supreme Decree N° 031- 2002- PCM regarding the general policies for the development of the Government Procurement Electronic System. CONSUCODE, the Government Procurement Council, became the principal office in charge of the administration and operation of this electronic system.

CONSUCODE has responsibility for supervising the government procurement process, evaluating bidder performance, disseminating information, educational programs, promoting revision and updating of government procurement legislation in order to ensure fairness. CONSUCODE, attends complaints from users involved in government procurement regarding unfair treatment by public entities.

## **COMPETITION POLICY**

Peru promotes and fosters free competition, promoting the appropriate participation of economic agents in the market, encouraging loyal competition between suppliers of goods and services, and, defending free competition in the international market.

INDECOPI is the agency with responsibility for applying legal provisions on protecting market from monopolistic practices, which may control and restrict competition in the production and commercialization of goods and rendering services, as well as practices that may generate unfair competition and those affecting market agents and consumers. INDECOPI, as well, controls and punishes dumping and subsidies practices; defends consumers rights; and, looks after the fulfillment of regulations that punish practices against commercial good faith; defends regulations on free trade; controls provisions establishing non-tariff restrictions. It also revises actions and provisions of Public Administration entities, included within municipal or regional scope, which may impose bureaucratic obstacles impeding or hindering, unlawfully or irrationally, access to or permanence of economic market agents.

Peru's competition policy framework is set out in Legislative Decree N° 701, *Antitrust Law*, Legislative Decree N° 807, *INDECOPI's Competence and Proceedings Law*, Law N° 27444, *Administrative Law*, and Law 26876, *Antimonopoly and Antioligopoly Law for the Electricity Sector*.

According to Law 26876, INDECOPI, is in charge of providing an ex-ante evaluation of mergers in the electricity sector, since the Free Competition Commission, has to be notified of merger proposals. Through Supreme Decree N° 087-2002-EF, published on June 1st, 2002, additional regulation has been set for Law N° 26876 "Antitrust and Antioligopoly Law for the Electricity Sector". This decree has the purpose of establishing a special procedure for the application of the law whenever a concentration takes place as a result of the promotion of investment by the Agency of Promotion of Investment, PROINVERSION.

INDECOPI has a coordination relationship with CONSUCODE, the entity responsible for supervising procurement by public organisations, in order to investigate possible restraints to free competition.

In addition to these regulations, according to article 36° in Law N° 27336, OSIPTEL is the body in charge of all matters related to the telecommunications sector, including the resolution of any conflict related to behaviors affecting the market of public services in this sector (abuse of dominant position and cartels).

## APPENDIX 'A'

### Directory of Principal Sectoral Institutions and Administrative Competent Agencies for Foreign Investors

#### **PROINVERSIÓN - Agencia de Promoción de la Inversión Privada (Investment Promotion Agency)**

Paseo de la República 3361- Piso 9 Lima 27

Telephone (511) 612-1200

Fax (511) 221-2941

Website: [www.proinversion.com](http://www.proinversion.com)

#### **Ministry of Economy and Finance**

Jr. Junín N° 319 Lima cercado, Lima

Telephone (511) 311-5930

Fax (511) 428-2509

Website: [www.mef.gob.pe](http://www.mef.gob.pe)

#### **Ministry of Foreign Trade and Tourism (MINCETUR)**

Calle Uno Oeste N° 50 Urbanización Corpac, San Isidro

Telephone (511) 513 - 6100

Fax (511) 224-3144

Website: [www.mincetur.gob.pe](http://www.mincetur.gob.pe)

#### **Ministry of Foreign Affairs**

Jr. Ucayali N° 318 - Jr. Lampa N° 535, Lima

Telephone (511) 311-2400

Fax (511) 426-2366

Website: [www.rree.gob.pe](http://www.rree.gob.pe)

**Ministry of Agriculture**

Pasaje Zela N° 150 - Jesús María

Telephone (511) 613-5800

Fax (511) 432-6784

Website: [www.minag.gob.pe](http://www.minag.gob.pe)

**Ministry of Production**

Calle Uno Oeste S/N Urb Corpac — San Isidro

Telephone (511) 6162222

Fax (511) 6162203 Anexo 641

Website: [www.minproduce.gob.pe](http://www.minproduce.gob.pe)

**Ministry of Energy and Mines**

Av. Las Artes 260, San Borja

Telephone (511) 475-0065

Fax (511) 475-0689 (511) 475-2669

WebSite: [www.mem.gob.pe](http://www.mem.gob.pe)

**Ministry of Labor and Social Promotion**

Av. Salaverry.N° 655 Jesús María

Telephone (511) 315-6000 / 315-7200

Fax (511) anex 5011

Website: [www.mintra.gob.pe](http://www.mintra.gob.pe)

**Superintendence of Banking and Insurance**

Ca. Los Laureles 214- San Isidro

Telephone (511) 221-8990

Fax (511) 441-7760

Website: [www.sbs.gob.pe/](http://www.sbs.gob.pe/)

**National Superintendence of Tax Administration**

Av. Garcilazo de la Vega 1472- Lima

Telephone (511) 433-4010

Fax (511) 432-2530

Website: [www.sunat.gob.pe](http://www.sunat.gob.pe)

**National Superintendence of Public Registry**

Mayor Armando Blondet 260 San Isidro

Telephone (511) 221-1540 (511) 221-1401

Telefax (511) 221-1391

Website: [www.sunarp.gob.pe](http://www.sunarp.gob.pe)

**CONSUCODE — Consejo Superior de Contrataciones y Adquisiciones del Estado**

Av. Gregorio Escobedo cuadra 7 s/n , Jesus Maria

Telephone: (511) 613-5555

Fax: (511) 613-5555

Website: [www.consucode.gob.pe](http://www.consucode.gob.pe)

**INDECOPI — National Agency for the Defense of Competition and Intellectual Property**

**(Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual)**

Calle La Prosa 138 - San Borja - Lima 41- Perú, San Borja

Telephone (511) 224-7800

Fax (511) 225-1096

Website: [www.indecopi.gob.pe/](http://www.indecopi.gob.pe/)

**List of the principal institutions that handle complaints from foreign investors**

**Public Ministry and Nation's Public Prosecutor**

Av. Abancay. Cuadra 5- Lima 1

Telephone (511) 426-4620/ 428-0969 / 427-6500 / 315-5555

Fax (511) 426-4429

Website: [www.mpfj.gob.pe](http://www.mpfj.gob.pe)

**Tax and Customs Tribunals**

Diez Canseco N° 250-270 Miraflores

Telephone (511) 446-9696 (511) 446-1219

Fax (511) 447-5406

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Calle La Prosa 138 - San Borja - Lima 41- Perú, San Borja

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## APPENDIX 'B'

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Fax (511) 221-2941

Website: [www.proinversion.com](http://www.proinversion.com)

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Jr. Junín N° 319 Lima cercado, Lima

Telephone (511) 311-5930

Fax (511) 428-2509

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Calle Uno Oeste N° 50 Urbanización Corpac, San Isidro

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Jr. Ucayali N° 318 - Jr. Lampa N° 535, Lima

Telephone (511) 311-2400

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**Ministry of Agriculture**

Pasaje Zela N° 150 - Jesús María

Telephone (511) 613-5800

Fax (511) 432-6784

Website: [www.minag.gob.pe](http://www.minag.gob.pe)

**Ministry of Production**

Calle Uno Oeste S/N Urb Corpac — San Isidro

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**Ministry of Energy and Mines**

Av. Las Artes 260, San Borja

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**Ministry of Labor and Social Promotion**

Av. Salaverry.N° 655 Jesús María

Telephone (511) 315-6000 / 315-7200

Fax (511) anex 5011

Website: [www.mintra.gob.pe](http://www.mintra.gob.pe)

**Superintendence of Banking and Insurance**

Ca. Los Laureles 214- San Isidro

Telephone (511) 221-8990

Fax (511) 441-7760

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## THE REPUBLIC OF THE PHILIPPINES

### Acronyms

BIR	Bureau of Internal Revenue
BLA	Bureau of Legal Affairs
BOI	Board of Investments
BSP	Bangko Sentral ng Pilipinas
BTRCP	Bureau of Trade Regulation and Consumer Protection
CAB	Civil Aeronautics Board
CDC	Clark Development Corporation
CDP	Car Development Program
CVDP	Commercial Vehicle Development Program
DOF	Department of Finance
DTI	Department of Trade and Industry
ECC	Emigration Clearance Certificate
E.O.	Executive Order
FIA	<i>Foreign Investments Act (1991)</i>
FINL	Foreign Investment Negative List
GEPS	Electronic Procurement System
IPO	Intellectual Property Office
IPP	Investment Priorities Plan
IPU	Investment Promotion Unit (Network)
LDA	Less Developed Areas
MDP	Motorcycle Development Program
M.O.	Memorandum Order
MVDP	Motor Vehicle Development Program
NLRC	National Labor Relations Commission

OSAC	One-Stop-Action Center
P	Philippines' Peso
P.D.	Presidential Decree
PDRCI	Philippine Chamber of Commerce and Industry
PEZA	Philippine Economic Zone Authority
R.A.	Republic Act
SBFZ	Subic Bay Freeport Zone
SBMA	Subic Bay Metropolitan Authority
SEC	Securities and Exchange Commission
SIRV	Special Investors Resident Visa
SRC	Special Return Certificate
SSS	Social Security System
WTO-CTG	World Trade Organisation's Council for Trade in Goods

## INTRODUCTION

The Philippines recognizes the prominent role foreign investments play in the country's economic development. Ideally situated within the world's fastest growing region, lying at the crossroads of international shipping and airlines; highly educated professionals and workers; rich natural resources; continually improving and expanding infrastructure; and a growing market, the Philippines offers the best promise for growth to foreign investors.

Under the *Foreign Investments Act* (FIA) of 1991 as amended by R.A. 8179, the government has made it an official policy to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations and governments. The objective of this policy is to channel this investment into activities contributing significantly to the process of industrialization and socioeconomic development within the Philippines, while at the same time remaining within the limits set by the Constitution and laws of the country. Foreign investment is encouraged in enterprises that significantly expand employment opportunities for Filipinos; enhance the economic value-added of agricultural products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; aid the transfer of relevant technologies in the agricultural and industrial sectors, together with the supporting services sector. Foreign investment is encouraged not only in the development of the export-oriented sector but is also welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market.

The following major pieces of legislation have been enacted into law in recent years as the foundations for recovery and growth continue to be built.

Citation	Summary
1. <i>The Omnibus Investments Code</i> of 1987 (E.O. No. 226) as amended by RA 8756	Provides the rules by which foreign and local investments in the Philippines may qualify for certain incentives.
2. <i>The Foreign Investments Act</i> of 1991 (R.A. No. 7042) as amended by R.A. 8179	Governs the entry of foreign investments and doing of business by foreigners without incentives. The Act was amended to ease restrictions on foreign investment by decreasing the minimum paid-up equity for new enterprises from US\$500,000 to US\$200,000 or US\$100,000 provided they involve advanced technology or hire 50 direct employees, and shortening the Negative List.
3. <i>Bases Conversion and Development Act</i> of 1992 (R.A. No. 7227)	Provides for incentives to enterprises located within the Subic Bay Freeport Zone, the Clark Special Economic Zone, and their extensions.
4. <i>The Special Economic Zone Act</i> of 1995 (R.A. No. 7916)	Provides for incentives to enterprises located within the Special Economic Zones as defined in RA 7916.
5. <i>Export Development Act</i> of 1994 (R.A. No. 7844)	Provides for incentives to enterprises in the export business.

Citation	Summary
6. <i>Investors' Lease Act</i> (R.A. No. 7652)	Allows qualified foreign investors to lease private lands for an initial period of up to 50 years, renewable for up to 25 additional years.
7. <i>An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines</i> (R.A. 7721, 1994)	Eased the restrictions on the entry and operations of foreign banks in the Philippines.
8. <i>Amendment of the Build-Operate-Transfer Law</i> (R.A. 7718, 1994)	Allows for variations of Build-Operate-Transfer schemes, eases the restrictions on government financing including the setting of tolls and charges, and increases the opportunity for wholly foreign-owned corporations to undertake such projects.
9. <i>An Act to Amend Article 7(13) of E.O. 226, otherwise known as the Omnibus Investments Code of 1987</i> (R.A. No. 7888, 1995)	Allows the President of the Philippines to suspend the nationality requirements under the Omnibus Investments Code in cases of investments by ASEAN nationals, regional ASEAN or multilateral financial institutions in preferred projects.
10. <i>Anti-Money Laundering Act of 2001</i> (R.A. No. 9160) as amended by RA 9194 (2003)	Creates a three-member Anti-Money Laundering Council that is empowered to look into suspicious bank accounts and initiate forfeiture of such deposits. It aims to ensure that the Philippines shall not be used as a money-laundering site for the proceeds of any unlawful activity.

For further, general information see <http://www.gov.ph>

For a detailed chronology of liberalization of the Philippine investment restrictions see <http://www.dti.gov.ph/contentment/9/63/56.jsp>

Complete texts of the laws covering foreign investments are available at <http://www.business.gov.ph/Laws.php?contentID=3>

## SCREENING OF FOREIGN INVESTMENTS

### What is screened?

Foreign investors are required to register with the Securities and Exchange Commission (SEC) or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry (DTI), in the case of single proprietorship, to ensure that foreign investments in the Philippines are in accordance with the Corporation Code, the FIA, policy statements, and sector or company specific legislations.

Under the Philippines' investment policy, the types of investment proposals by foreign interest that require prior notification and approval from the Philippine Government are as follows:

<b>Proposals</b>	<b>Guidelines/Conditions</b>
Merger	Compliance with the <i>Corporation Code</i> and the FIA requirements.
Acquisition	Compliance with the <i>Corporation Code</i> and the FIA requirements.
Greenfield investment	Compliance with the <i>Corporation Code</i> and the FIA requirements
Real estate/land	Foreign ownership of up to 40% only
Joint venture	Compliance with the <i>Corporation Code</i> and the FIA requirements
Management Contracts	Compliance with the <i>Corporation Code</i> requirements
Telecommunications	Foreign Equity of up to 40% only
Media	No Foreign Equity
Transport	Foreign Equity of up to 40% only
Agriculture	Foreign Equity for land ownership is up to 40% only, whether public or private land.
Mining	Subject to the provisions of the <i>Philippine Mining Act</i> of 1995, the Constitution and the FIA.
Infrastructure	Subject to the provisions of P.D. 1594 and <i>Build-Operate-Transfer Law</i> , the Constitution and the FIA.

In addition to SEC or BTRCP registration, any enterprise seeking to avail itself of incentives under the *Omnibus Investment Code* of 1987 must apply for registration with the Board of Investments (BOI), or the designated economic zone authority for incentives under the *Bases Conversion and Development Act* and *The Special Economic Zone Act*. These respective agencies shall process such application for registration in accordance with the criteria for evaluation prescribed in the said Code/Act.

Necessary documents for application may be obtained from and/or submitted to the following agencies.

Agency	Address/Telephone/Fax
Board of Investments (BOI)	Investment Promotion Group Industry and Investment Bldg. 385 Sen. Gil J. Puyat Avenue, Makati City Telephone: (63 2) 896-9212 Fax: (63 2) 897-2181 <a href="http://www.boi.gov.ph">http://www.boi.gov.ph</a>
One-Stop-Action Center (OSAC)	Board of Investments Industry and Investment Bldg., 385 Sen. Gil J. Puyat Avenue, Makati City Telephone: (63 2) 899-3586 / 896-7342 Fax: (63 2) 895-8322
Securities and Exchange Commission (SEC)	Company Registration and Monitoring Department/Corporate and Partnership Registration Division SEC Building, E. de los Santos Ave. Mandaluyong City Telephone: (63 2) 727 2011 Fax: (63 2) 724 1319 <a href="http://www.sec.gov.ph">http://www.sec.gov.ph</a>
Philippine Economic Zone Authority (PEZA)	Almeda Building Roxas Boulevard cor. San Luis St., Pasay City Telephone: (63 2) 551-3436 / 551 3438 Fax: (63 2) 551-3435 <a href="http://www.peza.gov.ph">http://www.peza.gov.ph</a>
Bases Conversion Development Authority	BCDA Corporate Center Gozar cor. Lucas Street, Villamor Air Base, Pasay City Telephone: (63 2) 510-0408 Fax: (63 2) 510-0414 <a href="http://bcda.gov.ph">http://bcda.gov.ph</a>
Bureau of Internal Revenue (BIR)	Atrium Building, Makati City Telephone: (63 2) 811-4393 / 811-4390 Fax: (63 2) 811-4055 <a href="http://www.bir.gov.ph">http://www.bir.gov.ph</a>
Bangko Sentral ng Pilipinas (BSP)	International Operations Department Corner A. Mabini & P. Ocampo Sr. Streets Malate, Manila 1004 Telephone: (63 2) 536-6077 Fax: (63 2) 536-0053 <a href="http://www.bsp.gov.ph">http://www.bsp.gov.ph</a>
Social Security System (SSS)	SSS Bldg., East Avenue, Diliman Quezon City Telephone: (63 2) 921-2022/922-2995 Fax: (63 2) 924-8470 <a href="http://www.sss.gov.ph">http://www.sss.gov.ph</a>

Agency	Address/Telephone/Fax
Subic Bay Metropolitan Authority (SBMA)	Building 229 Waterfront Road, Subic Bay Freeport Zone, Olongapo City Telephone: (63 47) 252-4381/4383 Fax: (63 47) 252-3014 <a href="http://www.sbma.com">http://www.sbma.com</a> .
Clark Development Corporation (CDC)	Bldg. 2122, C.P. Garcia Street Corner Quirino Street Clark Field, Pampanga Telephone: (63 45) 599-9000, 599-2043 Fax: (63 45) 599-2506 to 07 <a href="http://www.clark.com.ph">http://www.clark.com.ph</a>

### **Transparency of the Screening Process**

The Government seeks to ensure that the registration and licensing of all corporations and partnerships organized in the Philippines, including licensing of foreign corporations to establish branch/representative offices in the Philippines, are dealt with efficiently. Pre-processing services are rendered by the SEC before filing. The SEC will take 24 working hours from official acceptance to issue certificates of registration/license. In the case of sole proprietorship, the DTI-National Capital Region (NCR) shall act on the same within one working day.

For foreign investors availing of incentives, as provided in the *Omnibus Investments Code*, the BOI shall act upon the application within 10 days after official acceptance of the application and shall render its decision within 20 working days after official acceptance of the application for registration. In the case of the economic zone authorities, the processing and evaluation of application by the appropriate department usually takes 1 week and the decision on the project is made during the bi-monthly meetings of the economic zone authority's board.

To expedite the review of foreign investment proposals, all required documents must be completed upon submission.

In cases where a proposal is denied or modification of the proposal is requested, appeals may be filed with the SEC where a consultation/conference with the examiner or processing lawyer at its Registration and Monitoring Department may be arranged. Other related investment concerns may be forwarded to the following agencies:

Agency	Type of Complaint
Bureau of Trade Regulation and Consumer Protection (BTRCP) 361 Sen. Gil Puyat Ave., Makati City Tel No.: (63 2) 890 4872	Violation of consumer protection of sole proprietorship
Office of the Resident Ombudsman Board of Investments Industry and Investments Bldg. 385 Sen. Gil Puyat Ave., Makati City Tel No.: (63 2) 899 3587 Fax: (63 2) 528 1463	Violation of the <i>Anti-graft and Corruption Practices Act</i>

## SECTOR SPECIFIC LAWS AND POLICIES

The FIA provides the rules and regulations for foreign investments without incentives. The law further states that the domestic market is open to foreign investors as long as the activity is not restricted in the Foreign Investment Negative List (FINL). For an export enterprise, which exports 60% or more of its output, there are no restrictions on the extent of foreign ownership unless the activity falls within the negative list.

The current FINL is available at

[http://www.neda.gov.ph/references/EOs/EO%20389%20\(6th%20FINL\).pdf](http://www.neda.gov.ph/references/EOs/EO%20389%20(6th%20FINL).pdf)

Key industries have been liberalized in line with the development goals of the Philippines as follows.

### (i) Banking

Foreign investment in the banking sector needs to be consistent with RA 7721 *An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines and for Other Purposes, The Financing Act* of 1998, and the *General Banking Act* of 2000.

The Monetary Board of the BSP may authorize foreign banks to operate in the Philippine banking system through any of the following modes of entry:

- by acquiring, purchasing or owning up to 60% of the voting stock of an existing bank;
- by investing in up to 60% of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines; or
- by establishing branches with full banking authority, provided that:
  - the foreign bank may avail itself of only one (1) mode of entry
  - a foreign bank or a Philippine corporation may own up to 60% of the voting stock of only one domestic bank or new banking subsidiary.

In approving entry applications of foreign banks, the Monetary Board shall:

- ensure geographic representation and complementation, consider strategic trade and investment relationships between the Philippines, and the country of incorporation of the foreign bank;
- study the demonstrated capacity, global reputation for financial innovations and stability in a competitive environment of the applicant;
- see to it that reciprocity rights are enjoyed by Philippine banks in the applicant's country; and
- consider willingness to fully share their technology.

Only those among the top 150 foreign banks in the world or the top five banks in their country of origin as of the date of application shall be allowed entry in accordance with the provisions of RA 7721.

- In addition to being among the top 150 banks in the world or the top five (5) banks in its country of origin, a foreign bank seeking to establish a new banking subsidiary or to establish branches with full banking authority in the Philippines must also be:
  - widely-owned and publicly listed, in any stock exchange authorized by the government of the country of origin of said bank, unless more than 50% of the capital stock of said foreign bank applicant is owned by the government of its country of origin; and
  - the foreign bank should also comply with the capital requirements prescribed by the laws and regulations of its country of origin.
- Minimum capital requirements are as follows:
  - locally incorporated subsidiaries of foreign banks should comply with the same capital required for domestic banks of the same category. Existing capital requirements for domestic banks range from a high of P 4.95 billion for universal banks to as low as P52 million for thrift banks with head offices outside Metropolitan Manila.
  - for foreign bank branches with full banking authority, the applicant foreign bank shall inwardly remit and convert into Philippine currency, as permanently assigned capital, the US\$ equivalent of P 210 million using the US\$/P exchange rate of P26.979.
- Following the enactment of the general Banking Law of 2000, a foreign bank may, within seven years from the date the Act came into effect (i.e. 13 June 2000), acquire up to 100% of the voting stock of only one bank incorporated under Philippine laws.

(ii) Retail Trade

Foreign-owned partnerships, associations and corporations formed and organized under the laws of the Philippines may, upon registration with the SEC and the Department of Trade and Industry (DTI) engage or invest in retail trade business to the following categories:

- **Category A** — Enterprises with paid-up capital of the equivalent in Philippine Pesos of less than US\$2,500,000 shall be reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens.
- **Category B** — Enterprises with a minimum paid-up capital of the equivalent in the Philippine Pesos of US\$2,500,000 but less than US\$7,500,000 may be wholly owned by foreigners except for the first two years after the date on which the Act came in to effect wherein foreign participations shall be limited to not more than 60% of total equity.
- **Category C** — Enterprises with a paid-up capital of the equivalent in Philippine Pesos of US\$7,500,000 or more may be wholly owned by foreigners. This is provided, however, that in no case shall the investments for establishing a store in Categories B and C be less than the equivalent in Philippine Pesos of US\$830,000.
- **Category D** — Enterprises specializing in high-end or luxury products with a paid-up capital of the equivalent in Philippine Pesos of US\$250,000 per store may be wholly owned by foreigners.

Foreign retail stores shall secure a certification from the BSP and the DTI, which will verify or confirm inward remittance of the minimum required capital investment.

The foreign investors shall be required to maintain in the Philippines the full amount of the prescribed minimum capital, unless the foreign investors has notified the SEC and the DTI of its intention to repatriate its capital and cease operations in the Philippines. The actual use in Philippine operations of the inwardly remitted minimum capital requirements shall be monitored by the SEC.

Foreign investors acquiring shares from existing retail stores whether or not publicly listed whose net worth is in excess of the peso equivalent of US\$2,500,000 may purchase only up to a maximum of 60% of the equity thereof within the first two years from the date the Act came into effect and thereafter, they may acquire the remaining percentage consistent with the allowable foreign participation as provided.

(iii) Telecommunications

The government has opened up the telecommunications sector to new players to participate in the supply of telecommunication facilities all over the country as provided in EO 109 (1993).

(iv) Shipping

The entry of new operators into the domestic water transport industry was liberalized to enhance the level of competition and bring about reasonable rates and improved quality of services.

(v) International and Domestic Aviation

*International Air Transportation*

At least two international carriers shall be designated official carrier(s) for the Philippines. However, if the designated carrier(s) do not service the total frequency entitlement of the Philippines under existing Air Services Agreements or other arrangements, then additional carrier(s) may be designated to operate such unused frequencies.

The exchange of traffic rights and routes with other countries shall be based on (a) the National Interest which shall include value for the Philippines in terms of promoting international trade, foreign investments and tourism, among others; and on (b) the reciprocity between the Philippines and other countries. Reciprocity shall be interpreted to mean the exchange of rights, freedoms, and opportunities of equal or equivalent value. The Civil Aeronautics Board (CAB) shall determine “national interest” taking into consideration the larger interest of the country, especially the users of air services.

All grants of frequencies or capacity to, any increase of existing frequencies or capacities of and/or the grant of new routes or traffic points to any foreign carrier (even if on a provisional basis) shall be the sole prerogative of the CAB, subject to the confirmation of the Office of the President. The following rules shall determine the frequency and capacity for the carriers concerned:

- Frequency and capacity of third and fourth freedom carriers will be determined based on reciprocity and value of the Philippines.
- Fifth freedom traffic shall be secondary and supplemental to third and fourth freedom traffic

except that the CAB may grant fifth freedom rights in order to promote the development of routes and destinations.

- The CAB may authorize special flights when, for any reason whatsoever, the designated carrier(s) fail to accommodate a route/link traffic demand.

Authority shall be granted in the operation of air services connecting non-premier city airports of other countries to new international gateways of the country as provided for under economic cooperation agreements with the Philippines.

#### *Domestic Air Transportation*

To the extent allowed by law, transportation industry shall be industrialized. A minimum of two operators in each route/link shall be encouraged. Routes/links presently serviced by only one operator shall be opened for entry to additional operator(s).

The right of an existing operator to leave a particular route shall be recognized subject, however, to the statutory obligation that "no carrier shall abandon any route, or part thereof for which a permit has been issued, unless upon findings by the CAB that such abandonment is uneconomical and is in the public interest." (Last par., Sec. 11, R.A. No. 776)

To the extent allowed by law passage freight and other charges shall be liberalized. However, passage rates shall likewise be deregulated for routes/links operated by more than one common carrier. For routes serviced by a single operator, passage rates shall continue to be regulated. However, all freight rates, charges and passage rates shall be monitored by the CAB.

#### (vi) Mineral Exploration

As a rule, exploration, development and utilization of mineral resources as provided in RA 7942 (*Philippine Mining Act* of 1995) are allowed 40% foreign equity. However, 100% foreign equity is allowed for purposes of granting exploration permit, financial or technical assistance agreement or mineral processing

For purposes of mining operations, a mineral agreement may take the following forms:

- **Mineral production sharing agreement** is an agreement where the Government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output. The contractor shall provide the financing, technology, management and personnel necessary for the implementation of this agreement.
- **Co-production agreement** is an agreement between the Government and the contractor wherein the Government shall provide inputs to the mining operations other than the mineral resource.
- **Joint venture agreement** is an agreement where a joint-venture company is organized by the Government and the contractor with both parties having equity shares. Aside from earnings in equity, the Government shall be entitled to a share in the gross output.

A mineral agreement shall grant to the contractor the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area. In addition, the contractor may be allowed to convert his agreement into any of the modes of mineral agreements or financial or

technical assistance agreement covering the remaining period of the original agreement subject to the approval of the Secretary.

(vii) Automotive

Any foreign-owned companies organized under the Philippine laws that will engage in the manufacture/assembly of motor vehicles shall qualify as participant under the Motor Vehicle Development Program (MVDP) which covers the manufacture and assembly of the following motor vehicles:

- **Classification I** — Passenger cars shall refer to any four-wheeled motor vehicle, which is propelled by gasoline, diesel, electricity or any other motive power and principally designed to transport persons and not primarily to transport goods.
- **Classification II** — Commercial Vehicles shall refer to any four or more wheeled motor vehicle, which is propelled by gasoline, diesel, electricity and any other movie power and principally designed to transport persons and/or goods/cargoes, such as light commercial vehicles, buses, trucks, and special purpose vehicles (for example, ambulances, fire trucks, and the like). Light Commercial Vehicles shall refer to vehicles whether 4-wheeled drive or not, which may be classified under but not limited to the following: utility vehicles, sports utility vehicles, Asian utility vehicles, commuter vans, pick-ups, which are designed to carry both passengers and goods/cargoes.
- **Classification III** — Motorcycles shall refer to any two or three-wheeler vehicle fitted with an auxiliary motor, with or without sidecars.

The investments in the manufacture of motor vehicle parts and components shall be in any of the following schemes:

- Equity investment, either minor or major stockholdings in new or existing motor vehicle parts manufacturing company; or
- Investments in in-house motor vehicle parts manufacturing; or
- Cost sharing schemes with existing motor vehicle parts manufacturing companies in terms of toolings and/or modernization/upgrade of facilities; or
- Participation under the DTI's SME Assistance Program (Center Satellite Company for SME Guarantee and Facility); or
- Other investments that BOI may consider for the development of the motor vehicle industry.

(viii) Real Estate

Only Filipino citizens or corporations with at least 60% Filipino equity can acquire land in the national territory. Corporations with the accepted foreign/Filipino equity stake percentages must apply to the BOI for permission to buy, sell, or act as an intermediary in a real estate transaction.

Foreigners, on the other hand, are allowed to purchase up to 40% of the units in a condominium project. They may also inherit real property from their deceased Filipino spouses or parents.

Further, foreign corporations, in general, that are investing in the Philippines can lease land for up to 50 years, with a renewal option for another 25 years, as provided in the *Investors' Lease Act*.

Children born to a Filipino parent, whether legitimate or illegitimate, may inherit the property of the Filipino parent, even if the child is not a Filipino citizen. Filipinos who lost their Filipino citizenship will remain the owners of any property they have acquired before changing nationalities. On the other hand, a natural-born Filipino citizen who has lost his Philippine citizenship may be a transferee of private land, subject to the following limitations and conditions provided in *Batas Pambansa Blg. 185* (BP 185), which was enacted in March 1982, and R.A. 8179 (RA 8179), which amended the FIA.

For further information see: <http://www.dti.gov.ph/contentment/9/60/64/175.jsp#15> and <http://www.lawphil.net>

## **INVESTMENT PROTECTION**

### **(i) Conversion, Repatriation and Transfers (including any Balance of Payments Safeguards)**

The Philippines has adopted a floating rate system where the determination of the peso to dollar exchange rate is left to market forces. The BSP occasionally intervenes in the foreign exchange market by selling or buying dollars with the intention of smoothing out sharp fluctuations in the exchange rate, providing indicative guidance and ensuring stability in the foreign exchange market.

As a general policy, foreign investments need not be registered with the BSP. The registration of a foreign investment with the BSP is only required if the foreign exchange needed to service the repatriation of capital, remittance of dividends, profits and earnings accruing on said foreign investments shall be sourced from the domestic banking system. Given this general policy, BSP-registered foreign investments enjoy full and immediate repatriation of capital and remittance of dividends, profits, and earnings that accrue thereon. Unregistered investments may be serviced using foreign exchange which are neither sourced from the domestic banking system for from non-bank BSP-supervised entities and their subsidiary/affiliate forex corporations.

Unregistered investments may be serviced using foreign exchange sourced outside the banking system. In addition to the aforementioned regulations, a ceiling is imposed on the amount of forex that banks can sell over the counter, without need for documents, to US\$5,000 (BSP circular No. 287, 26 July 2001).

### **(ii) Expropriation and Compensation**

The Philippines guarantees foreign investment against expropriation except for public use or in the interest of national welfare and upon payment of just compensation.

In such cases, foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance.

(iii) IPR

On January 1, 1998, R.A. No. 8293, also known as the *Intellectual Property Code of the Philippines* (IP Code), took effect. This law codified the minimum IPR system committed to the Agreement Establishing the WTO having Philippines as one of its members since 1 January 1995. This commitment is particularly under the Agreement on Trade-Related Aspect of IPR (TRIPS Agreement).

The IPR recognized by the law are: patents, utility models, copyright and related rights, trademarks and service marks, geographical indications, industrial designs, lay-out designs of integrated circuits, protection of undisclosed information and protection of new plant varieties.

**a) Patents**

A *patentable invention* is any technical solution of a problem in any field of human activity, which is new, involves an innovative step and is industrially applicable. It may be, or may relate to, a product, or process, or an improvement of any of the foregoing. It may also include microorganisms, non-biological and microbiological processes.

The present patent system adopts the first-to-file system and provides for a term of 20 years from the filing date of the patent application.

**b) Copyright and Related Rights**

*The Copyright Law* provides protection to literary, scholarly, artistic and scientific works. Works are protected from the moment, and by the sole fact, of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose. Only certain classes of works are required to be registered and deposited for purposes only of completing the records of the National Library and the Supreme Court. Registration of work is not generally required for purposes of claiming protection and remedies under the law.

Rights related to copyright called “neighboring rights” are likewise protected under the law. These are the performer’s rights, sound recording producer’s rights, and broadcasting organization’s rights.

Copyright is protected during the lifetime of the author and generally, for 50 years after his death. Moral rights have the same term of protection.

In the case of related rights, the term of protection is 50 years from the end of the year in which the performance/recording took place. On the other hand, broadcaster’s rights are protected for 20 years from the date the broadcast took place.

**c) Trademarks**

A *mark* is any visible sign capable of distinguishing the goods or services of an enterprise and shall include a stamped or marked container of goods. The present trademark system eliminates prior actual use as requirement for application. However, the mark is to be actually used within three years from the application date. The present term is 10 years from date of registration. To maintain registration, the mark owner should file declarations of actual use and renewals within the prescribed periods.

#### ***d) Geographical Indications***

Protection of geographical indications is found under the trademark law. Specifically, Sections 123.1(g), 169 and 170 address this particular concern. Under the present system, the *False Designation of Origin and/or False Description or Representation* is made as a specific violation of IPR falling under the concurrent jurisdiction of the Bureau of Legal Affairs and of the Regional Trial Court.

#### ***e) Industrial Designs***

*Industrial design* is any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors. This is provided that such composition or form gives a special appearance to and can serve as pattern for an industrial product or handicraft. Only non-technical and non-functional designs are protected. An application for industrial design is subject to simple registration system as provided under the new implementing rules and regulations.

An industrial design is protected for a period of five years and may be extended for two five-year terms.

#### ***f) Protection of Undisclosed Information***

The Rules and Regulations on Voluntary Licensing contain provisions relative to the protection of undisclosed information.

*In Part I (1) (f), undisclosed information* shall mean information which:

- is secret in the sense that it is not, as a body or in the precise configuration
- and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps under the circumstances to keep it secret, by the person lawfully in control of the information.

There are likewise scattered provisions of different laws that can be invoked by analogy for the proper protection of this type of intellectual property. Among those are found in the New Civil Code on provisions dealing with human relations and obligations and contracts. Articles 318, 229 and 230 of the Revised Penal Code are also relevant.

#### ***g) Layout-Designs of Integrated Circuit***

Is an original photography (picture of a place) of elements, at least one of which is an active element, and of source or all interconnections of an integrated circuit, or such three-dimensional disposition prepared for an integrated circuit intended for manufacture.

#### ***h) Utility Model***

Is a “petty” patent for new and industrially applicable technical solution to a problem. A new and useful, but obvious improvement may be protected as utility model. Like industrial designs, application for utility model is subject to simple registration system.

A utility model is protected for non-extendible term of seven years.

### ***j) New Plant Varieties***

Is governed by R.A. No. 9168, which took effect on 20 July 2002. To be entitled for protection, the new plant variety must also be distinct, uniform and stable.

New plant varieties are protected for 25 years from the date of grant for trees and vines or 20 years for all other types of plants.

#### (iv) Enforcement

Infringement cases may be filed before any of the following fora: the Special Commercial Courts regardless of amount claimed, Office of Legal Affairs under E.O. No. 913 or the Bureau of Legal Affairs of the Intellectual Property Office (IPO). The Bureau of Legal Affairs (BLA) can take cognizance of administrative complaints with claim of damages of P200,000 and above. There are 10 administrative penalties that may be imposed by the Director of Legal Affairs for violations of laws on IPR. These penalties may be found under Sec. 10.2(b) of the IP Code, to wit:

1. The issuance of a cease and desist order which shall specify the acts that the respondent shall cease and desist from and shall require him to submit a compliance report within a reasonable time which shall be fixed in the order.
2. The acceptance of a voluntary assurance of compliance or discontinuance as may be imposed. Such voluntary assurance may include one or more of the following:
  - (a) An assurance to comply with the provisions of the intellectual property law violated;
  - (b) An assurance to refrain from engaging in unlawful and unfair acts and practices subject of the formal investigation;
  - (c) An assurance to recall, replace, repair, or refund the money values of defective goods distributed in commerce; and
  - (d) An assurance to reimburse the complainant the expenses and costs incurred in prosecuting the case in the Bureau of Legal Affairs.

The Director of Legal Affairs may also require the respondent to submit periodic compliance reports and file a bond to guarantee compliance of his undertaking.

3. The condemnation or seizure of products, which are subject of the offense. The goods seized hereunder shall be disposed of in such manner as may be deemed appropriate by the Director of Legal Affairs, such as by sale, donation to distressed local governments into charitable or relief institutions, exportation, recycling into other goods, or any combination thereof, under such guidelines as he may provide.
4. The forfeiture of paraphernalia and all real and personal properties which have been used in the commission of the offense.
5. The imposition of administrative fines in such amount as deemed reasonable by the Director of Legal Affairs, which shall in no case be less than Five Thousand Pesos (P5,000) nor more than One Hundred Fifty Thousand Pesos (P150,000). In addition, an additional fine of not more than One Thousand Pesos (P1,000) shall be imposed for each day of continuing violation.

6. The cancellation of any permit, authority, or registration which may have been granted by the Office, or the suspension of the validity thereof for such period of time as the Director of Legal Affairs may deem reasonable which shall not exceed one year.
7. The withholding of any permit, license, authority, or registration which is being secured by the respondent from the Office.
8. The assessment of damages.
9. Censure.
10. Other analogous penalties or sanctions.

Without prejudice and in addition to administrative penalties, the IPC provides for criminal action, which may be prosecuted before the regular courts. In the event of a guilt verdict, imprisonment and/or a fine shall be imposed.

**a) Patents**

Sec. 84. *Criminal Action for Repetition of Infringement* — If an infringement is repeated by the infringer or by anyone in connivance with him after finality of the judgment of the court against the infringer, the offenders shall, without prejudice to the institution of a civil action for damages, be criminally liable therefore and, upon conviction, shall suffer imprisonment for the period of not less than six (6) months but not more than three years and/or a fine of not less than One Hundred Thousand Pesos (P100,000) but not more than Three Hundred Thousand Pesos (P300,000), at the discretion of the court. The criminal action herein provided shall prescribe in three years from date of the commission of the crime.

**b) Copyright**

Sec. 217.1 *Criminal Penalties* — Any person infringing any right secured by provisions of Part IV of this Act or abetting such infringement shall be guilty of a crime punishable by:

- Imprisonment of one year to three years plus a fine ranging from Fifty Thousand Pesos (P50,000) to One Hundred Fifty Thousand Pesos (P150,000) for the first offense;
- Imprisonment of three years and one day to six years plus a fine ranging from Five Hundred Thousand Pesos (P500,000) to One Million Five Hundred Thousand Pesos (P1,500,000) for the third and subsequent offenses. Imprisonment of six years and one day to nine years plus a fine ranging from Five Hundred Thousand Pesos (P500,000) to One Million Five Hundred Thousand Pesos (P1,500,000) for the third and subsequent offenses.
- In all cases, subsidiary imprisonment shall be imposed in case of insolvency.

**c) Industrial Designs**

Sec. 84. *Criminal Action for Repetition of Infringement* — If infringement is repeated by the infringer or by anyone in connivance with him after finality of the judgment of the court against the infringer, the offenders shall, without prejudice to the institution of a civil action for damages, be criminally liable therefore and, upon conviction, shall suffer imprisonment for the period of not less than six months but not more than three years and/or a fine of not less than One Hundred Thousand Pesos (P100,000) but not more than Three Hundred Thousand Pesos (P300,000), at the discretion of the court. The criminal action herein provided shall be prescribed in three years from date of the commission of the crime.

#### *d) Trademarks*

Sec. 170. *Penalties* — Independent of the civil and administrative sanctions imposed by law, a criminal penalty of imprisonment from two years to five years and a fine ranging from Fifty Thousand Pesos (P50,000) to Two Hundred Thousand Pesos (P200,000), shall be imposed on any person who is found guilty of committing any of the acts mentioned in Section 155, Section 168 and Subsection 169.1.

#### *International Treaties*

The Philippines is a signatory to several international treaties on IPR:

Convention Establishing the WIPO (since 1980)

Paris Convention for the Protection of Industrial Property (since 1965)

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for Purposes of Patent Procedure (since 1981)

Berne Convention for the Protection of Literary and Artistic Works (since 1984). Substantive provisions of the Berne Convention entered into force with respect to the Philippines on 18 June 1997.

International Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organizations (since 1984)

Agreement on Trade-Related Aspects of IPR (TRIPS Agreement)

Patent Cooperation Treaty (5 February 2001)

WIPO Copyright Treaty (4 October 2002)

WIPO Performance & Phonographic Treaty (4 October 2002)

#### *Other Related Laws and Executive Issuances*

E.O. 913 (Strengthening the Rule-Making and Adjudicatory Powers of the Minister of Trade and Industry in Order to Further Protect Consumers)

R.A. 9150 (An Act Providing for the Protection of Layout Designs (Topographies) of Integrated Circuits, 6 August 2001)

RA 9168 (An Act Providing for the Protection of New Plant Varieties, 20 July 2002)

RA 8792 (Laws on Electronic Commerce)

RA 9239 (Optical Media Act)

For further information on IPR see <http://ipophil.gov.ph/>

(v) Dispute Settlement

*Disputes between Governments*

The Philippines subscribes to the WTO dispute settlement procedures as the primary and ultimate mechanism to settle disputes between governments in matters related to the formal jurisdiction of the WTO. It resolves disputes with its APEC partners through consultation, mediation and/or arbitration, as appropriate. Disputes are settled under the WTO dispute settlement procedures only as a matter of last recourse.

Bilateral trade and investment agreements entered into by the Philippines provide for consultations through diplomatic channels as a primary means of resolving disputes arising from the interpretation and application of the agreements. Joint commissions are established to settle trade and economic issues. Investment agreements provide an option for the submission of disputes to an ad hoc international arbitral tribunal.

*Disputes between Private Parties and Government*

The Philippines is a signatory to the ICSID Convention.

IPPs entered into by the Philippines provide for the amicable settlement through negotiations of disputes between a contracting party and a national of a contracting party. It also provides an option for the submission of disputes to a competent court of a contracting party of the ICSID.

*Disputes between Private Parties*

The Philippines recognizes various forms of alternative dispute resolution. Commercial disputes may be settled through negotiation, mediation/conciliation and arbitration.

Existing laws on disputes between private parties include:

R.A. No. 876 (*Arbitration Law*) prescribes the procedures for arbitration in civil controversies;

P.D. No. 1746 authorizes the Philippine Domestic Construction Board to adjudicate and settle claims and disputes in the implementation of public and private construction contracts;

E.O. No. 1008 (*The Construction Industry Arbitration Law*) establishes the Construction Industry Arbitration Commission, the body which has original and exclusive jurisdiction over disputes arising from or connected with contracts entered into by parties involved in construction in the Philippines, whether government or private contracts;

R.A. No. 8293 (*The Intellectual Property Code of the Philippines*) provides for a dispute settlement mechanism for disputes between parties to a technology transfer payments. It also provides the Director-General of the Intellectual Property Office with the original jurisdiction to resolve disputes relating to the terms of license involving the author's right to public performance or other communication of his work.

The Philippine Dispute Resolution Center Inc. (PDRCI) of the Philippine Chamber of Commerce and Industry was established in 1996 for the purpose of promoting and encouraging the use of arbitration as an alternative mode of settling commercial transaction dispute and providing dispute resolution services to the business community.

In September 2002, the Board of Investments announced the creation of a Mediation Team composed of intensively trained mediators to render dispute resolution services to its registered companies and investors.

The Philippines adheres to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

International arbitration proceedings are generally referred to arbitration institutions such as the International Chamber of Commerce and the American Arbitration Association.

The Philippines is a signatory to the ICSID Convention.

## **INVESTMENT AND DEVELOPMENT**

There are performance requirements under the Car Development Program (CDP), Commercial Vehicle Development Program (CVDP), and Motorcycle Development Program (MDP).

### *Local content requirement*

The local content requirement under the Motor Vehicle Development Programs is aimed to develop a viable automotive parts and components manufacturing sector. Participants of the CDP, CVDP, and MDP are required to comply with the local content requirement for them to stay in the program. From a shopping list of locally produced automotive parts and components, investors may select the automotive parts to import or source locally in order to meet the required local content which differs from category to category. However, pursuant to the provisions of Sec. 7.5 of M.O. No. 346, which was signed by President Ramos on 26 February 1996, the local content requirement shall be terminated by the year 2000 based on the Agreement on Trade-Related Aspects of Investment Measures under the General Agreements on Tariff and Trade.

### *Foreign exchange requirement for the importation of components/sub-assemblies for assembly of motor vehicles*

Aside from local content, automotive assemblers are required to earn foreign exchange credits (net value) by promoting the exports of automotive parts and components before they can import CKDs. To ensure foreign exchange credits, the assemblers encourage their foreign suppliers to locate in the country and to export the greater bulk of their production. Similar to the local content requirements, Sec. 10.8 of M.O. 346 provides that the net foreign exchange requirement shall be terminated by the year 2000 based on the Agreement on Trade-Related Aspects of Investment Measures under the GATT.

The WTO-CTG granted the Philippines an extension of the applicability of its notified measures affecting trade and investment in the motor vehicle sector (i.e. additional 3.5 years from and after 01 January 2000 – the original expiry date of the transition period for the elimination of TRIMS – until 30 June 2003 subject to a required phase-out schedule).

Following the approval of the WTO-CTG to extend the applicability of the TRIMS in the motor vehicle sector, the Philippines issued Memorandum Order No. 51, on 22 January 2002, which was further amended by Memorandum Order No. 73, issued on 12 September 2002, amending the Guidelines on the CDP, CVDP and MDP.

### *Local content requirement under the soap and detergent industry*

Soap and detergent manufacturers are required to use at least 60% locally produced cocochemical surfactant. The requirement applies to all soap and detergent manufacturers.

The above requirement is contained in E.O. 259 which was enacted in July 1987 for the purpose of rationalizing the soap and detergent industry and promoting the utilization of chemicals derived from coconut oil.

On 31 October 2000, a new law was enacted (R.A. No. 8970) which maintained the prohibition on the use of hard surfactants due to environmental concerns but allowed the use of soft surfactants that are not necessarily coconut-based.

## **INVESTMENT PROMOTION AND INCENTIVES**

### ***Investment Promotion Agencies (scope of Agencies and interactions with any screening mechanism)***

The One-Stop Action Center (OSAC) houses under one roof representatives from various government agencies that an investor will have to deal with when making an investment. These are the Bangko Sentral and Pilipinas, Bureau of Immigration (complete visa processing), SEC (on-call), and Department of Tourism. In addition, the Philippine Industrial Estates Association, a private sector, also provides its services in terms of site location through the OSAC. Further, full circle investment servicing is rendered through the Investment Promotion Unit (IPU) network composed of 26 agencies with corresponding contact points for investors.

Contact details follow.

<b>Agency</b>	<b>Contact Details</b>
One Stop Action Center Board of Investments (BOI)	Industry and Investments Bldg. 385 Sen. Gil Puyat Ave., Makati City Telephone: (63 2) 896-7884/896-7342 Fax: (63 2) 895-8322 <a href="http://www.boi.gov.ph">www.boi.gov.ph</a>
One-Stop Processing Center Bureau of Customs	Manila International Container Port Isla Puting-bato, Tondo, Manila Telephone No.: (63 2) 245-4101 local 2455 <a href="http://www.customs.gov.ph">www.customs.gov.ph</a>
One-Stop Shop Tax Credit Center Department of Finance (DOF)	Executive Tower BSP Complex, Roxas Boulevard, Manila Telephone No.: (63 2) 526-8450/523-9217 Fax: (63 2) 526-8450 <a href="http://www.dof.gov.ph">www.dof.gov.ph</a>

## *Incentives offered under the Omnibus Investments Code of 1987*

An enterprise engaged in a preferred activity listed in the current Investment Priorities Plan (IPP) and registered with the Board of Investments is entitled to the following incentives:

### 1. Income Tax Holidays

Newly registered pioneer projects are fully exempt from income tax for six years from the start of commercial operation and non-pioneer firms for four years from the start of commercial operation. The exemption period may be extended for another year in each of the following cases:

- the project uses indigenous raw materials;
- the project meets the BOI prescribed ratio of capital equipment to the number of workers;
- the net foreign exchange savings or earnings amount to at least US\$500,000 annually during the first three years of the project's commercial operation.

Projects locating in less developed areas (LDA) shall be entitled to the incentive for six years. Expansion projects and modernization projects are entitled to the income tax holiday incentive for three years limited only to incremental sales revenue/volume.

### 2. Additional deduction for labor expense

For the first five years from registration, a registered enterprise shall be allowed an additional deduction from taxable income equivalent to 50% of the wages of additional skilled and unskilled workers in the direct labor force. This incentive shall be granted only if the enterprise meets a prescribed capital to labor ratio and shall not be availed simultaneously with Income Tax Holidays. This additional deduction shall be doubled if the activity is located in an LDA.

### 3. Tax and duty free importation of breeding stocks and genetic materials for 10 years from registration or commercial operation for agricultural producers.

### 4. Tax credit on domestic breeding stocks and genetic materials under the same condition as in number 3.

### 5. Simplification of customs procedures for the importation of equipment, spare parts, raw materials and supplies and exports of processed products.

### 6. Importation of consigned equipment for 10 years from date of registration, subject to posting of a re-export bond.

### 7. Employment of foreign nationals

This may be allowed in supervisory, technical or advisory positions for five years from date of registration. Foreign nationals may hold indefinitely the position of president, general manager and treasurer (or their equivalent) of foreign-owned registered enterprises.

### 8. Tax credit for taxes and duties paid on raw materials, supplies and semi-manufactured products used in the manufacture of export products and forming part thereof for a period of 10 years from date of registration or commercial operation.

9. Access to bonded manufacturing/trading warehouse system. Registered export-oriented enterprises may have access to bonded warehousing systems subject to customs rules and regulations.
10. Exemption from wharfage dues and export tax, duty, impost and fees.

All enterprises registered under the IPP will be given a 10-year period from date of registration to avail of the exemption from wharfage dues and any export tax, impost and fees on its non-traditional export products.

11. Exemption from taxes and duties on imported spare parts. A registered enterprise with a bonded manufacturing warehouse shall be exempt from customs duties and national internal revenue taxes on its importation of required supplies/spare parts for consigned equipment or those imported with incentives.
12. Additional deduction for necessary and major infrastructure works. Registered enterprises locating in LDAs or in areas deficient in infrastructure, public utilities and other facilities may deduct from taxable income an amount equivalent to the expenses incurred in the development of necessary and major infrastructure works. This privilege, however, is not granted to mining and forestry-related projects as they would naturally locate in certain areas to be near their sources of raw materials.

#### ***Incentives offered under the Special Economic Zone Act of 1995***

The Philippine Economic Zone Authority (PEZA) grants the following incentives to registered ecozone companies:

- Business establishments operating within the ECOZONES shall be entitled to the fiscal incentives as provided for under P.D. No. 66, the law creating the Export Processing Zone Authority, or those provided under Book VI of E.O. No. 226, otherwise known as the *Omnibus Investment Code*.
- Tax credit for exporters using local materials as inputs shall enjoy the same benefits provided for in the *Export Development Act*.
- Exemption from taxes under the National Internal Revenue Code but in lieu of paying taxes, 5% of the gross income earned by all businesses and enterprises within the ECOZONE shall be remitted to the national government.

Two other special economic zones were created under two separate special laws. These are the Cagayan Special Economic Zone and the Zamboanga City Special Economic Zone. The incentives granted to those that will locate in these ecozones are similar to the incentives granted to PEZA ecozone enterprises.

#### ***Incentives offered under the Export Development Act***

R.A. No. 7844, or the *Export Development Act*, was promulgated to provide a macroeconomic policy framework to support the development of the export sector and the activities undertaken by exporters. Exporters are generally defined as those earnings at least 50% of their normal operating revenue from the sale of products or services abroad. Once registered under the *Export Development Act*, exporters are entitled to the following incentives:

- Tax credit for imported inputs and raw materials primarily used for the production and packaging of export goods which are not readily available locally until 31 December 1999

- Tax credit for increase in current year's export revenues.
- First 5% increase in annual export revenue over the previous year a credit of 2.5% to be applied on incremental export revenue converted to pesos;
- Next 5% increase would be entitled a credit of 5%;
- Next 5% increase would be entitled a credit of 7.5%;
- In excess of 15% would be entitled to a credit of 10%.

### ***Incentives offered under the Bases Conversion and Development Act***

The Subic Bay Metropolitan Authority grants incentives to registered enterprises located at the Subic Bay Freeport Zone (SBFZ).

- Exempt from all national and local taxes but in lieu of paying taxes, Subic Bay Freeport Zone enterprises will be required to pay a final tax of 5% of their gross income earned from sources within the SBFZ.
- Business enterprises and individuals residing in SBFZ will enjoy tax and duty exemptions on their importations of raw materials, capital equipment and consumer items.

### **MOBILITY OF CAPITAL AND TECHNOLOGY**

A Philippine resident may invest abroad only if:

- The investment are funded by withdrawals from foreign currency deposit units; or
- The funds to be invested are not among those required to be sold to the banking system for pesos; or
- The funds to be invested are sourced from the banking system but in amounts of less than \$US6 million per investor per year.

There is no regulation limiting technology exports.

### **LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

The *Wage Rationalization Act* (R.A. 6727, effective July 1989) created the regional tripartite wage and productivity boards to determine and fix minimum wage rates on the regional, provincial and industry levels.

The *Labor Code of the Philippines* sets the minimum conditions of employment in its Book III and the health, safety and social welfare benefits in its Book IV.

The "Occupational Safety and Health Standards" promulgated pursuant to Article 162 of the *Labor Code* prescribes the different rules for the protection of workers from workplace hazards.

RA 6715, in particular, aims to bolster protection for workers; strengthen their rights to organize, strike and conduct collective bargaining; promote voluntary modes of dispute settlement; and reorganize the National Labor Relations Commission (NLRC) — which has jurisdiction over cases involving employer-employee relations — in order to professionalize its ranks and bring its services closer to disputing parties.

Foreign technicians may be admitted into the Philippines with a pre-arranged employment visa if the skills they possess are not available in the country. The foreign technicians are required to have at least two understudies to be trained in relation to their respective assignments

A summary of domestic labor laws which apply to foreign firms in the context of labor disputes/relations.

<b>Law</b>	<b>Summary</b>
<i>Labor Code of the Philippines</i> (P.D. 442, as amended)	A consolidation of labor-related legislation, Book V thereof covers labor relations. It provides for the procedure and the agencies involved in the resolution of labor disputes and the rules governing labor organizations, collective bargaining and administration of agreements. Book VI governs post-employment which include termination of employment and retirement. The latest major amendment to Book V is R.A. 6715 ( <i>New Labor Relations Law</i> effective March 1989).
<i>Productivity Incentives Act of 1991</i> (R.A. 6971)	While primarily on productivity incentives, the law provides for the procedure in the resolution of disputes arising from productivity incentive programs adopted in accordance with law.
<i>Special Protection of Children Against Child Abuse, Exploitation and Discrimination</i> (R.A. 7610)	The law regulates the employment of children.
<i>Anti-Sexual Harassment Act of 1995</i> (R.A. 7877)	The law defines sexual harassment in a work-related environment, the duties of the employees and penalties for its violation

Foreign nationals who wish to come to the Philippines can enter as a tourist without visa under E.O. No. 408, or secure a temporary visitor’s visa under Section 9(a) of the *Philippine Immigration Act*, as amended before any Philippine consular posts abroad. Section 9(a) visa can either be for business, pleasure, or health and normally entitles the alien to an initial stay of 59 days, extendible to a year.

While in the Philippines, the Bureau of Immigration allows the alien to convert his immigration status from tourist/temporary visitor to another visa category without the necessity of leaving the country to secure the new visa.

***Multiple Entry Visa Holder Requirements***

The expatriates of BOI-registered firms who qualify for special non-immigrant visa under Section 47(a)(2) of the *Philippine Immigration Act* may apply for multiple entry visa by securing

Emigration Clearance Certificate (ECC) and multiple Special Return Certificate (SRC) before departure from the Philippines with the Bureau of Immigration. ECCs serve as their Exit Clearance while SRC's enable them to be admitted upon their return to the country under the same category when they left.

Any alien, except nationals classified restricted by the Department of Foreign Affairs and who meets the following qualifications may be issued the following types of visas:

1. Special Investors Resident Visa (SIRV)

- he/she had not been convicted of a crime involving moral turpitude;
- he had not been afflicted with any loathsome, dangerous or contagious disease;
- he/she had not been institutionalized for any mental disorder or disability; and,
- he/she is willing and able to invest the amount of at least US\$75,000 in the Philippines.

The holder of the special visa has the privilege to reside in the Philippines for as long as his/her investment exists. He shall be entitled to import his used household goods and personal effects tax and duty-free as an alien coming to settle in the Philippines for the first time under Sec. 105(h) of the *Tariff and Customs Code of the Philippines*. Further, the investor's spouse and unmarried children under 21 years of age who are joining him in the Philippines may be issued the same visa.

2. Pre-arranged employment Visa under Sec. 9(g) of the *Philippine Immigration Act*.

- Employment in any technical, executive or managerial position.

3. International Treaty Investors Visa under Sec. 9(d) of the *Philippine Immigration Act*.

- Investment of at least P300,000. Only Germans, Japanese and Americans are parties to this treaty.

4. Special Non-Immigrant Visa under P.D. No. 1034

This is granted to foreign personnel of offshore banks duly licensed by the BSP to operate as an offshore banking unit. They are also entitled to multiple entry privileges and are exempt from the payment of immigration fees, fingerprinting, and registration with the Bureau of Immigration.

***Special Non-Immigrant Visa under Section 47(a)(2)***

Enterprises registered under E.O. 226 and R.A. 7916 are allowed to employ foreign nationals in supervisory, technical, or advisory position under Section 47(a)(2) of the *Philippine Immigration Act* during its first five years of registration. Majority foreign owned registered enterprises may employ foreign nationals as President, treasurer and general manager beyond the five year period.

***Special Non-Immigrant Visa under Book III of E.O. No. 226***

Art. 59 of E.O. 226, provides for the issuance of special non-immigrant multiple entry visas to foreign national executives of Regional Headquarters or Regional Operating Headquarters of Multinational Companies.

### ***Special Subic Work Visa***

This is granted to foreign nationals employed as executives by SBFZ enterprises and other foreign nationals possessing highly technical skills.

Restrictions of law or regulation on the entry/sojourn of foreign technical personnel and their accompanying family members are as follows:

<b>Instances/Cases</b>	<b>Positions</b>
Registered enterprise under the Board of Investments may employ foreign nationals for a period not exceeding five years from its registration.	Supervisory, technical, or advisory positions.
Majority foreign-owned BOI-registered enterprise may employ foreign nationals beyond the period of five years.	President, treasurer and general manager positions or their equivalents
Subic Bay Freeport enterprises may employ foreign nationals upon prior approval of the Subic Bay Metropolitan Authority for a period of five years extendible from year to year.	Foreign executives and highly technical positions.
Foreign nationals entering into coal operating contracts and service with the government for the exploration and development of oil and geothermal resources are likewise allowed to employ foreign nationals.	Specialized and technical personnel.
Foreign nationals under the <i>Corporation Code</i> may be elected as member of the Board of Directors in proportion to the foreign equity holding.	All corporate positions except secretary who should be a Filipino citizen.

### **GOVERNMENT PROCUREMENT**

Under RA 9184 or the *Government Procurement Act*, all government transactions pertaining to procurement of materials and services was centralized via a major computer network infrastructure, namely the Electronic Procurement System (GEPS). This is in line with the government's objective to minimize graft and corruption and increase transparency in all government acquisitions, small and large. The Act conforms to the government's three pillars of good governance, namely; a moral foundation to guide leadership at all levels; a philosophy of transparency in government actions; and a ethic of effective implementation through the bureaucracy.

### **COMPETITION POLICY**

The Philippines, through constitutional and statutory provisions, encourages competition for a healthier business environment. The Philippine Constitution mandates that the state must protect Philippine enterprises against unfair competition and trade policies. The Constitution also prohibits monopolies and combinations in restraint of trade or unfair competition.

The basic statute which prohibits unfair trade practices, monopolies, and combinations in restraint of trade is the *Law on Monopolies and Combinations* under RA 3247, as amended and the *Revised Penal Code*, as amended by RA 1956. The law deters any person, firm or entity from monopolizing or attempting to monopolize, or from taking part in any conspiracy or combination in the form of trust in restraint of trade or commerce or from restraining free market competition. The objective is to promote efficiency by effectively promoting desirable competition resulting in increased output, faster economic growth and lower prices of goods and services.

Other competition-related laws/statutes include, among others:

The *Civil Code of the Philippines* which allows the collection of damages arising from unfair competition;

The *Corporation Code of the Philippines* which provides for rules regarding mergers and consolidations, and the acquisition of all or substantially all the assets or shares of stock of corporations;

The *Securities Regulation Code* which proscribes manipulation of security prices and insider trading; and provides protection to shareholders through tender offers, among others;

The *Intellectual Property Code of the Philippines* which penalizes patent, trademark and copyright infringement;

The *Price Act* which defines and identifies illegal acts of price manipulation such as hoarding, profiteering and cartels; and

The *Consumer Act of the Philippines* which provides for consumer product quality and safety standards.

The Strengthening the Mechanism for the Imposition of Countervailing Duties and the Anti-Dumping Act of 1999 deal with unfair trade practices of subsidization and dumping.

## RUSSIAN FEDERATION

### Acronyms

CBR	Central Bank of the Russian Federation
EBRD	European Bank for Reconstruction and Development
FAS	Federal Anti-monopoly Service
FIAC	Foreign Investment Advisory Council
IPZ	Industrial-and-Production SEZ
MEDT	Ministry of Economic Development and Trade
MIA	Ministry of Internal Affairs
OPIC	Overseas Private Investment Corporation
PSA	<i>Law on Production Sharing Agreements</i>
Rospatent	Russian Agency for IPRs, Patents and Trademarks
Rosstat	Federal-State Service on Statistics
RUB	Rouble
SEZ	Special Economic Zones
TIZ	Technological-and-Innovative SEZ
TRZ	Tourist-and-Recreational SEZ
UST	Unified Social Tax
UVIR	Ministry of Interior Affairs, Department of Visas and Registrations

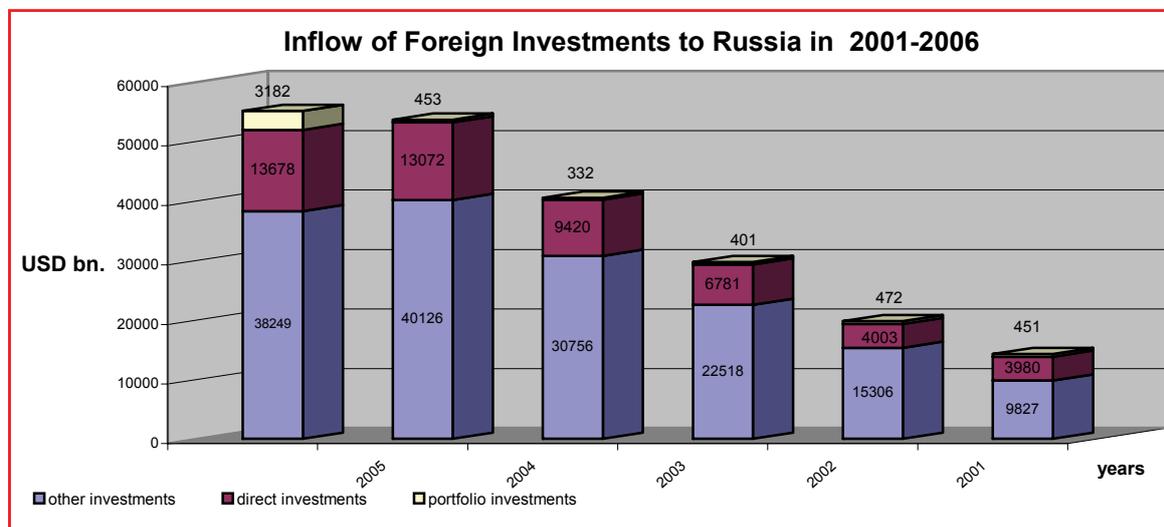
A general aim is to show the world community the new Russian reality and explain that, after 15 years of reforms; **Russia has become a country entirely different** from what it was in the early or even mid-1990<sup>s</sup>. It goes without saying that far from everything has been done to make the business community feel quite comfortable in Russia. However, the conditions of entrepreneurial activity in our country have obviously improved in recent years. **Russia is currently a country not of extreme, but of civilized entrepreneurship.**

*“As for the political climate, I do not see any barriers to the development of retailing in Russia, both by local and foreign companies. In this respect, retailing is not an industry to rivet attention of bureaucrats. From the political perspective, there are no serious problems while the general stability contributed to the country’s appeal among international retailers.”*

**Ruslan Korzh, Director, A.T. Kearney, Russia**

## INTRODUCTION

Taking into account Russia's competitive advantages, it has a lot of appeal for investors. Among the main Russian competitive advantages foreign investors most frequently name the expanding capacity of the domestic market, rapid economic growth, political and macroeconomic stability, and strong human capital growth based on high education standards.



That is why the current policy of the Government of the Russian Federation is aimed at encouraging foreign investment in Russia. In recent years, the legal bases for the market economy and its basic institutions have been in general completed. Civil, corporate, anti-monopoly legislation and the system of intellectual property protection have been created, an equity market is successfully developing and the adoption natural resources use regulation (such as land, forests, water and sub-soil) is close to completion. Licensing, technical regulations, a trade remedies system, based on international norms and principles are being improved.

This is the base for improvement of the positive image of Russia in the world. Russia has been already granted Moody's, Fitch, Standard and Poor's **investment credit ratings**.

<b>Russia's Long-term foreign currency sovereign credit rating by leading International Rating Agencies</b>		
<b>Rating agency</b>	<b>Credit rating and outlook</b>	<b>Updated</b>
<b>Moody's</b>	<b>Baa2</b>	October 2005
	<b>A2 (by new method)</b> stable outlook	May 2006
<b>Fitch Ratings</b>	<b>BBB+</b> stable outlook	July 2006
<b>Standard &amp; Poor's</b>	<b>BBB+</b> stable outlook	June 2006

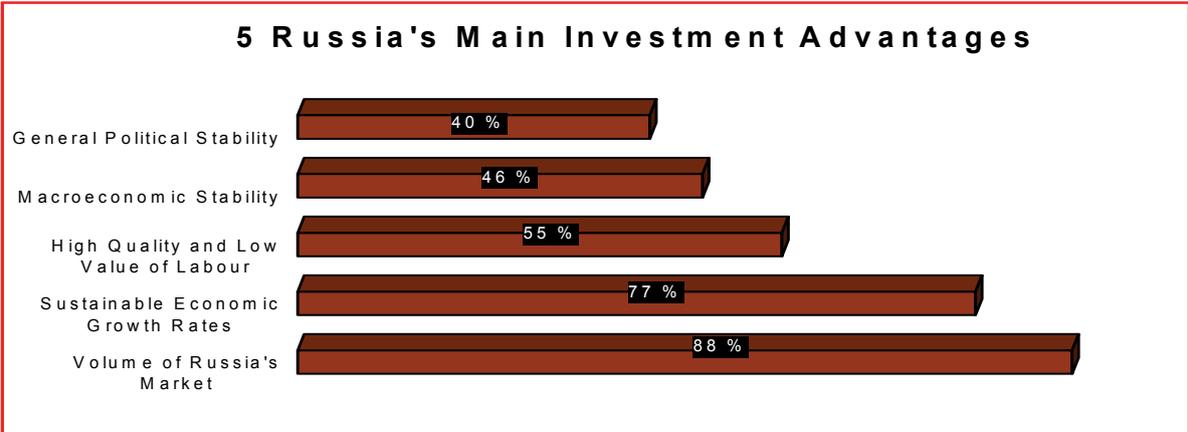
Investment policy is particularly directed at creating the conditions to promote the expansion of foreign investment, and also the formation of a transparent and stable code of rules in the conduct of economic activities. The Russian legislative acts in this sphere provide proper guarantees for the protection of foreign investors' rights and interests and advantageous conditions for foreign investors and enterprises which intend to invest in the Russian Federation respecting its domestic investment legislation and relevant international treaties signed by the Russian Federation.

Russia has undertaken major liberalization of its foreign investment laws, regulations and policies over recent decades. Wishing to take into account investors' opinion in the course of improving "the rules of the game", the Government of the Russian Federation has maintained its relationship with foreign investors at the highest level.

The return on investment projects has been fairly high in Russia: three-quarters of investors polled by FIAC<sup>38</sup> responded that their profits grew over 10% in 2004, and two-fifths said the growth was over 30%.

According to estimates made by foreign investors in the course of the poll carried out by the FIAC, the following advantages play the most important role:

However, the competitive advantages are not limited to those listed above. The most significant advantages include the opportunity for investors to participate in improving the business climate of the country, to perfect legislation and work out directions for development of certain segments.



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<sup>38</sup> The Foreign Investment Advisory Council (FIAC) headed by the Russian Federation's Prime Minister is one of the most effective mechanisms for interaction between the Russian Federation Government and business.

At present, it may be said that the reform of the tax system in general has been completed, and the resulting taxation regime is fairly supportive for investors: the tax on profits is 24%, tax on personal income is 13%, the highest rate of the single social tax is 26% and the VAT is 18%. Conditions for small business are even more favorable: the single tax is 6% and the tax on income less expenses is 15%.

Russia's *Law on Foreign Investment in the Russian Federation* (Law No. 160-FZ of 9 September 1999) and a set of other laws effective in Russia establish the national regime and stable conditions for investors, ensure the fair settlement of disputes, and guarantee the protection of investments. Although the Russian legislation governing investment operations needs to be improved, it is of a market and liberal nature even now and meets the international standards in this sphere. All the changes and adjustments that are being or will be made in investment legislation are approaching the best of world experience in this sphere.

As regards portfolio investments, protection of rights of security holders is guaranteed in the *Law on Securities Markets* (Law No. 39-FZ of 22 April 1996).

To ensure mutual promotion and protection of capital investment at the international level, the Russian Federation has been working on concluding bilateral agreements with countries from Europe, Asia, Africa and America; 37 agreements have entered into force so far.

A number of other recent initiatives have had a positive impact on the business environment in Russia. In particular, the Government introduced several important tax amendments which came into effect in 2006, which aim at stimulating general investment activity but also respond to the demands of foreign investors. Firms are now allowed to depreciate in a single installment up to 10% of the value of new fixed assets. VAT reimbursement on capital investment, which intervened previously only after the completion of the whole project, will be accelerated and intervene after a specific capital expenditure occurs. Also, in the response to frequent complaints by domestic and foreign operators, the Government has submitted a law proposal to reduce the power of tax auditors. The amendment of the *Tax Code* by the Supreme Arbitration Court has a similar objective as it restricts the time period during which debtors' funds or property could be confiscated by the tax authorities to cover tax obligations. A new law reduces the period during which commercial deals, including past privatizations, may be contested from the previous 10 to 3 years.

The ongoing reform of competition policy and improved efficiency of the Federal Anti-monopoly Service (FAS) can also have a positive impact on the business environment, in particular for SMEs that will see their administrative constraints reduced due to the increased threshold for authorization and notification.

The Russian regions have not been bypassed. Laws governing investment operations were adopted in almost 80 from 88 entities (regions) of the Russian Federation.<sup>39</sup> The regional legal acts establish

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<sup>39</sup> Attracting foreign investment to regions other than large cities and to sectors other than energy, which have been so far its main beneficiaries, is one of the important goals of Russia's economic policy. Despite a number of comparative advantages many Russian regions can offer, such as relatively cheap land and property and a qualified workforce, their investment environment is still perceived as being insufficiently attractive by foreign investors. The efforts of the regions to tackle investment barriers, in particular by granting tax incentives and developing investment promotion programs, have not brought expected results so far. The objective of the recently adopted laws on Special Economic Zones (SEZ) and "Concessions" to make specific regions and sectors also attractive to foreign investors could be attained only if they are implemented in a non-discriminatory and transparent manner with a minimum of market distortions (in line with the *OECD 2006 Investment Policy Review of the Russian Federation*).

state guarantees for investors' rights and preferential taxation of investment operations. They also reduce the rates charged for the use of land and other natural resources, and grant preferences for the lease of real estate and for investment tax loans.

The fact that it is not necessary to register investment projects is a significant competitive advantage for Russia. Expert evaluation of an investment project and conclusion of investment agreements is mandatory only for projects seeking one or another form of government participation.

Russia's competitive advantages also lie in its proximity to Europe. Russia's geographic proximity and favorable business conditions allow using Russian territory to enter Europe from Asia via Russia. These opportunities have been underdeveloped so far, but they exist. In the opinion of investors, it is far easier to operate in Russia than in neighboring countries; in this respect Russia is approximately at the same level as China and India. According to investors' estimates, conditions in Russia are favorable as regards return on project investments and conditions for making business.

Measured by the average return on investments, Russia has left behind developed countries, Central and Eastern Europe, neighboring countries and emerging markets as a whole.

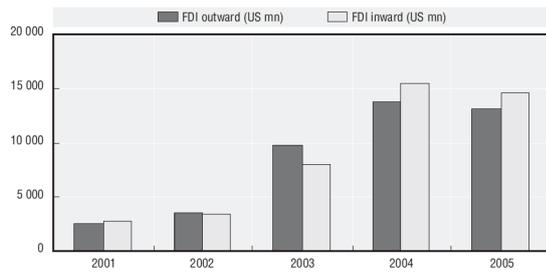
Russia's economic cooperation is favorably developing also with the USA, China, and some other countries. Russia is now a recognized participant in the Asian Pacific markets and an active member of the APEC.

Given economic globalization, development of interstate trade and economic relations, and the international division of labor, Russia attracts increasingly greater attention from foreign partners. The negotiations on Russia's accession to the WTO that have entered their final stage, along with continued negotiations on OECD membership, are indicative of such interest and of recognition of Russia as a market economy. Until recently, Russia has been regarded as a transitional economy for which it has not always been treated equally by the world business community.

**Investment activity** in Russia is rising. It can be seen from increased credits given by the banking system of the non-financial sector. Fixed capital investments increased by more than 10% in 2005. The inflow of FDI is growing though taking into account the scale of the Russian economy their value is still not sufficient — US\$12 billion in 2004 and more than US\$16 billion in 2005. At the end of 2005 the foreign capital stock in Russia reached nearly US\$112 billion, a 36.4% net increase compared to 2004.

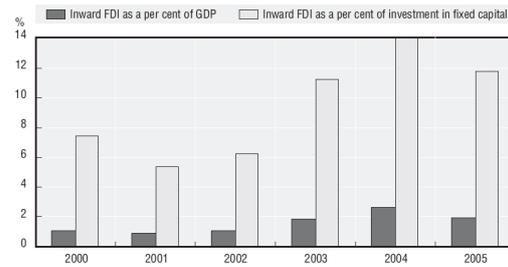
The federal government also envisages improving and streamlining its investment promotion activities. A special unit, recently created within the Investment Policy Department of the Ministry of Economic Development and Trade, was assigned a task to develop a new concept of investment promotion with a special focus on reducing administrative barriers to foreign investment.

Figure 1.1. Annual FDI flows to and from Russia



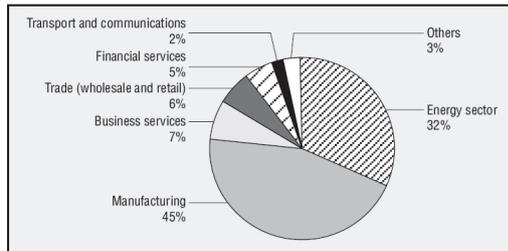
Source: Central Bank of Russia, Balance of Payments Statistics.

Figure 1.2. Russia's FDI inflows as a percentage of its GDP and of its investment in fixed capital



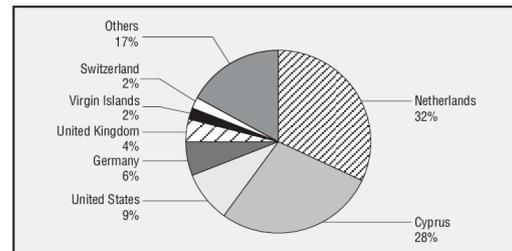
Source: Central Bank of Russia, Federal State Statistical Service.

Figure 1.3. Russia's inward FDI inflows: share by sector (2005)



Source: Federal State Statistical Service.

Figure 1.4. Russia's inward FDI stocks: main partners (2005)



Source: Federal State Statistical Service.

## Forms and Types of Investment Activities

Russia mobilizes capital in the form of direct and portfolio investments, capital investment loans, and through the placement of bonds in international capital markets. There are no restrictions for foreign investors in Russia from the legal viewpoint: their companies may be registered under any legal form stipulated in the legislation. Those who may be foreign investors are the following: foreign legal entities including any company, firm, enterprise, organization, and association established and entitled to invest in accordance with the laws of the country of their residence; foreign citizens or individuals without citizenship; Russian citizens residing permanently abroad if they are duly registered in the country of citizenship or permanent residence; as well as foreign governments and international organizations.

Foreign investment in the Russian Federation may be made into any assets which are not proscribed in the legislation. These may include new and modernized capital and current assets in all sectors of the economy, securities, target deposits, high-tech goods, IPRs, and other property rights.

Foreign investors are entitled to make investment in the Russian Federation in the form of:

- Shares in ventures established jointly with Russian legal entities and citizens.
- Establishment of ventures owned fully by foreign investors, as well as the establishment of branches of foreign legal entities Purchase of ventures, estates, buildings, constructions, shares in ventures, units of investment trusts, stocks, bonds, and other securities, as well as other assets which may be owned by foreign investors in accordance with the effective legislation (usually through auction, tender, competition, or purchase at the secondary market).
- Purchase of the rights on the use of land plots and other natural resources (usually in the form of lease or the purchase of constructions on a land plot allocated thereto or the acquisition of a Russian venture holding the title to a land plot, or the establishment of joint-stock companies with entities which contribute land plots to the Charter Fund).
- Purchase of other ownership rights.

- Issuance of loans, contribution of assets and ownership rights.

Ventures with foreign investment may operate under different legal forms to include joint-stock companies and other companies and partnerships stipulated in the legislation of the Russian Federation.

These may include:

- a) Ventures with foreign shares (joint ventures), as well as their subsidiaries and branches.
- b) Ventures owned fully by foreign investors, as well as their subsidiaries and branches.
- c) Branches of foreign legal entities.

Evidently, in such cases investments are made through the establishment of entities with 100% capital owned by foreign investors or with foreign investors' shares, acquisition of operating entities or their shares, establishment of branches and representative offices, and conclusion of investment agreements. The investment agreement is defined to include accords between investment entities on the fulfillment of certain actions to implement an investment project.

The system of investment agreements may include bargain and sale agreements (namely, the sale of real estate, ventures, and securities), financial lease, building contract, provision of chargeable services, commercial concession, trust, special partnership, and founding agreements.

The *Law on Production Sharing Agreements* (PSA) was adopted in Russia 10 years ago – the first investment law which paved the way for market-oriented civil contractual relations pertaining to the use of natural resources, a sphere formerly closed to foreign investors. PSAs have been used so far only for development of the oil and gas fields in Sakhalin and the shelf thereof.

For further information see <http://www.economy.gov.ru> For since 2000 see Russia's APEC Individual Action Plan and its 2005 APEC Peer Review at <http://www.apec-iap.org/> The OECD's *2006 Investment Policy Review of the Russian Federation* should also assist: [www.oecd.org](http://www.oecd.org)

## SCREENING OF FOREIGN INVESTMENT

### (i) Transparency of the screening process

On 27 July 2006, Federal Act No. 149-FZ *On Information, Information Technologies and Protection of Information* was adopted. In 2006-2008 it is supposed to elaborate and to implement the mechanisms of public information disclosure about activity of the federal executive bodies, executive bodies of the subjects of the Russian Federation and the provincial government bodies including its investment activity.

The draft *Law Providing of Access to Information on Activity of State Executive Bodies and Municipal (Local) Executive Bodies* was scheduled for review by the State Duma at the time of printing the *APEC Investment Guidebook*, together with the necessary amendments to the federal laws on mass media and administrative responsibility for disclosure/non-disclosure information on activity of these public executive bodies.

The information and procedures of its disclosure to the public domain in general (or general framework to ensure transparency principles in Russia) is improving in Russia thanks to implementation of the APEC General Transparency Standards.

The information gathering in monetary, fiscal and financing policies and dissemination of macroeconomic policy data, as well as procedures for its disclosure to the public domain continues to improve.

The present *Law on Procurement for State Needs* demands that tender information and conditions of procurement be published on official government Internet-sites. According to the Law, regional and municipal executive bodies have to create their own e-procurement web-sites. Use of Internet publication will broaden the reach of transparency throughout Russia. The Internet can be considered as a tool in fighting corruption, too. Further to this point, the Decree of the Russia's President No. 305 of 8 April 1997 *On the Top-Priority Measures on an Avoidance of Corruption ... at Organization of Purchase of Products for the State Needs* was a major advance. This covered relations arising in connection with competitive bidding for the purchase of products for the State via the Federal budget, budgets of the subjects (regions) of the Russian Federation, state extra-budgetary funds and extra-budgetary funds of the subjects of the Russian Federation which have been not settled by the aforesaid federal law, the *Civil Code of the Russian Federation* and other federal acts on delivery of products for the state needs.

Federal constitutional laws, federal laws and acts of the Chambers may also be published in other press organs and be brought to public knowledge through the media, distributed to state authorities, officials, enterprises, establishments and organizations, transmitted via communication channels or distributed in machine-readable formats. Many government agencies publish newsletters on a regular basis, which should contribute to making Russian trade policy more transparent and Russia's trading and investment partners with a better understanding of the state of Russian trade and investment policy.

In accordance with Article 5.3 of the Constitution, laws and other regulatory acts relating to human rights, freedom and duties are subject to official publication. This provision was developed in *Law on the Procedures for Publishing and Entering into Force of Federal Constitutional Laws, Federal Laws, and Acts* (Law No. 5-FZ of 14 July 1994) passed by the Chambers of the Federal Assembly; and *Presidential Decree on the Procedures for Publication and Entering into Force of the Acts of the President of the Russian Federation, the Government of the Russian Federation and the Normative Legal Acts of the Federal Executive Bodies* (Presidential Decree No. 763 of 23 May 1996).

In accordance with paragraph 2 of Presidential Decree No. 763, acts of the President of the Russian Federation and of the Government were subject to official publication in the "Rossiyskaya Gazeta" and in the digest *Sobraniye Zakonodatelstva Rossijskoj Federatsii* within 10 days of their signing. Distribution of the acts of the President and the Government in a machine-readable form by the scientific and technical centre of legal information *Systema* was also deemed to constitute an official publication. Moreover, in accordance with paragraph 8 of *Presidential Decree No. 763*, regulatory legal acts of federal executive bodies related to human rights, freedom and duties or establishing the legal status of organizations or acts of inter-departmental nature were subject to official publication in the *Rossiyskaya Gazeta* within three days of their registration, and in the *Bulletin of Normative Acts of the Federal Bodies of Executive Power* published by the publishing house *Yuridicheskaya Literatura* of the Administration of the President. This Bulletin is distributed in a machine-readable form by "Systema".

Federal constitutional laws, federal laws and acts of the Chambers are also be published in other press sources and brought to public knowledge through media, distributed to state authorities, officials, enterprises, establishments and organizations, transmitted via communication channels or distributed in machine-readable formats. A great deal of draft legislation is made available on various governmental and parliamentary websites from the time it is formally proposed to the State Duma. The Government intends to continue and expand this practice.

Since 1996 the All-Russia Market Research Institute has published quarterly in English *Russia: Foreign Economic Relations, Trends and Prospects*. It presents the most up-to-date comprehensive review of early statistics, developments and legal position concerning Russia's **foreign trade and investment**, demonstrating business opportunities in Russia on the macro- and micro level.

In accordance with *Law on Fundamentals of State Regulation of Foreign Trade Activity* – Article 16 (Law No. 164 of 8 December 2003), *Customs Code* – Article 24 (No. 61-FZ of 28 May 2003) and *Government Resolution on Access to Information on Activities of the Government of the Russian Federation and Federal Executive Bodies* (Government Resolution No. 98 of 12 February 2003), all federal executive bodies are required to ensure public access to information with regard to laws, Presidential decrees, government resolutions, as well as their own regulations, orders, rules, instructions, recommendations, letters, telegrams, teletype messages, etc., having an impact on trade and investment, including by placing this information on the Internet.

Comparative studies of APEC economies and Russia's trade and investment statistics and forecasting of Russia's foreign trade and investments are carried out and published monthly on the Ministry of Economic Development and Trade (MEDT) website <http://www.economy.gov.ru>

The *Law on Licensing of Specific Types of Activity* (Law No. 128-FZ of 8 August 2001) imposed specific procedural requirements, including criteria and time limits for decisions on licensing and licensing authorities, and requirements for written notification of decisions. All acts of the Government of the Russian Federation are subject to official publication before they come into effect.

See also the following useful Internet addresses of the Russian federal authorities:

[www.kremlin.ru](http://www.kremlin.ru) — the official Internet-site of the President of the Russian Federation;

[www.government.gov.ru](http://www.government.gov.ru) — the Russian Government official Internet-site;

[www.mid.ru](http://www.mid.ru) — Ministry of Foreign Affairs of Russia;

[www.minfin.ru](http://www.minfin.ru) — Ministry of Finance of Russia;

[www.halog.ru/eng/](http://www.halog.ru/eng/) — Federal Tax Service of Russia;

[www.gks.ru/eng/](http://www.gks.ru/eng/) — Federal-State Service on Statistics (Rosstat);

[www.fas.gov.ru](http://www.fas.gov.ru) — Federal Anti-monopoly Service (FAS);

[www.fips.ru/ruptoen/index.htm](http://www.fips.ru/ruptoen/index.htm) — Russian Agency for IPRs, Patents and Trademarks (Rospatent);

[www.cbr.ru/eng/](http://www.cbr.ru/eng/) — Central Bank of the Russian Federation (CBR);

<http://www.wto.ru> — the official information with regard to the Russia's accession to the WTO; etc.

(ii) Foreign Investment Advisory Council

The Foreign Investment Advisory Council (FIAC) is an effective government policy vehicle for mobilization of foreign investment. Currently, the Chairman of the Government of the Russian Federation is the FIAC head. Several federal ministries and agencies, primarily economic, take part in its operations from the Russian side. The Ministry of Economic Development and Trade of the Russian Federation has been charged with coordination of the FIAC and its working groups' operations.

In 1995, the FIAC Standing Committee was established. Its objectives include coordination of the activities of federal executive agencies for implementation of FIAC resolutions, conducting FIAC operations in-between the annual sessions, as well as preparation of proposals for consideration by the Government of the Russian Federation.

Standing Committee members from the Russian side are the Government Staff, Ministry of Economic Development and Trade, Ministry of Foreign Affairs, Ministry of Finance, Ministry of Justice, Ministry of Education and Science, Ministry of Natural Resources, Ministry of Industry and Energy, Federal Tax Service, Federal Customs Service, Federal Financial Markets Service, Supreme Arbitration Court, and Bank of Russia. Foreign participants are represented by company members and the European Bank for Reconstruction and Development (EBRD). The Standing Committee reviews such issues as implementation of the proposals made at FIAC sessions with the objective of attracting foreign investors to the Russian economy and Russian securities market, as well as the rotation of FIAC members and organization of its working groups' work.

The working groups which include representatives of federal and regional agencies and foreign investors are an essential part of the FIAC mechanism. The working groups review such issues as improvement of the tax legislation and economic conditions for foreign investors in Russia.

The following working groups operate within the FIAC currently:

- State Regulation
- Tax & Accounting
- Financial Institutions & Capital Markets
- Industry, Construction, and High Tech
- Natural Resources
- Food & Agriculture
- Image of Russia.

The main form of FIAC operations is conducting a direct dialogue between the Government of the Russian Federation and foreign companies and banks – members of the FIAC on issues related to the establishment of a favorable investment climate in Russia and mobilization of foreign investment for the Russian economy. The FIAC has succeeded in setting up an effective dialogue between the Government of the Russian Federation, ministries, and agencies with major international companies which have already made capital investments in the Russian economy. Cooperating with government representatives in the working groups, the FIAC members have prepared recommendations for legislative reform over the past decade.

The FIAC relies on the **operational** experience of companies conducting business in different countries, which take into account specifics of the markets. During its initial years, it was essential for Russia to use its vast international experience, which was particularly important because of the restructuring of the centrally planned governance system. In effect, the FIAC was one of the vehicles for restructuring the Russian economy and a catalyst for economic transformation rather than a mere channel for bringing capital investments to this country.

Foreign participants in the FIAC rotate periodically. Currently it includes 27 foreign companies and banks making large-scale investment to the Russian economy.

Periodically the OECD carries out studies of the Russia's investment climate and state policy (e.g. see the 2006 Investment Policy Review of the Russian Federation at [www.oecd.org](http://www.oecd.org) ).

**Where to find further information:**

Main websites are: [www.economy.gov.ru](http://www.economy.gov.ru) ; [www.gks.ru](http://www.gks.ru) ; [www.cbr.ru](http://www.cbr.ru) ; [www.vniki.ru](http://www.vniki.ru) , etc.

Changes since 2000 also appear in Russia's Individual Action Plan and its 2005 Peer Review at <http://www.apec-iap.org/>

## SECTOR-SPECIFIC LAWS AND POLICIES

### (i) Banking and Securities

The Central Bank issues licenses to commercial banks, supervises their operations, and grants permission for the establishment of foreign banks' representative offices. Neither foreign banks nor their branches are allowed to operate on the Russian market under current legislation.

By law all foreign banks operating in Russia are Russian banks with foreign capital (100% or less), operating in accordance with Russian legal acts under the supervision of the Bank of Russia. Currently there are approximately 130 such banks, of which 34 have 100% foreign capital and 42 have 50% and higher. The banking services market has been liberalized considerably of late – foreign subsidiaries enjoy a regime very close to the national regime, and after accession to the WTO, they will be granted full-fledged national status.

Reaching a trade-off for the sector of financial services was the most difficult problem during bilateral negotiations on the Russia's accession to the WTO. Russia has not committed to open its market for direct branches of foreign banks, and has reserved the right to use 50-per cent quotas for foreign participation in the banking and insurance systems.

In the frame of bilateral treaties with the WTO member countries, Russia has agreed to bind most existing market access and to offer some liberalization of treatment of foreign bank subsidiaries, including:

- allowing 100% foreign ownership of all commercially meaningful types of non-insurance, Russian financial companies, including banks, broker dealers and investment companies, upon accession;

- exempting foreign proprietary electronic networks for trading of securities (e.g. ECNs) from a 20% single investor limit on ownership of stock exchanges;
- allowing foreign-invested companies to own and trade the full range of securities (including state securities, bullion and new instruments once they are approved), lead-manage Russian securities issuance, and participate in financing of privatization of government- owned firms;
- allowing cross-border services such as financial leasing, financial information and data processing, credit cards and other types of payments, and advisory services and, starting in 2008, asset management services to sophisticated investors;
- returning to consideration of bank branching upon joining the OECD or in the next multilateral round of negotiations whichever comes first.

Nevertheless, certain restrictions will remain: the cap on foreign banks' shares in the total capital of the banking system and the prohibition on establishing foreign bank branches in order to ensure an even playing field for Russian banks.

(ii) Insurance

Russia will provide a significant level of market access and national treatment for foreign insurance companies, including 100% foreign ownership of non-life insurance firms upon accession. Limits on the number of life insurance licenses granted to foreign insurance firms, as well as foreign participation in a small number of mandatory insurance lines will be phased out 5 years from the date of accession. Russia will allow foreign insurance companies to open direct branches for life and non-life insurance, reinsurance and services auxiliary to insurance nine years from the date of its accession.

Nevertheless, Russia retains the discretion to limit new FDI in banking and insurance and insurance branches, if foreign investment exceeds 50% of total investment in the sector. The calculation of the 50% ratio excludes foreign investment: 1) made by January 1, 2007; 2) in firms privatized after Russia's accession; 3) in internal branches; and 4) over 51% after it has been in place in Russia for 12 years, unless Russia makes a formal decision annually to continue to include such investment.

Russia has also agreed to conduct within 5 years from the date of accession an overall review of the discretionary foreign investment limit and whether it is necessary to keep it in place.

Russia agreed to open the market for direct branches of foreign insurance companies 9 years after its entry to the WTO. The commitments as formulated will allow Russia to apply to branches of foreign insurance companies operating in Russia the entire package of measures to ensure the financial stability of such branches, adequate quality of their services, and compliance with all requirements of the Russian legislation in force. For all practical purposes, Russia will be entitled to apply to such branches the same regulations as in the case of Russian legal entities licensed for insurance activities. Along with that, Russia reaffirmed the adherence to the existing legislation that discards any possibility (as a generic regulation) for imposing limitations upon foreign shares in the assets of banks and insurance companies established in Russia. These restrictions will be applied solely to certain kinds of insurance for as long as a 5-year transition period.

According to the Federal Financial Markets Service, Russia's financial sector has evolved into a mechanism for bringing investments into the Russian economy. However, the current activities on the securities market have been insufficient to meet the needs of economic modernization.

For this reason, a Strategy for the development of financial markets has been prepared. The strategy's main objective is to transform the market into one of the main mechanisms for mobilizing investments in the Russian economy and to create conditions for the effective investment of household savings and the investment funds of mandatory savings systems. The strategy aims to make Russian stock exchanges and trading systems the main centers for organized trade in Russian financial assets. And in order to ensure their international competitiveness, a system of incentives should be established on Russian stock exchanges to encourage transactions with the financial assets of countries enjoying close financial and economic relations with Russia.

It envisages gradual divestiture of government shares in commercial banks as well as their consolidation and specialization. In this context, certain amendments will be introduced to legislation, e.g. the terms and conditions of banks' M&As will be streamlined. On the other hand, bank supervision will be enhanced, and commercial banks will be required to increase the transparency of their operations, e.g. the identification of banks' virtual owners. The Development Strategy includes provisions affecting bank customers; it envisages the establishment of a deposit insurance system for banks operating with household funds and credit bureaus.

It entails the adoption of approximately 30 new legal acts as well as amendments to current legislation with a view to removing obstacles to the development of the domestic financial market.

### (iii) Energy

The Energy Strategy of Russia for the period up to 2020 (established by the decree of the Government of The Russian Federation № 1234-r as of 28.08.2003) for the development of the gas markets envisages:

- Step-by-step gas price increasing on the internal market, the change to the gas realization by the market prices for the self-finance of the market subject, objective consumer appraisal of gas quality;
- Transition from wholesale price regulation to the establishment of transport gas tariff for all producers;
- Provision of the adaptation period for readjustment to the changing conditions of the gas market functioning for consumers;
- Advocacy of the social sensitive consumer groups from abrupt variation of gas price;
- Development of the internal market structure for the change to gas realization for market price;
- Creation of conditions for the development of independent gas producers;
- Creation of conditions for non-discriminatory access to long-haul pipeline system for all participants of the market;

- For medium prospect, conservation of the uniform natural gas industry system as united infrastructure technological complex, its development at the cost of construction and connection of a new object of any type of ownership (including share holding);
- Creation of conditions for competition in gas market sectors, where it is possible and economically expedient (sale, extraction and subsurface gas storage conservation), it must assure cost reduction, increase of effectiveness and service quality, provided for subjects of the market.

The main aim of the reform of electric power industry was price deregulation and market liberalization with keeping of state price regulation solely in natural monopoly types of activity (services in electric power sector, operations dispatching).

Russia has made commitments in energy and energy-related services that will provide some market access to foreign energy service companies.

#### (iv) Environmental Services

Russia will liberalize its environmental services market, allowing U.S. environmental services companies to supply a range of services from sewage services for industrial waste to noise abatement services, in all relevant modes of supply. Foreign service suppliers will be allowed to operate as 100% foreign-owned enterprises and will enjoy full national treatment.

#### (v) Strategic Sectors

The proposed law on strategic sectors in Russia as currently discussed within the government would cover a few closed sectors and contain a list of approximately 39 sectors, including in particular arms and defense-related sectors as well as nuclear energy and aerospace industries, in which foreign investors would need the governmental authorization to acquire more than 50% ownership. As for gas and oil sectors, prior authorization for majority foreign ownership would concern only a limited number of large extraction sites and would be determined by amended Subsoil Law. A special commission composed by representatives of the main ministries and federal agencies, will be in charge to deliver relevant authorizations and notify them to the applicants within a specified time period (30-60 days in the government's current draft).

In the view of the Russian authorities, the proposed law should not be perceived as a ban on FDI but as an attempt to make the current situation more transparent and predictable and to put the Russian procedures in line with similar legislation adopted in other countries.

In the energy sector, the trend has been clearly towards the consolidation of state ownership and control, though private and possibly foreign minority shareholding has been allowed, for example in Gazprom and in the near future in Rosneft. In some other sectors, commonly considered strategically important by the Russian authorities (such as banking and telecommunications), the entry of foreign investors does not seem to meet major obstacles but the Government seeks to control its modalities, in particular by allowing only foreign bank subsidiaries. Moreover several

recent consolidation operations in other sectors, such as aircraft, arms and automotive industries, aim at developing major state-controlled companies able to compete internationally.<sup>40</sup>

(vi) Transport

Transportation of cargo and passengers and a number of other transportation services are subject to licensing. Unlike other types of transport water transportation has certain limitations for foreign companies (a prohibition to sail under foreign flags in the internal waters of Russia with the exception of certain areas where a special permission of the Government of the Russian Federation is required). The Russian Federation is not a participant in the multilateral Agreement on Transit (1944), and air-traffic through the territory of the Russian Federation is regulated on a bilateral basis.

(vii) Civil Aviation

In the area of services provided by the airports, certain decisions, written down in the Transport Strategy of the Russian Federation till 2020 were made:

- gradual cancellation of quota arrangements on the airlines, that will assure access of all air companies to the airlines;
- conclusion of privatization and to incorporate the united air groups with division into separate independent air companies and airports that will insure non-discriminatory access of all air companies (including foreign companies) to the airport services;
- establishment of juridical conditions for shortening of the property structure, limited in the civil transactions and assignation into the subject air companies property of The Russian Federation, that doesn't comply with the Federal tasks;
- liquidation of the sole administration of Moscow airports.

(viii) Shipping and Seaports

Reforms in the area of seaport of the Russian Federation, in order to divide control functions and functions of undertaking by detachment from seaports an organization departments to deal with economic activity are coming to the end.

(ix) Railways

The Railway Structural Reforming Program envisages to establish an integral, effective, well-coordinated transport system, to raise stability and regularity of the railways, railway traffic safety, availability and quality of the services rendered, to cut aggregated economic expenses on railway

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<sup>40</sup> In 2004, the government share (based on sales) was 24.5% in industry and 20% in transport/communications and the foreign investment share 5.3% and 1.2% respectively. In the banking sector, the state ownership represented 25.6% of banking assets, whereas the share of banks with foreign participation amounted to 10.8% (see: *From Transition to Development: A Country Economic Memorandum for the Russian Federation*, p. 145; World Bank 2005).

freight services and to satisfy the growing demand for railway services, to attract investments necessary for renewal of the rail rolling-stock, and containers in the first place.

(x) Telecommunications

Regulation is based on the Federal Law “On Communications” and the Law “On Natural Monopolies”. Physical and legal persons operating in this sector are required to obtain licenses issued by the Ministry for Communications and Informatization of the Russian Federation for radio emitters and high frequency equipment. In the most part of communications services the activities of foreign companies are subject to national regime.

In the territory of the Russian Federation foreign organizations or citizens can provide jointly with Russian operators the following services:

- All types of services on dedicated lines (i.e. lines without access to the lines of general use);
- Local telephone communication services (rural, urban, area);
- Value added communication services.

Coordination of foreign service providers with the national communications network is reviewed separately.

Provisions concerning qualification requirements, technological standards and licensing/registration for providing communication services in the territory of the Russian Federation are regulated by appropriate provisions of Acts, Conventions, and Agreements of the International Telecommunications Union and the World Post Union.

After implementation of a new regulatory system for communication, liberalization of long-distance calls market was done. Already 3 operators of a long-distant communication is operating on the market, 17 more got the license.

In the domain of telecommunications, Russia's commitments to accede the WTO are tailored to the market access conditions as stipulated by the applicable legislation in force. In some cases, they provide for additional measures to protect national operators (e.g. if necessary, Russia may exercise, at the initial stage, its control over fixed communications operators, including Svyazinvest companies and other traditional operators, after their privatization). The commitments in the sphere of satellite communications will contribute to further development of Russian telecommunication companies through securing their liberalized access to services that can be provided by foreign satellite systems. At the same time, full control over providing satellite communication services to end consumers and subscribers in Russia is retained.

Russia will open its telecommunications services market both on a facilities and non-facilities basis to all foreign suppliers. Sectoral coverage is comprehensive and Russia will allow foreign telecommunications companies to operate as 100% foreign-owned enterprises. Russia also accepted the pro-competitive WTO Basic Telecommunications Reference Paper establishing an independent regulator, obligations to prevent anti-competitive behavior by the dominant supplier, transparency obligations and interconnection requirements.

(xi) Audio-visual Services

Russia will open its market to foreign audio-visual service suppliers in several important sectors, such as motion picture distribution and projection services, as well as the sale of television and radio programs to television and radio stations. Russia will allow foreign audio-visual companies to operate as 100% foreign-owned enterprises. Nevertheless, TV and radio broadcasting in and from the territory of the Russian Federation is subject to compulsory licensing. More than 900 commercial companies are operating in this sector.

The existing legislation does not impose any quantitative limitations either on the use of foreign programs or participation of foreign investors in the development and operations of receiver-transmitter equipment. In the field of film and video production and rental all persons are required to obtain registration of films made for the purpose of public rental and a state rental certificate of the set form. Activities related to the public rental of cine- and video films are subject to compulsory licensing also. No screen time limitations are applied.

Considerable attention within the framework of the negotiations for Russia's accession to the WTO was paid to the sector of audiovisual services, which is comparable to such sectors as telecommunications and financial services by its significance. As a result, in key spheres of audiovisual services, Russia has managed to arrive at well-balanced and win-win conditions for the presence of foreign companies. For instance, as far as production of motion picture and video films, TV and radio broadcasting and other associated services are concerned, Russia is entitled, if required, to continue the current governmental support to domestic motion picture producers. In the sectors for which Russia has assumed certain commitments (e.g. exhibition of motion picture and video films), the right is also reserved to exercise measures to protect cultural heritage and identity.

(xii) Express Delivery Services

Russia will allow foreign express delivery companies to operate as 100% foreign-owned enterprises upon accession. Russia's membership in the WTO will ensure the unrestricted delivery of documents, parcels, packages, and other items through all relevant modes of supply, and guarantee that foreign express delivery operators will receive treatment no less favorable than that accorded to domestic express delivery operators. Redaction of the law "On Mail Communications" is well under way, which is supposed to help development of competition relations on the mail market.

(xiii) Distribution

Russia will liberalize the wholesale, retail and franchise sectors, allowing foreign distributors to operate as 100-per cent foreign-owned enterprises upon its accession to the WTO. Foreign distributors will be allowed to engage in the distribution of most products, including pharmaceuticals, with minimal limitations and on terms comparable to those of domestic distributors. In addition, Russia's commitments for distribution provide for direct sales by individual commission agents.

(xiv) Business Services

Russia's commitments for business services will ensure market access and national treatment for a wide variety of professions, including lawyers, accountants, architects, engineers, health care professionals, advertising and marketing professionals and management consultants. Foreign service suppliers in these sectors will be allowed to operate as 100% foreign-owned enterprises and in most cases will enjoy full national treatment. In addition, Russia's commitments for computer and related services will ensure a high level of market access, including 100% foreign equity investment in this rapidly growing sector, in which some APEC member economies' companies are globally competitive.

(xv) Healthcare and Social Services

Foreign persons wishing to perform medical or pharmaceutical activities in the Russian Federation are required in accordance with the effective legislation to have official notification of certificates of professional education and to pass the relevant qualification examinations.

(xvi) Tourism and Travel Services

The effective legislation does not provide for any limitations on the activities of foreign firms in the Russian market of tourist services.

New legislation will define clearly the role of the government, both in terms of the sectoral coverage and the modalities of its intervention.

For further information see [www.economy.gov.ru/wps/portal/english](http://www.economy.gov.ru/wps/portal/english); [www.fas.gov.ru](http://www.fas.gov.ru); [www.wto.ru/en/newsmain.asp](http://www.wto.ru/en/newsmain.asp)

## **INVESTMENT PROTECTION**

To protect national interests in the sphere of the country's economic development, the federal law of the Russian Federation provides for some restrictions in the limited list of sectors: banking, insurance, mass media, aviation industry, land ownership, surface transport, and natural monopolies.

(i) Guarantee of Foreign Investment in Russia

Despite the aforementioned difficulties in the transition period, the generally favorable development of the Russian economy and the establishment of a rule-of-law state have laid the basis for a high investment rating of Russia. Based on the specific indicators of legal security of all business entities, Moody's and S&P rating agencies concluded the evolvement of a favorable investment climate in Russia. It has been achieved primarily due to a high level of political stability. However, the general state of economy and the government policy of economic development also play a pivotal role in this context.

Improvement of the legal system is an essential condition for raising the investment attractiveness of a country. The investment procedure in Russia is regulated both by the national as well as international legal standards ensuring the safety and operations of investment and the establishment of appropriate safeguards at all levels.

The government promotes investors' participation in privatization of public property in Russia. Mandatory licensing is required only for privatization of hi-tech manufacturing facilities and defense plants undergoing conversion and enterprises of the fuel and energy complex. The set of national security measures provides for such restrictions as the interdiction to foreign investors to privatize certain entities, the establishment of a ceiling for their shares in the authorized capital of a joint-stock company for up to three years, and preservation in the public ownership of the block of shares entitling to veto or give the decisive vote.

The *Law on Foreign Investment in the Russian Federation* adopted in 1999 regulates the terms and conditions of investment and the guarantees thereof. Article 3 of the law stipulates that foreign investment in Russia is regulated by Russian laws and legal acts, as well as by international agreements.

The effective legislation provides full-fledged and unconditional legal safeguards to foreign investors. It also provides guarantees against forced property confiscation or the illegal actions of government agencies and officials, and it assumes that compensation should be paid in the amount of inflicted damage, missed interest included.

Thus, Article 8 of the law reads "foreign investment in the Russian Federation are not subject to the confiscation, nationalization, and requisition included..." except as stipulated in the law of the Russian Federation or its international agreements. At the same time, the legislation has a provision that in the event of nationalization or requisition, which should be of nondiscriminatory nature, the foreign investor is entitled. The bilateral agreements concluded by the Russian Federation with other countries on the promotion and mutual safeguards of capital investment establish transparent and enforceable rules ensuring and promoting access of foreign investment to a recipient country. The definition of a general legal regime has a prominent position within such rules, for a clear-cut description of the general legal regime is essential for the establishment of a favorable investment climate in any given country. It should be mentioned that in addition to the MFN clause, the Russian Federation undertook to provide the national regime to foreign investors, also viewed in industrialized countries as a basic requirement for investment activities. Where such a regime is granted with respect to foreign capital investment, domestic and foreign entrepreneurs enjoy equal rights at the domestic market with some exceptions. In most cases the domestic laws, and not the laws of the country of origin, regulate an investors' right in a host country. In this context the regime granted to foreign investment may not be less favorable than the regime granted to Russian investors.

Russia has reserved the right to make exemptions from the national regime in such industries and activities as power generation, production of uranium, other fissionable materials, and the products thereof, ownership rights on land, use of subsoil assets and natural resources, ownership rights on real estate entities, and performance of the transactions therewith, etc. The international investment law allows also for the restrictions which are enforced pursuant to public health and environmental requirements.

The law on foreign investment in the Russian Federation includes a similar provision. Guarantee of the repatriation of foreign investor's receipts is an essential element of legal safeguards for foreign investment. The law on foreign investment (Article 8) stipulates that "property of a foreign investor or business entity with foreign investment shall not be subject to confiscation including

nationalization and requisition, with the exception of events and reasons as established by federal law or international agreement of the Russian Federation.” It also reads, “In the event of nationalization, the cost of the nationalized property and other losses shall be compensated to a foreign investor or a business entity.”

The ownership right is one of the basic economic rights granted to individuals in the context of civil relations and, concurrently, it is a legal form for the fixation of property to individuals. Due to such reasons, legislative guarantees of the ownership right, foreign investors’ rights included, are a prerequisite not only for stable development of market-driven relations, but for democratic transformations in general.

Legal protection of the foregoing right in Russia is guaranteed pursuant to the principles and standards of international law and the Constitution of the Russian Federation. The aforementioned constitutional and international provisions have been developed further in the Russian civil legislation and judicial practice.

The protection of ownership rights and the provision of guarantees to owners is an essential function of the judiciary in the Russian Federation. The principles of universality and absence of discrimination prevail amongst the general principles of international law. They presume the inadmissibility of discrimination of the persons that own, use, and dispose of property based on race, nationality, ethnic origin, and color of skin, gender, political, social and religious adherence.

Laws adopted in regional entities of the Russian Federation stipulate foreign investors’ rights and the guarantees extended to them. With a view to mobilize higher amounts of foreign capital, regional entities establish preferences pertaining, among others, to taxation.

#### (ii) Risk Insurance

Insurance of political risks is a prerequisite of FDI. If one takes into account the specifics of such insurance it will become evident that only the insurance companies independent of the country where the investments have been made are capable of providing such type of insurance. Furthermore, such a company should not specialize exceptionally in the risks associated with the Russian market: its operations must include several countries.

Western companies operating in Russia often insure political risks related to the possibility of nationalization or expropriation of their property. The foregoing practice was introduced by major international corporations which accessed the Russian market in the beginning of the 1990s. They made a rule of insuring risks related to government policy changes then and have done so ever since.

The US insurer of investments to developing countries — Overseas Private Investment Corporation (OPIC) signs insurance agreements and provide guarantees only with respect to projects in the countries which have signed agreements to with the US government. The Agreement of 1992 between the United States of America and the Russian Federation is one of such agreements. The Ministry of Foreign Economic Relations and the OPIC signed the agreement on principles of their cooperation on 27 September 1994.

(iii) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

The Russian Rouble is a non-convertible currency.

The Russian Government maintains minimal currency controls. All payments and profits on foreign stock and capital investments are processed through standard commercial channels, without governmental interference or delay.

The *Foreign Exchange Law* of 2004 represents a major improvement for domestic and foreign investors. By endorsing progressive liberalization, non-discrimination and increased transparency, the new Law is consistent with the guiding principles of the *OECD Code of Liberalisation of Capital Movements*. **The last 2006 OECD Review welcomed the abolition of capital controls in advance of the schedule initially set out in the *Foreign Exchange Law*.** A number of restrictive and cost ineffective capital control arrangements have been introduced in advance of the schedule of 1 January 2007. Nevertheless, the orderly removal of capital controls needs to be accompanied by supporting measures, including appropriate tax controls, anti-money laundering and non-discriminatory prudential safeguards. This should be accompanied by building the necessary institutional structures and capabilities to ensure an adequate statistical and reporting system for all categories of financial market activities of concern for authorities. Continuing international monitoring is warranted given that the 2004 Law does not preclude the reinstatement of capital controls, in particular in the case of balance of payments difficulties.

Exchange rates are determined on the basis of demand and supply conditions in the exchange market, but the Central Bank of Russia retains discretionary power to intervene in the foreign exchange market. Authorised foreign exchange dealers may deal among themselves, with their customers, and with overseas counterparties at mutually negotiated rates in any foreign currency.

Regarding the **reduced attractiveness of the Russian market for foreign investors**, the very intention with the reserve requirements was exactly that to make operations in the Russian securities markets less attractive to foreign operators. This applies especially to efforts directed towards smoothing out in time very large short-term cross-border capital flows, which can have significantly more negative impact on the market and the economy than a medium-term reduction in the attractiveness of Russian financial market instruments.

Although Russia has abolished the *Law on Special Accounts* and provisions concerning reserve requirements, Russia still maintains requirements regarding prior registration and the use of certain special accounts.

Most fundamentally, the existing **mechanisms of the system of reporting currency operations** remain in place, being basically reliant upon balance-of-payments statistics as well as data from the customs offices complemented by reporting from the banks and other currency control agents.

(iv) Expropriation and Compensation

Private property can be expropriated for public purposes in accordance with established principles of international law. Due process rights are established and respected, and prompt, adequate and effective compensation (under just terms) is paid under the Constitution.

Furthermore, Article 19 of the *Foreign Exchange Control Law* of 2004 setting out the repatriation requirement and Article 9 setting out procedures for currency operations between residents as well

as procedures for residents to operate deposit accounts and to open accounts with banks located abroad (Article 12) will remain.

(v) IPR

*Copyright Law*

Russian legislation on copyright and related rights is based on two laws: the law of the Russian Federation “Concerning Copyright and Related Rights” and the law of the Russian Federation “Concerning the Legal Protection of Computer Programs and Databases.”

Copyright law protects works of literature (including computer programs), dramatic and musical-dramatic works, stage works, choreographic works and pantomime, musical works, audiovisual works (cinematic, television, and video films, slide films, filmstrips, and other film and television productions), paintings, sculptures, graphics, design, graphic stories, comics, and other works of graphic art, works of decorative, applied, and stage art, works of architecture, urban design and landscaping, photographic works and works obtained by means similar to photography, geographic, geological, and other maps, charts, sketches, and models relating to geography, topography, and other sciences, and other works.

Copyright law does not protect documents (laws, judicial decisions, and other texts of a legislative, administrative and judicial nature) and their official translations, state symbols, and signs (flags, emblems, medals, banknotes, etc.), folk works, reports of events, and facts of an informational nature.

Works may be quoted without the author’s consent and without payment of royalties, provided that the name of the author and the source are cited.

Works of architecture, photography, and visual art that are permanently located in a place open for free visiting may be reproduced without the author’s consent and without payment of royalties. Musical works may be publicly performed during official and religious ceremonies as well as funerals. Works may be used for judicial proceedings without the author’s consent and without payment of royalties.

Patent Law. Russian patent law (industrial property in the narrow sense of the word) protects inventions, useful models, and industrial prototypes. Important conditions of the patentability of industrial property are its novelty and industrial applicability. Patent law establishes the absolute (international) novelty of industrial property.

If a violation of patent rights is proved, the patent holder is entitled to take civil-law sanctions against the violator as provided by law or, which is the same thing, to utilize one or another means of protecting his or her violated rights. The specific means of protection is selected by the person who is wronged, but as a rule is determined by the type of violation and its consequences.

Russian law protects patents, trademarks, designs, copyrights and integrated circuit layout rights. Russia is a member of the WIPO, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the Geneva Phonogram Convention, the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, and the Patent Cooperation Treaty.

According to the Status of Russia's Federal Service on Intellectual Property, Patents and Trademarks (Rospatent of Russia), approved by the Russian Federation Governmental Resolution No. 299 of 16 June 2004, Rospatent of Russia attends to representations from citizens, provides well-timed and complete examination of the oral and written appeals of the citizens and legal persons, makes decisions on them and sends the answers to the applicants, publishes the items of information on the registered objects of intellectual property, extension of operating, termination and resumption of operating on rights protection in the case of the objects of intellectual property.

During bilateral negotiations with the WTO Working Parties' Group on the Russia's accede to the WTO the Parties have agreed on a binding blueprint for actions that Russia will take to address piracy and counterfeiting and improve protection and enforcement of IPRs, both stated priorities of the Russian Government, starting immediately. This agreement sets the stage for further progress on IPRs issues in Russia through the next phase of multilateral negotiations.

The agreement requires action on critical IPRs issues, including:

- fighting optical disc piracy;
- fighting Internet piracy;
- protecting pharmaceutical test data;
- deterring piracy and counterfeiting through criminal penalties;
- strengthening border enforcement against piracy and counterfeiting;
- bringing Russia's laws into compliance with the WTO TRIPS Agreement and other international IPRs standards; and
- continuing training and bilateral cooperation on IPRs protection.

#### *Fighting Optical Disc Piracy*

- The Parties agreed on the objective of permanently closing down production of optical media containing pirated and counterfeit material.
- Russia will:
  - terminate leases, and refuse new leases, for optical media factories on restricted military industrial sites;
  - inspect licensed plants regularly, day and night;
  - find and shut down unlicensed plants;

- find and inspect warehouses for pirated and counterfeit goods; and take criminal actions where there is evidence of commercial scale piracy.
- Russia will also strengthen regulation of optical media plants, including working to enact legislation by 1 June 2007, to deny licenses to past offenders.

#### *Fighting Internet Piracy*

- The Parties agreed on the objective of shutting down websites that permit illegal distribution of music and other copyright works.
- Russia will:
  - take enforcement actions against the operation of Russia-based websites; and
  - investigate and prosecute companies that illegally distribute copyright works on the Internet.
- Russia will work to enact legislation by 1 June 2007, to stop collecting societies from acting without right holder consent,
- Russia will also work to enact legislation implementing the 1996 WIPO Internet treaties.

#### *Protecting Pharmaceutical Test Data*

- Russia will work to enact legislation by 1 June 2007, to protect undisclosed information (such as test data) submitted to obtain marketing approval of pharmaceuticals.
- Russia has proposed legislation that would provide a period of protection of at least six years.
- During this period:
  - no one else may rely on such data in support of an application for product approval without the right holder's consent;
  - notice of subsequent applications for registration will be provided;
  - subsequent applications will not be granted unless the applicant submits its own data or has the right holder's consent;
  - products registered without such data will be removed from the market.

*Deterring Piracy and Counterfeiting through Criminal Penalties*

- The Russian Government will propose to Russia's Supreme Court that it clarify practices relating to imposition of penalties for IPRs crimes, including:
  - imposition of penalties that take into account the high degree of public harm from IPR infringement; and
  - the objective of preventing future crimes.

*Strengthening Border Enforcement against Piracy and Counterfeiting*

- The Parties agreed on the objective of strengthening enforcement against piracy and counterfeiting at Russia's border.
- Russia will significantly increase export inspections to find shipments of counterfeit or pirated goods and refer cases to appropriate authorities for investigation and prosecution.
- Russia will work to enact legislation by 1 June 2007 strengthening Customs officials' authority to take actions on their own initiative, and will encourage Customs officials to use such authority.

*Bringing Russia's Laws into Compliance with International Standards*

- The Parties agreed on the objective of fully implementing the WTO TRIPS Agreement and other IPRs-related international agreements upon accession.
- Russia is examining changes to its laws required to implement and comply with these agreements. These changes will include:
  - amendments to provide protection to trademarks and geographical indications that comply with WTO TRIPS Agreement obligations on rights of trademark owners;
  - broader authority to order seizure and destruction of machinery and materials used in the production of IPRs infringing goods;
  - appropriate remedies for trademark counterfeiting; and
  - other measures to provide for more effective enforcement.
- Russia will ensure that any changes in its laws, including those made in the context of Part IV of its Civil Code, made prior to its accession to the WTO do not reduce consistency with key international IPRs standards.

*IPR Enforcement in Russia*

- Russia has reported increasing numbers of enforcement actions, including:
  - more than 4,500 criminal cases for infringement of copyright or related rights in the first nine months of 2006, compared to 2,924 in all of 2005;
  - more than 1,600 convictions for copyright offenses in first the nine months of 2006, compared to 1,450 convictions in all of 2005; and
  - more than 500 criminal cases for trademark infringement in the first six months of 2006, compared to 545 in all of 2005.
- Russia has provided information showing that Russian authorities continue their efforts on IPRs enforcement, with raids at comparable levels to last year.

Further information on Russia’s IPR laws may be found on the Rospatent web-site <http://www.rupto.ru> and <http://www.fips.ru>

(vi) Dispute Settlement

It is standard practice for Russia to include a clause in its BITs enabling disputes between a Contracting Party to the agreement and a national of the other party for conciliation and arbitration.

**Judicial bodies** in the Russian Federation are the Constitutional Court, the Supreme Court, the Supreme Arbitration Court, and courts of constituent entities of the Russian Federation. They vary in structure and relation to the federal structure and administrative and territorial division of the Russian Federation.

**The Constitutional Court** of the Russian Federation is a judicial body guided by the Constitution as well as by the federal constitutional law “Concerning the Constitutional Court of the Russian Federation.” It is made up of 19 judges and has no system of courts under its jurisdiction.

At the request of the President of the Russian Federation, the Federal Council, the State Duma, the Government, the Supreme Court, Supreme Arbitration Court, and the Constitutional Court decides issues as to whether one or another legislative act or specific decision is in agreement with the Constitution of the Russian Federation.

**The Supreme Court** of the Russian Federation is the highest judicial body to hear criminal, administrative, and civil cases in general jurisdiction. Its functions include supervising judicial activity and clarifying issues of general judicial practice. The Supreme Court stands at the head of a system of courts of general jurisdiction, including the supreme courts of the republics, territories, autonomous districts, provinces, federal cities, and districts.

**The Supreme Arbitration Court** of the Russian Federation is the highest body to consider economic disputes and other cases heard by arbitration courts. The system of arbitration courts includes cassation and appellate courts as well as arbitration courts of constituent entities of the Russian Federation.

Judicial bodies administer justice by means of administrative, civil, criminal, and constitutional proceedings. Together they make up the judicial system. All courts are independent and subject only to the law.

Court rulings that have entered into legal force are mandatory for all state bodies, local government bodies, public associations, individuals and legal entities without exception and must be rigorously executed throughout the country. The degree to which the rulings of courts of foreign states and international courts and arbitration are binding in Russia is determined by the international agreements of the Russian Federation. Proceedings in all Russian courts are open. Hearings may be closed only in cases stipulated by law. In Russian courts, judicial proceedings are held and records kept in Russian, but the state language of the republic in which a court is located may also be used. Persons who have not mastered the language of court proceedings are entitled to speak and give explanations in any language of communication that they choose as well as to use the services of a translator.

The courts ensure the resolution of disputes arising out of the activities of foreign investors in Russia. Here an important role is played by arbitration courts, including international. In concluding an agreement on investments, credits or trade cooperation, the parties stipulate the arbitration court that will consider disputes arising between them.

The Supreme Arbitration Court is the highest judicial instance for federal district arbitration courts and arbitration courts of constituent entities of the Russian Federation. This means that it can review any of their judicial acts. Its own judicial acts may not be reviewed by any court or other body.

Only the Supreme Arbitration Court itself may review, on the basis of newly discovered facts, judicial acts that it has adopted and that have entered into legal force.

The procedure for judicial proceedings and jurisdiction of cases is determined for arbitration courts by federal laws – above all, by the Arbitration Procedure Code. According to the code, an arbitration court considers cases involving foreign companies, companies with foreign investment, international organizations, foreign citizens, and stateless persons who engage in business activity.

An arbitration court decision that has entered into legal force may be appealed after the case is heard by an appellate or cassation court.

A decision may be modified or reversed on grounds that it is illegal or unjustified.

**Federal District Arbitration Courts** hear cases as a cassation court and on the basis of newly discovered facts. It is the highest judicial instance for arbitration courts of constituent entities of the Russian Federation that have jurisdiction in the given judicial district. This means that litigants are entitled to appeal to the federal district arbitration court against judicial acts of arbitration courts of constituent entities of the Russian Federation. The federal district arbitration court also reviews its own judicial acts on the basis of newly discovered facts.

It should be noted that federal arbitration courts of districts are not linked to the existing administrative and territorial division, thus eliminating the influence of local authorities on dispute resolution. In this sense, they guarantee equal protection of the rights of litigants located in various regions of Russia and realize the principle of a unified economic and legal territory.

**Arbitration appeals courts** have been created in Russia – courts which, in the appeals instance, review the legality and justification of judicial acts adopted in the first instance by arbitration courts of constituent entities of the Russian Federation.

**The Arbitration Court of a Constituent Entity of the Russian Federation** hears cases as a court of first instance as well as on the basis of newly discovered facts. It should be noted that one arbitration court may have jurisdiction in several regions, and several such courts may have jurisdiction in one Russian region.

The judicial acts of arbitration courts are executed after they enter into legal force, with the exception of cases of immediate execution of justice, in accordance with the procedure established by the Arbitration Procedure Code and other federal laws regulating the execution procedure.

A judicial act is enforced on the basis of a writ of execution issued by the arbitration court, unless otherwise stipulated by the Arbitration Procedure Code.

The formation in Russia of an effective civil-law society creates the conditions necessary for comprehensive legal protection of the rights of all subjects of legal relations, and the entire complex of international-law and domestic measures affecting Russia's foreign economic activity is designed to enhance the investment process in the country.

#### *Procedure for the Consideration of Cases Involving Foreign Entities*

Part 4 of Article 15 of the Constitution of the Russian Federation proclaims that the general principles and standards of international law as well as Russia's international agreements are an integral part of its legal system. Judicial bodies are guided by this principle in resolving international disputes, including in the economic sphere.

Arbitration courts adopt decisions on economic disputes and other cases relating to the business of foreign companies, international organizations, foreign nationals and stateless persons.

In addition, the courts may hear cases by agreement between the parties. This happens when at least one party is a foreign entity, and the parties have concluded an agreement stipulating that a Russian arbitration court is competent to resolve disputes relating to their conduct of business. In this case, the arbitration court has exclusive jurisdiction over such a dispute, provided that the agreement does not alter the exclusive jurisdiction of the foreign court. An agreement determining jurisdiction must be concluded in writing.

A foreign state acting as a power holder enjoys legal immunity from suits brought against it in Russian arbitration court as well as from participation in a case as a third party, the attachment of assets belonging to the foreign state and located in the Russian Federation, and court measures in pursuance of a suit and property interests. An execution may be levied on such assets in fulfillment of a judicial act of an arbitration court only with the consent of the competent bodies of the given state, unless otherwise stipulated by an international agreement of the Russian Federation or by federal law. The issue of the legal immunity of international organizations is determined by international agreement of the Russian Federation and by federal law.

Legal immunity may be waived as envisaged by the law of a foreign state or the rules of an international organization. In this case, the arbitration court hears the case in accordance with the procedure established by the current Arbitration Procedure Code.

Cases involving foreign entities are heard by an arbitration court in accordance with the rules of the Arbitration Procedure Code and the details stipulated thereby, unless otherwise stipulated by an international agreement of the Russian Federation. If foreign entities or their management bodies,

branches, representative offices, or representatives authorized to conduct business are located or reside in Russia, cases involving them are heard within the time limits established by the Code.

If they are located or reside outside Russia, the foreign entities are notified of the arbitration court's decision to hold judicial proceedings by an instruction sent to the department of justice or another competent body of the foreign state. In such cases, the arbitration court extends the period for considering a case by the time established by a legal assistance agreement for sending instructions to the department of justice or another competent body of a foreign state or, should the agreement lack such a time period, or in the absence of such an agreement, by not more than six months.

Russia has other special bodies to resolve economic disputes. These are the International Commercial Arbitration Court and the Maritime Arbitration Commission under the Russian Chamber of Commerce and Industry. The legal status of the International Commercial Arbitration Court is determined by the *Law Concerning International Commercial Arbitration* of 7 July 1993. This law is based on the standard law adopted in 1985 by the UN Commission on International Trade Law and approved by the UN General Assembly for possible use by states in their national legislation.

The International Commercial Arbitration Court is an independent, permanent arbitration court. It considers disputes arising out of contractual and other civil-law relations in connection with foreign trade and other types of international economic relations if at least one of the parties to a dispute has a commercial enterprise abroad, disputes between companies with foreign investment and international associations and organizations established in the Russian Federation, disputes between their shareholders, and their disputes with other Russian legal entities. It also considers disputes over which it has jurisdiction under international agreements of the Russian Federation, including agreements assigning exclusive competence to the corresponding arbitration centers in the respondent's country.

The Maritime Arbitration Commission is one of the oldest maritime arbitration bodies in the world, founded in 1930. Its status is currently governed by the statute on this commission appended to the *Law Concerning International Commercial Arbitration*. Russian law is recognized as meeting world standards in regulating arbitration as an out-of-court, private-law method of resolving disputes used by agreement between entrepreneurs of different countries.

Virtually any civil-law dispute in connection with merchant shipping may now be appealed to the Maritime Arbitration Commission. In addition to traditional disputes arising out of cargo shipping, vessel chartering, maritime insurance, rescue and fishing operations and collisions between vessels, proceedings may also involve disputes in connection with broker and agency agreements, the sale and repair of vessels, relations between the founders of joint ventures, offshore operations, and many other relations that may arise in merchant shipping in market conditions.

Disputes involving river shipping companies are also an important part of the Maritime Arbitration Commission's practice. Parties to disputes may be ship owners and insurance companies, export-import firms and other users of transportation services, ports, and repair companies, etc., both foreign and domestic.

## INVESTMENT AND DEVELOPMENT

### (i) Performance requirements

There are no performance requirements imposing limits on trade and investment or any TRIMS in Russia.

### (ii) Means of Entry into the Russian Market

Foreign investors may do business in the Russian Federation by opening or participating in the capital of representative offices, branches, limited liability companies, and closed and open joint stock companies.

After obtaining a permit, a foreign investor's company is registered with the appropriate state authorities. *The Law Concerning the State Registration of Legal Entities* of 1 July 2002. Under this law, legal entities are now registered with local tax authorities.

The procedure for the state registration of legal entities has been greatly simplified, permitting a unification of two executive functions: state registration of legal entities and registration with the tax authorities. A "one window" principle also facilitates cooperation between registering bodies and state authorities whose functions include registering legal entities.

To this end, the law requires that a registering body provide information to the state authorities specified by the Government of the Russian Federation within five working days after state registration.

A **representative office** is a subdivision of a foreign company in a different location that represents and defends the foreign company's interests. For a representative office to be recognized as such, the following conditions must be met. First, the foreign company's activities must be regular, of an entrepreneurial nature, and have a place where they are carried out. Second, a person representing the interests of a foreign company in the Russian Federation must act on behalf of this foreign company and be authorized to conclude contracts. The general procedure for accrediting representative offices in Russia is currently regulated by a decree of the State Standards Committee (now the Federal Agency for Technical Regulation and Metrology). According to this document, accreditation is a procedure resulting in the issuance of a certificate verifying that a representative office is competent to perform specific work. A legal feature of accreditation is that it may be either mandatory or voluntary. The purpose of mandatory accreditation is official state verification that an activity meets established requirements and complies with normative technical documentation. Certain types of activity require accreditation and are unlawful without it. To obtain accreditation, professional audit associations must satisfy certain requirements: they must have at least 1,000 certified auditors on staff and/or at least 100 audit organizations meeting the charter requirements of this professional association. Under Russian law, a representative office of a foreign credit institution is understood as an autonomous subdivision opened in Russia that has obtained a permit from the Bank of Russia. Such a representative office organizes its work in accordance with Russian law and instructions of the Central Bank of the Russian Federation. Twice annually it reports on its activities to the Bank of Russia.

A **branch** is an autonomous subdivision of a legal entity that is located in a different place and performs all or part of the legal entity's functions, including those of a representative office. Representative offices and branches are not, however, legal entities. They are allotted property and

act on the basis of statutes approved for them. Their directors are appointed by the legal entity and act on the basis of a power of attorney.

Even though **branches** and **representative offices** are considered autonomous subdivisions of a legal entity – its constituents – they cannot themselves be legal entities and do not have their own civil-law personality or capacity. As such, they do not participate in civil-law relations. The director of a branch or representative office acts as the legal entity’s representative. A branch is distinguished from a representative office by the volume and nature of its functions. If a foreign organization converts its branch or representative office into a legal entity, the latter ceases to be the subdivision of a legal entity. Accreditation of a branch is in practice similar to the accreditation of a representative office.

A foreign legal entity with a branch or representative office may bear direct property liability for obligations in connection with commercial activities.

Russia does not use policies targeting foreign investment in the area of the environment or sustainable development, or affecting indigenous persons, to promote broad economic development objectives.

## INVESTMENT PROMOTION AND INCENTIVES

### (i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

Russia has not set up any Federal Investment Promotion Agency with some exclusion with respect to the Special Economic Zones (SEZs) and some regional initiatives (see below).

#### *Responsibilities of federal and regional authorities in the Russian Federation*

Russia comprises 88 regions (“Subjects of the Federation”) that include 21 ethnic republics, 48 provinces, 7 territories, 9 autonomous districts, one autonomous province and the two federal cities of Moscow and St. Petersburg. The delineation of jurisdictions and powers between the Federation and its Subjects is stipulated in the Articles 71, 72 and 73 of the Constitution of the Russian Federation, which define that:

- a. The sphere of exclusive competence of the Federation includes the legal foundation of the single market, regulations of financial, currency and customs matters, foreign policy and international treaties and foreign economic relations (Article 71).
- b. Joint jurisdiction of the Federation and its Subjects covers the issues of the ownership and use of land, mineral resources, water, and delimitation of state property, environmental protection, public health and taxation (Article 72). The joint jurisdiction also concerns “co-ordination of international and foreign economic relations of components of the Russian Federation and the fulfillment of the Russian Federation’s international treaties”.

Following the entry into force of the *Law on the Principles and Order of Division between the Administrative Bodies of the Federal Centre and Subjects of the Federation* of 24 June 1999, new regional legislative acts must be discussed and passed to the Federation Council for final approval. President Putin used his right set up by Article 85.2 of the Constitution to suspend regional legislation found to be in contradiction with federal legislation. In April 2001, it was announced that four-fifths of regional legislation had been brought into compliance with federal norms, including the legislation concerning transport, migration, trade and licensing.

(ii) Fiscal, Financial, Tax or Other Incentives

In Russia, no tax incentives have traditionally been available at the federal level (though the new *Law on Special Economic Zones* seems to change this — see below).

Firms resident in SEZs, whether national or foreign-controlled, are eligible for various tax incentives, in particular exemptions on regional taxes (property and land taxes), but also and, in contrast to previous practice, the Russia's government will offer reductions on the unified social tax to firms in technology-innovative zones from the normal 26% rate to 14%. Industrial firms will be able to accelerate depreciation of their fixed capital investment, transfer their losses to following years and include their R&D spending in current expenditures. Registration procedures for SEZs-based firms are to be simplified, in particular thanks to the "one-window" arrangement and the number of tax inspections is to be reduced. SEZs-based firms will benefit from a number of customs privileges, in particular exemption of customs duties and VAT on their imports and exemptions of excise duties on Russian goods. Exports of goods from SEZ will not be subject to payments of customs duties, VAT and excise taxes.

Conversely, tax incentives are the main instrument used by the regions to attract foreign investors. These tax exemptions concern the parts of federal taxes, which are under the control of the regions and/or the taxes collected and retained by the regions. Concretely, the regions frequently offer foreign investors a reduction in the regional element of the federal income (profit) tax rate from the normal rate of 17.5% to 13.5%. They have discretion to grant exemptions on corporate property tax, transport and land taxes, which are under the exclusive control of regional and local budgets (see Table below).

Regional tax incentives are granted to so-called "priority" or "high priority" investment projects. The definition and the selection of these projects vary greatly amongst the regions. The most frequently used criterion is the amount of foreign investment. For example, in the Republic of Bashkortostan, foreign participation in a priority project must be at least RUB350 million (near US\$15 million). The status of a (high) priority project may be linked to a specific type of activity, for example the extraction and processing of mineral resources, or to high technology content. The current system thus gives considerable discretion to regional and local authorities to select priority projects and adjust the tax rates accordingly. Based on negotiations, the process usually favors incumbent firms or enterprises with strong negotiating power at the expense of outsiders and smaller enterprises.

When considering the expected tax burden, investors take into account not only statutory tax levels and provisions, but also tax compliance costs, including complexity, transparency and predictability of tax procedures.

Aware of the highly dissuasive effect of several tax-related cases on new foreign investment, Russia seeks to curb and better control the prerogatives of tax authorities. In particular, the new law currently examined by the Duma intends to clearly specify the rights and obligations of both of tax payers and tax authorities, including for example the regulations in the case of prolongation of tax control and regarding the list of documents to be submitted by firms during such procedures.

Some interesting initiatives aimed at reducing other administrative barriers have been undertaken in several regions. For instance in the region of Archangelsk, a specific commission was established with the objective of making proposals for removing administrative barriers that impede business in the region, especially with respect to licensing, certification and registration procedures.

The Republic of Karelia in the North-West Region in 2004 created a working group headed by the Prime Minister of the republic to review regularly the implementation of ongoing projects and assist investors in resolving problems for which regional executive authorities may be responsible.

The recently decided establishment of a register of regional and municipal legislation will be an important step in improving the access to information on regional laws and regulations. Maintained in parallel with the already existing Federal Register containing federal legal acts, the new Register will cover regional and municipal legislative acts concerning in particular local taxes, land registration and communal services.

Table 3.2. **Main taxes and possible tax reductions in the Russian Federation**

Taxes/Tax base (TB)	Tax rate	Federal budget	Regional budget	Local budget	Comments
<i>Income (profit) tax</i> TB: firms' financial results	24% (can be lowered to 20%)	6.5%	17.5% (can be lowered to 13.5%)		Frequent reduction on the regional tax component, e.g. for high priority projects (Republic of Bashkortostan, Astrakhan region); for specific sectors (agriculture in Kaluga region). Full exemption for residents of Kaliningrad SEZ.
<i>Value-added tax</i> TB: sales of goods and services	18% 10% for foodstuffs and children products 0% on exports	All			
<i>Unified social tax</i> TB: payments to employee	26%	All			The rate reduced to 14% in technical and innovation SEZ.
<i>Individual income tax</i> TB: aggregate personal income	13% for residents 30% for non-residents	All			
<i>Corporate property tax</i> TB: fixed assets	0.9-2.2%		All		Possible reduction up to 50-90% for priority investment projects (e.g. Astrakhan) exemption for 5 years (e.g. Republic of Bashkortostan)
<i>Transport tax</i> TB: motor capacity	Depending on type and capacity		All		Possible reduction up to 50-90% for priority projects
<i>Land tax</i> TB: land plots	0.3%: agricultural land, housing, municipal infrastructure 1.5%: other land			All	Tax reduction possible for priority projects. Exemption for SEZ residents in the first 5 years of their operations.
<i>Individual property tax</i> TB: real estate of natural persons		0.1-1% according to value of property		All	

In addition to specific incentives and attempts at reducing administrative barriers, the Russian regions devote considerable financial and human capacities to investment promotion activities. Several regional examples of such activities<sup>41</sup> indicate, however, that responsibilities of different governmental units and special agencies responsible for investment promotion are often unclear and their multiplication casts doubts on their cost efficiency. In most cases, the main role of regional investment promotion agency is “marketing the region”, e.g. organizing travel abroad, press invitations, international seminars and publishing brochures, which are usually costly and not necessarily very efficient.

Foreign investors generally welcomed the prospects of private investment participation in infrastructure development and the absence of formal discrimination between domestic and foreign investors.

### (iii) International Tax Conventions to Which Russia is a Party

Russia’s intensive integration into the world economy and the international relocation of entities, capital, goods and services has afforded greater opportunities for tax evasion and for double taxation of the same entity. Thus, one of the key international tasks of the Russian tax service is to establish, maintain, and develop international relations and cooperation with the tax authorities of other countries for the purpose of obtaining and exchanging tax information. In organizing and maintaining an international exchange of tax information within the framework of bilateral inter-state and inter-governmental double-tax agreements of the Russian Federation, the Tax Service of Russia is guided by the provisions of these agreements (treaties, conventions), which have been approved by federal laws and so prevail over Russian legislation.

Current legislative and regulatory acts allow the Russian tax service to exchange information with the tax departments of more than 60 countries, including all CIS countries. Among the APEC economies only the financial and tax department of the USA is the most active in exchanging information with Russia.

In Russia, the **tax burden on business** continues to decrease. It is less than the average tax burden in countries. In the next two years, the Russian Government intends to reduce the tax burden by 1% of GDP annually. The reduction will primarily affect entrepreneurs, because it is largely the business community and not the public that pays taxes in Russia. In 2005, for instance, taxes constituted 33% of GDP, slightly less than 30% of which was paid by the business community and only a little over 3% by the public.

Many taxes have been abolished in Russia recently. Among those remaining, the following are the most important for budgets at all levels:

- Federal taxes:
  - VAT

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<sup>41</sup> For example, in the Republic of Bashkortostan, the following agencies are involved in investment promotion activities: *i*) Agency of the Republic of Bashkortostan for Foreign Investment; *ii*) the Fund for Business Development and Support of Bashkortostan (with 29 offices in towns and districts in the Republic) and *iii*) several different departments in the government of the Republic of Bashkortostan, i.e. Council for Business Support in the Cabinet of Ministers; Department of Investment Cooperation in the Ministry of Foreign Economic Relations and Trade of Bashkortostan; Department of Business Development and Department of Investment Policy (both in the Ministry of Economic Development and Industries of Bashkortostan).

- Excise duties
- Personal income tax
- Unified Social Tax (UST)
- Water tax, levies for the use of animals and marine life
- Corporate profits tax
- Mineral extraction tax
- Regional taxes:
  - Corporate assets tax
  - Transportation tax
  - Gaming tax
- Local taxes:
  - Personal property tax
  - Land tax

For further information contact the:

Department of Investment Policy  
 Ministry of Economic Development and Trade, Russia  
 Telephone: (+7-495) 248-8402  
 Facsimile: (+7-495) 248-8539  
 Email: [dip@economy.gov.ru](mailto:dip@economy.gov.ru)  
<http://www.economy.gov.ru/english/>

(iv) Free Trade Zones or 'Special Investment Areas'

Formation of SEZs is, in fact, creation of a punctual instrument for stimulation of prospective “growing points” of Russian economy. The creation of special economic zones in Russia should insure the increased inflow of investments both in the long run and in the near future, specifically in high-tech industries and tourism.

The structure of SEZs is built on state-business partnership: government creates organizational structures, forms a system of preferences and provides control; business must have mechanisms of absolutely transparent procedures and take advantage of the unique opportunities offered by the SEZs.

On 22 July 2005, the “*Law on Special Economic Zones in the Russian Federation*” was signed. The oversight of the SEZ program is carried out by a newly created Federal Agency for Managing

Special Economic Zones under the supervision of the Ministry for Economic Development and Trade.

Normative and legal regulation of SEZs includes:

- Law on Special Economic Zones in the Russian Federation (Law No. 116-FZ of 22 July 2005);
- President's Decree on Federal Agency for Management of Special Economic Zones (Decree of the President of the Russian Federation No. 855 of 22 July 2005);
- Order on Federal Agency for Management of Special Economic Zones (Order of the Government of the Russian Federation No. 530 of 19 August 2005); and
- Agreements between the Government of the Russian Federation and subjects (regions) of the Russian Federation on creation of SEZs on their territory.

The oversight of the SEZs program is carried out by a newly created Federal Agency for Managing SEZ under the supervision of the Ministry of Economic Development and Trade. A special committee, in which different ministries are represented, is responsible for estimating and selecting the requests for creation of SEZ. Each SEZ will be managed by a supervisory board, which will also include representatives of SEZ-based firms. Financing of transport and other infrastructures will be partly financed by the federal budget (between 50 to 75% according to different zones) and the remaining cost by regional budgets. The Federal SEZ Agency also negotiates with Russian banks the possibility of guarantees and privileged credit conditions for SEZ-based firms.

According to the Law, three categories of SEZ (industrial production SEZs; technical and innovation SEZs; and tourism and recreational SEZs) can be set up on land owned by federal or local governments.

The SEZ resident firms are eligible for various tax incentives, in particular exemptions on regional taxes (property and land taxes), but also and, in contrast to the previous practices, the federal government will offer reductions on the federal unified social tax to firms in technical and innovation SEZ from the normal 26% rate to 14%. Industrial firms will be able to accelerate depreciation of their fixed capital investment, transfer their losses to following years and include their R&D spending to current expenditures. Registration procedures for SEZ resident firms are to be simplified and the number of tax inspections reduced.

In November 2005, as results of the first round of tenders, 6 regions were selected among 70 candidates: four sites for technical and innovation zones (Zelenograd, Dubna, St. Petersburg and Tomsk) and two sites for industrial productions SEZ (Lipetsk and Yelabuga). They will benefit from fiscal and customs privileges for 20 years and after this period the regime will be abolished but the property will remain in hands of investors.

In December 2005, six SEZs were created in Russia. Among them two industrial-and-production SEZ (IPZs) were created in Lipetskaya province (IPZ “Kalinka”, 400 kilometers to the south of Moscow — household electronics production mainly); and in Yelabuga city, the Republic of Tatarstan (IPZ “Alabuga” — manufacture of cars and there components, highly technological production of petrochemistry, etc.).

Four technological-and-innovative SEZ (TIZ) were created in Dubna city (TIZ in the Moscow province — development of information and nuclear-physical technologies); Zelenograd town (TIZ near Moscow — development of micro and nano-electronic products); in St.-Petersburg city (TIZ in 2 locations — development of hi-tech production: computer software, precise and analytical devices, etc.); in Tomsk city, Siberia (TIZ — development of new materials: industrial and medical biotechnologies, alternative energy sources, nano-materials, etc).

The amendments in the Russia’s law on SEZs came into force in July 2006 (see Law No. 76-FZ as of 3 June 2006). They stipulate an opportunity and procedure to set up a new type of the Russia’s SEZs — tourist-and-recreational zones (TRZs) for making business in the sphere of tourism, health and cultural recreations. Its will be set up in 7 regions (subjects) of the Russian Federation; particularly, near Baikal Lake (Irkutskaya province and Republic of Buryatiya, Siberia) and in Altai (all of them in Siberia), Krasnodarsky and Stavropolsky territories (in Russia’s South) and Kalinigradskaya province (in the East of Russia).

For further information see the Federal Agency for Management of Special Economic Zones <http://www.rosoez.ru/>

#### (v) Concession Agreements

The “*Law on Concession Agreements*” (Law No. 115-FZ of 21 July 2005) is the first attempt in Russia to develop a PPP scheme and as such it represents an important step in clarifying the government’s long-term strategy on the level and modalities of its economic interventions in different sectors. The law will serve as a basis for the development of PPPs.

The law aims to reduce the role of government as direct investor and provider of infrastructures and establish it as an enabler and partner in investment projects. The law stipulates the conditions for the private sector’s involvement in state-owned infrastructures that the government does not intend to privatise, in particular highways, pipelines, power plants and grids, airports, railways as well as cultural and medical undertakings.

In accordance with a concession agreement, the state or a municipal entity (the conceder) provides to the other party (the concessionary) state or municipal property for the use on a time and chargeable basis, at such concessionary’s risk and under the condition that the concessionary has made the investments as stipulated in the concession agreement; and grants the right to set up (build) a concessionary entity and the use (business use) thereof after it has been set up (built) during an established period and at the conditions as stipulated in the concession agreement with its subsequent return to the public or municipal ownership, as well as the right to perform work or provide services. The law states precisely that access to the infrastructure installations which are the subject matter of a concession agreement may be granted to foreign citizens.

In general the concession agreement is nothing but a public-private partnership in which the private sector and the government accept all the risks associated with a project. E.g. the share of expenses

under a project incurred by the government may be stated as the terms and conditions of a tender for the right to conclude a concession agreement. Pursuant to the government concept, the Investment Fund will be used, as the first priority, to develop the infrastructure, national innovations, and carry out large-scale restructuring. That is to say, some of its funds may be used for the co-financing of concession agreements. Besides the Investment Fund, the Federal Target Programs will be an additional incentive for the investors seeking to conclude concession agreements with the government. A certain share of the foregoing funds should be used for the construction and modernization of major transport facilities, as well as the implementation of technological programs.

It regulates the relations arising from the preparation, conclusion, performance, and termination of concession agreements, and it establishes the rights and legitimate interests of the parties thereto. Its scope includes the assets which may not be privatized. Concession presumes that the government retains the ownership rights on an asset and grants its use to a private entity for a certain period. Parties to a concession agreement, i.e. federal, regional, and municipal government entities, as well as concessionaries, are entitled to set the foregoing period. Concessions are to be granted for a maximum of 99 years.

The law defines conditions and procedures for tenders on the basis of whom firms will be selected to manage and invest in such projects.

The law stipulates the list of concessionary entities to include highways and engineering facilities of the transport infrastructure; railway and pipeline transport installations; sea and river ports; seaships and riverships, sea- and river-going ships (combined), icebreakers, surveying ships, research ships, ferries, docks; airports; water-development works; facilities for generation, transmission and distribution of electric and heat energy; utilities systems and installations; underground railway and other public transport; facilities used for medical treatment and recreation, provision of medical services, tourism; public health facilities, educational, cultural, and sporting facilities, as well as other social entities and entities providing services to households. Subsoil assets may not be the subject matter of a concession agreement.

The concessionary and the state may conclude a concession agreement only with respect to public assets. If an asset is held in joint ownership, the government must register its exceptional ownership right on such assets before it may grant concession on its use.

As the adopted law has an evident slant towards the infrastructure, one can assume that it will have an impact on the mobilization of private investment, particularly, for the construction of real estate or the restructuring of publicly owned real estate entities.

The progressive nature of the *Law on Concession Agreements* is manifested also by the fact that it sets up conditions for the participation of small and medium-size companies, as well as small investors in large-scale projects.

In fact, there are many minor projects in the utilities sector which are a constant headache to municipal and village authorities. If the matter at stake is a local boiler or water intake, one may seek to become a concessionary even with the capital of US\$10,000. Hence the obstacles preventing private companies and private investors to access this sphere have been removed.

It was assumed that the *Law on Concession Agreements* would be directly applicable. However, it has become evident even now that the preservation of other effective legislative provisions regulating the investment process, in individual branches included, is a significant obstacle for its implementation. It has turned out that a whole range of laws and legal acts on railways, power

generation, and, particularly, the laws on federal and municipal property will contradict the law on concession agreements.

Problems may arise with the placement of public assets in concession, as well as the conflict resolution practice of arbitration courts with respect to concession agreements. Moreover, as mentioned above, the law formed a basis for development of the legislation on public-private partnership. For such reasons one should expect amendments of the effective legislation and the adoption of other federal laws, e.g. the *Law on Seaports and Toll Highways*, etc.

One should also take into account that regional laws may be adopted in certain regions seeking to conclude concession agreements. Thus, a regional law stipulating 10 types of concession contracts was drafted in Saint Petersburg. Under one of them, the concessionary is to build a real estate entity at its expense in order to receive its tenure for up to 50 years. Another scenario presumes that a public asset can be placed in trust for the same period. One of the contracts establishes the right to a long-term lease of a real estate entity which has been set up with its subsequent buy-out. Still another scenario provides for the reimbursement of construction costs to a company from the budget after an entity has been put into use.

Both laws on SEZs (see below) and Concessions illustrate a growing importance given by the authorities to regional development and indicate some reorientation in regional policies. Russia's Regional Development Ministry, created in September 2005, has developed a new "Strategy for the Socio-Economic Development of Regions of the Russian Federation".

In proposing to allocate central budgetary funds to the so-called "pilot" regions, the program seems to promote a differentiated or cluster approach to regional development.

In more general terms, the new strategy appears to give a greater role to decentralised initiatives by expanding regional responsibilities and encouraging more flexibility, including in labour markets.

#### (vi) Investment Funds

The 2006 budget had one more recipient of budget funds — *the Investment Fund*. Pursuant to the budget prepared by the Government of the Russian Federation, the Investment Fund was set at RUB69.7 billion (RUB110.6 billion in 2007 and RUB104.3 billion in 2008). The amount may not seem particularly high in comparison with other government investments allocated for the federal target programs (approximately, RUB400 billion).

The Government's investment should assist private capital which does not want to invest in long-term projects to overcome the fear of economic disruptions and political unpredictability. The focus is made on public-private partnerships; the Investment Fund will be used to finance projects where the share of mobilized private capital will be no less than 25% of the total project cost. Naturally, there may be projects where private companies will seek to invest half of the project cost or even more. However, the matter at hand is the branches in which the private sector has been reluctant to invest in so far. The Investment Fund will be used for development of the following infrastructures: construction of utilities, roads, airports, sea and river ports, etc. Realization of such projects jointly with the private sector is such a high priority for the government that it will be prepared to allocate the required funds. If private investors mobilize loans for implementation of such projects, the government will guarantee their obligations to credit organizations. The Regulations on the Investment Fund read: "Government guarantees are extended, amongst others, to borrowers in favor of credit organizations, credit organizations with foreign investment included."

The Government mobilizes funds to pay for its shares in the projects from two sources: the budget windfall from high oil prices and the interest savings resulting from the ahead-of-schedule foreign debt repayment.

Regional entities of the Russian Federation and municipalities or private companies operating in Russia may initiate projects to be realized jointly with the government. Naturally, not all proposals will be good enough to receive budget financing. Firstly, there are restrictions with respect to the amount of funds that can be allocated and the deadline of project realization. These should be large-scale national projects worth no less than RUB5 billion. The period for the provision of public support is not to exceed five years.

Additional criteria for the selection of investment projects have been set: the availability of a prospective private investor that has confirmed its preparedness to take part in the project, the compliance of a project with the priorities of Russia's socioeconomic development and the industrial development strategy, as well as projects financial, budget, and economic efficiency.

In addition, initiators of such a project will have to substantiate the impossibility of its implementation without the government's support and provide favorable opinion of the branch ministry and the investment advisor. Advisors will have to be chosen from among the reputed firms working over large-scale projects.

The Commission included all cabinet ministers, as well as representatives of the State Duma, the Federation Council, and Government staff and headed by Russian Federation Minister of Economic Development and Trade, selects projects which will be financed from the Investment Fund.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Amendments to *Law on Exchange Control and Currency Exchange Regulation* (Law No. 173-FZ of 26 June 2006) changed the Central Bank of Russia's requirements for currency management between residents and non-residents including reserving sums of currency for foreign transactions, and abolished regulation by the Government of currency capital transactions.

Since 1 July 2006, there are no restrictions in Russia on the repatriation of capital and earnings by foreign investors related to foreign investment.

There are no laws or regulations that restrict the export of technology. Russia has supportive legislation in this field.

### **(i) Labour, Movement of Businessmen**

Regulations relating to personnel management in Russia are subject to laws at the federal (state) level and do not discriminate between foreign and locally owned enterprises. Accordingly, a foreign firm employing Australian workers has exactly the same legal rights and obligations in relation to conditions of employment and related matters as any local firm in a similar situation.

## Terms and Conditions of Coming to Russia

The Russian visa is a document that permits a stay in Russia during a certain period of time. The visa, with two photographs of the holder attached, shows the dates on which he or she should enter and exit the country. A Russian visa is required for both entering and exiting the country.

If a foreign visitor loses his or her visa or stays in Russia longer than his/her visa permits, he/she may have serious problems when leaving.

For a tourist or business trip to Russia, everybody will need the following documents: a valid international passport (a passport must be valid for at least the next six months after the end date of the trip), tickets and documents permitting to exit the country or to travel further, and a Russian visa. The visitor is not required to have any special vaccinations made to travel to Russia.

There are several types of visas:

A **Russian Tourist Visa** is issued to foreign citizens traveling to Russia for non-business purposes for a period of time of up to 30 days (pursuant to the requirements of the Russian embassy or consulate). A tourist visa shall suit the foreign visitor most if he/she knows exactly where and how long they are going to stay. To obtain a tourist visa, the visitor should have a confirmation of accommodation for the whole term of stay in Russia.

When applying for a tourist visa, the foreign visitor must provide his/her complete passport data, including the dates on which he/she is planning to enter and exit Russia. A letter of invitation or a tourist voucher is issued by the receiving party on the day of application or on the following working day (depending on the urgency).

A **Russian Business Visa** is issued to foreign citizens traveling to Russia on business. Business visas are most convenient for foreign citizens who do not have a pre-determined traveling route, and are going to spend over 30 days in the territory of the Russian Federation or are going to visit it more than once. Russian business visas entitle to a maximum of two entries in Russia for a period of up to 90 days. There are also business visas which are valid for 3, 6, or 12 months, and grant the visitor an unlimited number of entries. A business visa can be obtained only on the basis of an official letter of invitation issued via the Ministry of Internal Affairs (MIA) or a regional branch thereof. Letters of invitation issued by enterprises alone shall be rejected. To obtain a business visa, one needs to submit official visa support documents to the local Russian embassy or consulate.

A **Russian Individual Visa** allows the foreign visitor to stay in Russia for up to 90 days. If he/she is traveling to Russia to visit his/her family or friends, he/she can apply for an individual visa. Visitor's family and friends whom he/she shall be visiting must apply to the local UVIR Office (the Department of Visas and Registrations of the Ministry of Interior Affairs) for such a visa, and send the original letter of invitation to the visitor. This takes more time than to obtain a Russian tourist visa.

A **Russian Transit Visa** is issued if the visitor is traveling to another country through the territory of the Russian Federation. To apply for a transit visa, he/she must submit the original of the entry visa to the country of his/her destination and a copy of a ticket. If he/she cannot provide the above documents, he/she should apply for a regular tourist visa, instead.

To obtain a visa the visitor needs to submit the following documents:

### **Russian Tourist Visa**

- Valid passport with at least two void pages left for a Russian visa (a foreign passport must be valid for at least the next six months after the proposed end date of trip to Russia)
- Two completed and signed copies of an application for a Russian visa
- One recent passport-size photograph
- For tourist and cruise groups: a letter from the travel/cruise company confirming your route, and an enclosed copy of a confirmation issued by the authorized Russian travel company
- For individual travelers: confirmation of a hotel reservation issued by the authorized travel company or directly by the hotel.

### **Russian Business Single-Entry, Double-Entry, and Multiple-Entry Visa**

- Valid passport with at least two void pages left for a Russian visa (a passport must be valid for at least the next six months after the proposed end date of trip to Russia)
- Two completed and signed copies of an application for a Russian visa
- One recent passport-size photograph
- If the visitor is planning to spend in Russia more than three months, or if he/she is applying for a multiple-entry visa, he or she must submit results of an HIV test
- Official letter of invitation issued by the authorized organization.

A letter of invitation to the Russian Federation must be issued via the MIA, its regional branch, or another authorized organization of the Russian Federation. The letter must have an official seal and address of the organization and the name and signature of the authorized person inviting the foreign citizen to Russia. The embassy may require the original invitation letter.

### **Russian Individual Visa**

- Valid passport with at least two void pages left for a Russian visa (the visitor's passport must be valid for at least the next six months after the proposed end date of his/her trip)
- Two completed and signed copies of an application for a Russian visa
- One recent passport-size photograph
- Notice from the local UVIR Office. The receiving party must receive and forward to the visitor the original notice.

The receiving party must have the following information: the visitor's full name, address, nationality, passport number and date of birth, the date of arrival/departure.

## Registration of Visas in Russia

All Russian visas must be registered within 72 hours upon the holder's arrival in Russia (except for days-off and statutory holidays).

- If the foreign visitor is staying at a hotel, he/she can register the visa there. The visitor must submit the visa and his/her passport. The hotel may charge a small registration fee.
- If the visitor is traveling on a tourist visa, and is not staying at a hotel, he/she must register his/her visa at a passports-and-visas section of a regional UVIR Office).
- If the foreign visitor has a business visa, and is not staying at a hotel, then he/she or his/her representatives must register his/her visa in the central UVIR Office. For visa registration, the receiving party shall need the following documents: the visitor's passport (original), migration card bearing an entry stamp, registration application (to be filled out in the Russian language), and a letter from the visa holder. While the visitor's visa is in the process of registration, he/she will be provided with an official document confirming that his/her documents are being registered with UVIR. The visitor's visa will not be registered without his/her original passport. The minimum registration time is five working days.

If the foreign visitor's final destination is not Moscow or St.–Petersburg, and if he/she is not staying at a hotel, he/she must register his/her visa at the local UVIR. To speed up the registration process, he/she will need an official letter issued by the receiving party to be submitted to UVIR. Multiple-entry business visas are only registered for the period of or under six months. Foreign citizens with multiple-entry visas valid for 12 months must leave Russia after the first six months of stay, then return to Russia and prolong the registration of the visa.

An absence of registration is a violation of Russian Federation applicable laws, which may entail serious problems, such as penalty or arrest, ban to leave the country, etc. To avoid possible complications, the foreign visitor should register his/her entry visa directly upon his/her arrival in Russia.

Further information is available at: [www.mid.ru](http://www.mid.ru); [www.mvdinform.ru](http://www.mvdinform.ru)

### (ii) Management of Foreign Employees

Economic reforms, the transition from a closed to an open society, and the unfavorable demographic situation in Russia have led to the expanding use of foreign labor in domestic enterprises. The state's immigration policy is being reconsidered and is currently aimed not so much at shaping the influx from abroad as holding it back and fighting illegal immigrants.

Foreign nationals have the same rights and an obligation in employment relations as Russian citizens, i.e. the law is based on the principle of a national regime in the area of employment relations. Foreigners are covered by provisions on job safety and special provisions concerning working conditions for women and minors, and they are equally entitled to social benefits and vacation.

At the same time, the law stipulates special rules for the conclusion of employment agreements by various groups of foreigners and places restrictions on their performance of certain kinds of work. The legal position depends on two factors: the purposes and bases of a foreigner's presence in the Russian Federation and whether Russia and the foreigner's country have concluded agreements regulating employment issues.

Based on these two factors, foreign physical persons may be divided into several groups. The first group comprises foreigners who are permanent residents of the Russian Federation. Such persons may be employed on the same basis as Russian citizens. The only exceptions are cases in which certain professions may be engaged in or certain positions held only by Russian citizens.

The second group includes refugees and persons granted political asylum. On the whole, they enjoy the same labor rights as permanent residents. An employer needs no special permit to hire them. Moreover, the relevant state bodies are required to assist refugees in finding work and, if necessary, in obtaining vocational training and retraining.

The third group comprises foreigners who temporarily reside in Russia for purposes of employment and whose hiring involves a general permission procedure. A common principle for all temporary residents in Russia is that they may work in the Russian Federation if this is compatible with the purposes of their stay. An employer must obtain a permit from the Federal Immigration Service of Russia to hire foreign workers, and a foreigner must obtain verification of the right to work in the Russian Federation. Employers bear liability under Russian law for hiring foreign workers without the appropriate permit. Foreign nationals entering the Russian Federation for purposes of employment may be employed in Russia only if they have verification of the right to work issued in his name on the basis of a permit obtained by his employer. An employer, having obtained a permit to hire foreign workers, must conclude employment agreements with the foreigners. The law operates on the principle that the work conditions, remuneration, and job safety as well as social benefits and insurance of foreign employees are determined by the laws of the Russian Federation, taking into account the provisions of international agreements between Russia and foreign countries.

The fourth group is made up of foreign nationals temporarily residing in the Russian Federation and hired for work in Russia under international agreements between the Russian Federation and foreign countries. These may be special agreements setting forth the principles and conditions for sending foreign nationals to work in the Russian Federation (such agreements, for example, have been concluded with Viet Nam and the PRC) and agreements envisaging the participation of foreign nationals in specific projects in Russia (construction of enterprises, development of natural resources, etc.). In this case, the general permission procedure for hiring foreigners in the Russian Federation does not apply. Such international agreements stipulate the procedure for hiring foreign workers and, as a rule, define the limits of applicability of both Russian law and the law of the partner country under a given international agreement.

Depending on the specific situation, agreements stipulate either that the laws of the country that sent workers to Russia apply (especially if the foreign employees work in a compact group under the direction of the national organizations that engaged them to work in Russia) or that the two legal systems apply in combination. In the latter case, as a rule, the law of the place where work is performed applies to work conditions closely related to the production process (working hours, time off, safety regulations, and job safety). As for other conditions (remuneration, vacation, grounds for dismissal, benefits, etc.), the relative weight of Russian law (the law of the country where work is performed) and foreign law (the law of the country that sent the worker) may vary. In this connection, the rights enjoyed by foreign workers, with respect to quantity and the guarantees provided, may be less than those stipulated by the laws of the Russian Federation.

The general permission procedure and, consequently, the requirement that the terms of an employment agreement comply with Russian law (including the remuneration, social benefits, and insurance of foreign employees) also apply to agreements between foreign workers and foreign firms that hire them to fulfill contracts in Russia.

The law also contains special provisions on the hiring of foreigners by companies with foreign investment. To hire foreigners from among highly qualified specialists as directors of companies with foreign investment located in the Russian Federation as well as directors of the subdivisions of such companies, an employer does not need to obtain a permit from the Federal Immigration Service, but the foreigner must verify his right to work.

Article 33 of the *Law on Foreign Investment* envisages a general principle according to which employment relations in a company with foreign investment, including issues with respect to hiring and termination, working hours and time off, terms of remuneration and guarantees and compensation, are regulated by a collective agreement and individual employment agreements (contracts). At the same time, the terms of collective and individual employment agreements may not stipulate worse conditions for a company's employees than those stipulated by the laws in effect in Russia. The law assumes that the conditions of foreign employees' hiring, work, time off, and pension benefits will be agreed to in his or her individual employment agreement.

Salary received by foreign employees in foreign currency may be transferred abroad after income tax is paid. Subsequently adopted legislation stipulates that a joint venture must make compulsory medical insurance and social insurance payments (with the exception of pension insurance) to the relevant Russian organizations for foreign employees temporarily residing in the Russian Federation. Pension insurance payments are made not to the Pension Fund of Russia but to the corresponding organizations in the foreigner's country. The law also requires all employers without exception (unless otherwise stipulated by an international agreement to which Russia is a party) to observe Russian standards of job safety.

Foreign organizations may hire foreigners for work in Russia not only by following the aforementioned permission procedure but also in accordance with international agreements of the Russian Federation.

Finally, a special category of foreign nationals employed in Russia comprises employees of foreign companies, institutions, and organizations seconded for work in the Russian Federation, including for extended periods (e.g. employees of foreign firms' representative offices in Russia). In this case, employment agreements are concluded abroad, and relations between the foreign employees and foreign employers are wholly governed by foreign law. In this case too, however, foreign employers doing business in Russia are required to observe the requirements of Russian law with respect to job safety.

Agreements concluded by the Russian Federation with other countries under which citizens of those countries participate in the construction and assembly of enterprises, the joint development of natural resources, and the construction of joint projects (oil pipelines, etc.) regulate employment relations as well. Agreements, along with the provisions of material law, stipulate that employment relations are governed either by Russian law, as the law of the place where work is performed, or by the law of the employee's country or for some labor issues by the laws of the country where work is performed, and for other issues by the law of the employee's country.

The law of the place where work is performed applies, as a rule, to work conditions most closely related to the production process, i.e. working hours, time off, job safety, and safety regulations. By applying the law of an employee's country and the provisions of international agreements on a number of other issues, it is possible to take into account the specific work conditions and way of life of foreign nationals and provide incentives for employing them in our country.

## GOVERNMENT PROCUREMENT

The procurement policy framework is a subset of the financial management framework related to the procurement of goods, works or services for the state needs. The Russian Federation Government procurement law establishes the core procurement requirements for all federal departments and agencies (agencies) as well as for regional and municipal bodies subject to the *Law on Placement of Orders for Delivery of Goods, Performance of Works and Provision of Services for State Needs* (Law No. 94-FZ which came into force on 1 January 2006)<sup>42</sup> and their officials, when performing duties in relation to procurement.

The new Law will allow achieving:

- provision unity of economic space in the territory of the Russian Federation;
- effective using budgetary and extra budgetary funds;
- revoke the limitations on participation of foreign suppliers and goods;
- development conscientious competition;
- arrange transparency of placement of orders;
- prevent corruption and other misapplications in the sphere of orders placement.

Concerning the foreign goods, works and services the Law has fixed a national treatment regime. Foreign suppliers and Russian suppliers can participate in the procurement for state needs under equal conditions. National treatment applies provided analogous (similar) treatment fixes concerning Russian goods. In case analogous (similar) treatment isn't fixed, Russian authorities search the conditions of admission foreign goods, works and services<sup>43</sup>.

The Russian Government made a decision to bar from acquiring foreign goods, works and services rendered by foreign entities for Russia's defence and security needs, except the cases when Russian producers do not offer the needed goods (works or services) not meeting requirements of Russian Federation customers (Russian Government Resolution No. 369 of 13 June 2006).

A new division has been established within the Federal Anti-monopoly Service (FAS) to give effect to the *Law on Federal Body of State Authority which is Authorised to Realize Control over the Orders Placement Services Rendering for State Needs* (Government Decree No. 94 of 20 February 2006) in the sphere of State orders.

For further information see [www.economy.gov.ru](http://www.economy.gov.ru) ; [www.zakupki.gov.ru](http://www.zakupki.gov.ru) ; [www.goszakupki.ru](http://www.goszakupki.ru) ; [www.bob.ru](http://www.bob.ru) ; [www.statetenders.ru](http://www.statetenders.ru) ; [www.gz-spb.ru](http://www.gz-spb.ru)

Changes since 2000 also appear in Russia's APEC Individual Action Plan and in its 2005 APEC Peer Review at <http://www.apec-iap.org/>

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<sup>42</sup> It is based on the UNCITRAL Model Law *Procurement of Goods (Works) and Services*.

<sup>43</sup> A majority of APEC economies is the WTO members. The WTO Agreement on Government Procurement adjusts the issue of national treatment on multilateral level. According to this Agreement member-states cannot give national treatment another states (including Russia) on bilateral base. It is important to point out that Russia does not plan to participate in the WTO's Government Procurement Agreement scheme.

## COMPETITION POLICY

The measures applied by Russia's state economic executive and anti-monopoly bodies and with regard to control of observance of the anti-monopoly legislation in the commodity and financial markets, are directed on creation of equal and fair competition contributing to effective resources distribution and sustainable economical development and aimed also at creating favorable business and investment climate. Thereupon the FAS is making efforts to increase transparency of the activity of natural monopolies and effectiveness of its investment programs, but at the same time to create conditions for the growth of goods and services volume, that are produced by independent suppliers in competition industries.

A new *Law on Competition Protection* came into force in October 2006. The new standard for exemption from administrative responsibility of cartel agreements participants will be introduced. The following conditions for mitigation will be also introduced:

- voluntary statement about violation;
- rejection of participation in such agreements;
- representation of information necessary for ascertainment of the facts of a violation.

It is proposed in the mid-term:

- to draw-up and approve a number of standing administrative orders to render the public services and fulfill the state functions by 2009;
- to perfect the recent control and supervisory system by means of state-public debates on the drafted decisions, as well as the initial introduction of outsourcing mechanisms of the administrative management processes;
- to enhance the mechanisms of cooperation among the state executive bodies and the civil society, including participation of it representatives in drawing-up and taking socially significant state decisions, setting-up and working of the public councils under state executive bodies with participation of the representatives of civil society;
- to draft the federal act on commissions for claims and interests settlement.

This Law provides more comprehensive and up-to-date regulatory framework for the competition policy, as it unifies regulations for financial and commodity markets, introduce a list of the types of dominant positions abuse and establish more accurate definitions to enable the effective enforcement of the legal requirements and terms. The Law broadens the conceptual base of anti-monopoly legislation. It introduces conceptions of coordination economic subjects by a third person and agreed activities which limit concurrence. The Law modifies the conception of dominating economic subject. If an economic subject occupies a market share more than 50% it should prove that it doesn't occupy the dominating market share. The law saves the rule that the subject with 35% of market share couldn't be considered as dominating. But there is an exemption for commodities market which has peculiar structure of demand and offer.

The following federal acts were passed also:

- *Law on the Ratification of the UN Convention Against Corruption* (Law No. 40-FZ of 8 March 2006);

- *Law on the Ratification of the Convention on Criminal Liability for Corruption* (Law No. 125-FZ of 25 July 2006).

By Government Order No. 1789-r of 25 October 2005, Russia has adopted *The Concept of Administrative Reform in the Russian Federation for 2006-2008* and *Action Plan (Roadmap) of the Administrative Reform's Execution by 2009* setting out the following measures:

- introduction of the principles and procedures for management based on results of the state executive bodies and agencies activity;
- elaboration and introduction of the public service standards, rendered by the state executive authorities, as well as the standing administrative orders in the public executive bodies;
- introduction of the practice of independent ant-corruption expertise of bills and other drafted statutory acts;
- enhancement of the efficiency of state-public cooperation.

It is important to mention also that on 13 May 2007, the Federal Law dated 9 April 2007 № 45-FL *On Introducing Amendments into the Code of the Russian Federation on Administrative Violations* entered into force, to change completely the system of administrative penalties applied for the violation of the competition legislation. For example, starting from 13 May 2007, an administrative penalty amounted to from one hundredth to one fifteenth part of the violator's proceeds of the sales of goods (works or services) in the market where the violation occurred could be imposed for the abuse of dominant position on the legal entity.

For further information see [www.fas.gov.ru](http://www.fas.gov.ru) ; and [www.economy.gov.ru](http://www.economy.gov.ru)

Changes since 2000 also appear in Russia's APEC Individual Action Plan and its 2005 APEC Peer Review at <http://www.apec-iap.org/>

Currently, the main obstacle for foreign investment growth is the widespread opinion among foreign business that Russian companies are too risky for investment. This opinion is to a large degree supported by certain Western mass media which paint the overall situation in Russia and economic situation, in particular, in exclusively dark shades, presenting occasional single flaws, failures, and just premature decisions (which are inevitable in the period of radical reforms in any society) as typical and widely spread. As a result, many of Russia's potential foreign partners still have a contorted picture of life in Russia.

In the meantime the companies that have been working in Russia long enough have already realized all its advantages. This is also proven by the results of the survey held in February 2005 by the international agency PBN Company upon request of the FIAC which works in close cooperation with the Russian Government and the Ministry of Economic Development and Trade of the Russian Federation. The survey demonstrated that 80% of investor companies working in various regions of the Russian Federation have successfully achieved their business goals in the past two years, and consider their activities here quite successful. Almost the same amount of company managers said that they were going to further develop their businesses in Russia in the near future. It is remarkable that nearly all survey participants agreed that "... in fact, Russia promises greater success than one might perceive."

So, increasing Russia's attractiveness for investors largely depends on providing objective information to foreign businesspeople, widely spreading transparent and understandable data related

to the conditions of investing in Russia, and to the most profitable and promising sectors of the Russian economy.

The open-heartedness and traditional hospitality of the Russian people, the respect they have for guests from abroad, and their other personal and professional qualities have won the respect and trust of millions of people from all over the world who visit Russia every year.

## APPENDIX 1 — RUSSIA’S INVESTMENT-RELATED INTERNET RESOURCES

### **President of the Russian Federation**

<http://www.kremlin.ru>

### **Federation Council**

<http://www.council.gov.ru>

The Council’s members and structure, recent information on the lawmaking process, information on committees and commissions.

### **State Duma**

<http://www.duma.gov.ru>

Official website: rules and regulations, complete list of deputies and groups of deputies, lists of committees and commissions. New feature: a list of bills.

<http://www.duma.ru>

Second official website: information for the press, the Duma newsletter, digest of publications on the State Duma and its deputies, news and reference information.

### **Russian Federation Administrative Bodies**

<http://www.gov.ru>

Various information on the Russian President (biography, political career, civil status, income, property, etc.), press releases of the presidential administration, related web links.

### **Government of the Russian Federation**

<http://www.government.ru>

### **Russian Ministry for Foreign Affairs**

<http://www.mid.ru>

### **Ministry of Economic Development and Trade**

<http://www.economy.gov.ru>

### **Information Retrieval System “Export Capacities of Russia”**

<http://www.exportsupport.ru>

A government register of some 2,000 Russian companies interested in expanding their sales abroad.

### **Russian Ministry of Finance**

<http://www.minfin.ru>

News, ministry structure, federal budgets, quarterly reports on the implementation of the 1997 and 1998 budgets. Draft of the Tax Code. Information on state securities.

### **Russian Federation Ministry of Defense**

<http://www.mil.ru>

### **Federal-State Statistics Service (Rosstat)**

<http://www.gks.ru>

Official website, the service's structure, regulations, statistical data, news, information.

### **Federal Financial Markets Service**

<http://www.fcsm.ru>

The service's structure and management, press releases, official documents, e-version of the FFMS newsletter, detailed information on issuers.

### **Federal Tax Service**

<http://www.nalog.ru>

Archive, structure, activities. Statistical data on budget revenues from taxes, tax legislation.

### ***Business in Russia***

<http://www.deloros.ru/>

### **The Chamber of Commerce and Industry of the Russian Federation**

<http://www.tpprf.ru>

News of the chamber and regional chambers, the chamber's management, organizational structure, committees, agenda, list of services, contacts.

### **All-Russia Movement "Opora Rossii" (SMEs' support)**

[http:// www.opora.ru/live/](http://www.opora.ru/live/)

All-Russia public organization of small and medium entrepreneurs

### **Investor Protection Association**

<http://www.corp-gov.ru>

## **Russian Federal Property Fund**

<http://www.fpf.ru>

Information on the fund and its structure, regulations, digest of the newsletter Reform.

## **Russian Managers Association**

<http://www.amr.ru>

## **League of Management Companies of Russia**

<http://www.nlu.ru>

## **Institute of Direct Investments**

<http://www.ivr.ru>

## **Expert Institute of the Russian Union of Industrialists and Entrepreneurs (Employers)**

<http://www.exin.ru>

## **American Chamber of Commerce in Russia**

<http://www.amcham.ru>

## **Russian-Chinese Center for Trade and Economic Cooperation**

<http://rus-china.centro.ru>

## **Legal Agencies**

### **Ministry of Justice of the Russian Federation**

<http://www.scli.ru>

News, databases, conferences.

### **Supreme Court of the Russian Federation**

<http://www.supcourt.ru>

The court's structure, resolutions, newsletter, judicial bodies, news, reference materials.

### **Supreme Arbitration Court**

<http://www.arbitr.ru>

News, arbitration practice, press releases.

### **ConsultantPlus**

<http://www.consultant.ru>

Wide range of legal information.

**GARANT (Computer legal information reference system)**

<http://www.garant.ru>

Wide range of legal information.

**Kodeks (The Code)**

<http://www.kodeks.net/win/rus.htm>

Information system.

**Banking System of Russia**

**Central Bank of Russia (CBR)**

<http://www.cbr.ru>

Financial and economic data. Information and analytical materials, information on banknotes and coins and on the central banks of CIS countries, the Baltic states, and other foreign countries. Statistics. CBR newsletter, archive.

**Savings Bank of the Russian Federation (Sberbank)**

<http://www.sbr.ru>

Bank history, Sberbank today, annual report, services, news, branches, subsidiaries, customer information (including issued securities).

**Vneshtorgbank**

<http://www.vtb.ru>

News, financial statements, services, information on securities (including Vneshtorgbank bonds), depository services.

**Association of Russian Banks**

<http://www.arb.ru>

News, the association's activities and working groups, international cooperation.

**Russian Lending Institutions Association of Regional Russian Banks**

<http://www.asros.ru>

News, banking legislation, inter-regional and international cooperation.

## **Mass Media**

### **AK&M Information Agency**

<http://www.akm.ru>

Information on the Russian stock market. Articles, analytical reviews, ratings, indexes. Information on privatized and investment companies.

### **Aurora Access Securites**

<http://www.aas.ee/en/>

Internet resource providing financial and other information: benchmarking assets analysis, currency exchange rates, useful links, etc.

### **Finansy.ru**

<http://www.finansy.ru>

News, publications (the Russian economy, international trade, banking, investments, accounting, taxes, etc.), online media, links to personal websites of economists, information for Ph.D.s and Ph.D. candidates, etc.

### **Finmarket Information Agency**

<http://www.finmarket.ru>

Financial and economic information, analytical reviews, news, discussions.

### **IFIN.ru**

<http://www.internetfinance.ru>

Financial technologies and services provided on the Internet (Internet trading, banking, and insurance). News, publications, calendar of significant events, forum, glossary.

### **Interfax Information Agency**

<http://www.interfax-agency.com>

Political, economic, and industrial news.

### **ITAR-TASS, Information Agency**

<http://www.tass.ru>

Wide range of information.

<http://www.itar-tass.com/eng/>

English mirror site.

### **Novosty (News) Russian Information Agency**

<http://www.rian.ru>

A wide variety of information on various subjects, references (Russian political parties and organizations, political leaders), calendars of significant and memorable dates, newsletters (economics, privatization, customs).

### **Polpred Analytical Center**

<http://www.polpred.com>

Information on Russian foreign economic relations, investments, macroeconomics.

### **RosBusinessConsulting Information Agency**

<http://www.rbc.ru>

Information from leading trading floors, analytical reviews, financial profiles of major Russian companies, statistical data, etc.

**APPENDIX 2 — COUNTRIES WITH THE LARGEST ACCUMULATED INVESTMENTS INTO RUSSIA (THE END OF PERIOD)**

	2005			2006	
	June	September	December	June	December
	<i>million US dollars</i>				
<i>Investments – total</i>	90 820	96 474	111 835	127 988	142 926
<i>Cyprus</i>	17 305	17 576	19 279	25 590	32 276
<i>Netherlands</i>	14 236	15 586	18 909	22 051	23 451
<i>Luxemburg</i>	15 361	16 101	20 984	19 404	22 870
<i>Germany</i>	8 977	9 321	9 726	10 218	12 260
<i>United Kingdom</i>	8 104	9 642	12 752	13 766	11 801
<i>USA</i>	6 751	7 157	6 844	8 270	7 698
<i>Virgin Isl. (UK)</i>	1 636	2 151	2 463	3 056	4 259
<i>France</i>	3 613	3 483	3 918	2 478	3 699
<i>Switzerland</i>	1 708	2 179	2 364	2 382	2 832
<i>Japan</i>			695		2 725
	<i>as percentage of total</i>				
<i>Investments – total</i>	100	100	100	100	100
<i>Cyprus</i>	19,1	18,2	17,2	20,0	22,6
<i>Netherlands</i>	15,7	16,1	16,9	17,2	16,4
<i>Luxemburg</i>	16,9	16,7	18,8	15,1	16,0
<i>Germany</i>	9,9	9,7	8,7	8,0	8,6
<i>United Kingdom</i>	8,9	10,0	11,4	10,7	8,2
<i>USA</i>	7,4	7,4	6,1	6,5	5,4
<i>Virgin Isl. (UK)</i>	1,8	2,2	2,2	2,4	3,0
<i>France</i>	4,0	3,6	3,5	1,9	2,6
<i>Switzerland</i>	1,9	2,3	2,1	1,9	2,0
<i>Japan</i>			0,6		1,9

**APPENDIX 3 — RUSSIA'S INVESTMENTS ABROAD: ACCUMULATED AS OF  
1 JANUARY 2007**

	Investment outlays (US\$000,000)					Memo Item: Investments in 2006
	Total		FDI	Portfolio investments	Other investments	
	Value	%				
<b>TOTAL</b>	14 277	100	6 054	1 070	7 153	51 978
<i>Top 10 countries of which:</i>	11 754	82,3	4 464	971	6 319	44 266
<i>Ukraine</i>	3 291	23,0	92	381	2 818	3 001
<i>Cyprus</i>	2 629	18,4	1 292	553	783	2 686
<i>Bahamas' Isl.</i>	1 097	7,7	-	0,2	1 097	403
<i>Austria</i>	1 037	7,3	145	0,0	892	12 970
<i>Luxemburg</i>	1 018	7,1	857	0,1	161	1 012
<i>Netherlands</i>	1 007	7,1	728	29	250	735
<i>USA</i>	597	4,2	584	-	13	18 241
<i>United Kingdom</i>	469	3,3	358	1	110	2 006
<i>Germany</i>	318	2,2	133	7	178	3 190
<i>Lithuania</i>	291	2,0	274	-	17	22

Source: Rosstat of Russia



# SINGAPORE

## Acronyms

ACRA	Accounting and Corporate Regulatory Authority
EDB	Economic Development Board
IAC	Industrial Arbitration Court
IDA	Info-Communications Development Authority
IE SINGAPORE	International Enterprise Singapore
IPOS	Intellectual Property Office of Singapore
MAS	Monetary Authority of Singapore
SPRING SINGAPORE	Standards, Productivity and Innovation Board

## INTRODUCTION

Singapore has an open economic system and an effective pro-business, predictable, transparent and market-friendly policy framework. All foreign investors alike can maintain 100% foreign equity and are free to make their own decisions on markets, technology licensing and other investment areas. Singapore actively promotes investment in productive economic activities and now has strong industry clusters in the manufacturing and services sectors — the twin engines of growth that powered the drive towards a knowledge-based economy in the 21<sup>st</sup> century sustained by the continued development of the necessary capabilities and infrastructure and encouragement and nurture of talent. Enhancement of the business environment to make Singapore an investment location of choice and an important platform for ideas, funds, markets and partners has convinced many international players to complete the full chain for manufacturing and services, including R&D, design, production, supply chain management and headquarter operations in Singapore.

The establishment of Singapore as a strategic and compelling global business hub is further enhanced by the championing of global free trade and investment by entering into economic arrangements and partnerships and expanding its network of investment guarantee agreements and FTAs.

With the aim of promoting a healthy competitive market in Singapore, the *Competition Act* to prohibit anti-competitive activities that prevent, restrict or distort competition was enacted and came into force on 1 January 2005. Open and vigorous competition to spur efficiency and innovation and respond to consumer needs has benefited the economy.

For further information see:

<http://www.sedb.com>

<http://apec-iap.org>

## SCREENING OF FOREIGN INVESTMENT

There is no screening of potential foreign investments in Singapore. Hence, no screening forms are issued. Investors need only to register their businesses with the Accounting and Corporate Regulatory Authority (ACRA) formed on 1 April 2004 with the merger of the Registrar of Companies and Businesses and the Public Accountants Board. No authorization is required on threshold in value of investment in Singapore. Guidelines, conditions, requirements, laws and regulations apply to investors irrespective of nationality.

Every new business in Singapore must be registered. The requirement also applies to any firm, individual or corporation conducting business as a nominee, trustee or agent for any foreign corporation. Business registration and guidelines are available online at <http://www.business.gov.sg>. A branch of a foreign company needs also to register with ACRA and have two local agents appointed to accept notices served on the branch. These must be natural persons (not necessarily citizens) resident in Singapore. A foreign company may establish a representative office in Singapore to undertake promotional and liaison activities on behalf of its parent company. Representative offices from the manufacturing, trading, trade logistics and trade-related services sectors may register with the International Enterprise Singapore online at <http://www.roms.iesingapore.gov.sg>. Representative offices from the finance-related industries may register with the Monetary Authority of Singapore. Forms are available at <http://www.mas.gov.sg>.

Licences, if required under specific sectors, may be obtained from the respective organizations at their websites. Entrepreneurs can also apply for licences online at <http://www.business.gov.sg> through a step-by-step licence search facility. Licence requirements, if any, stem mainly from special conditions of the specific sector, mostly financial activities, such as banking, insurance and stock-broking and manufacture of a small number of items, such as optical discs listed in the *Manufacture of Optical Discs Act* and beer and stout, cigars and cigarettes, drawn steel products, chewing gum and matches listed in the *Control of Manufacture Act*. Reasons for rejection of a licence are given. An applicant can make an appeal for review with the same organization. It may take between 14 days to 2 months to get all the necessary licences and approvals to form a business.

Joint ventures may take the form of equity investment in a limited liability company, unlimited partnership or limited liability partnership. The laws of companies or partnerships apply where appropriate.

M&As in Singapore are subject to non-statutory rules in the Singapore Code on Takeovers and Mergers which is administered and enforced by the Securities Industry Council. It has powers under the law to investigate any dealing in securities that is connected with a takeover or merger transaction. A person or legal entity with effective control of a public company (30% of voting rights) must make an offer for the balance of outstanding shares. Except in a few sectors, foreign buyers face the same rules as local ones.

The *Companies Act* has been amended in phases after a review completed in October 2002 by the Company Legislation and Regulatory Framework Committee set up to look into how Singapore's regulations and corporate practices can keep up with international best practice and remain conducive to business.

For further information see:

<http://www.business.gov.sg> ; <http://www.mas.gov.sg> ; <http://www.iesingapore.com>

Relevant laws:

*Business Registration Act*

*Companies Act*

*Partnership Act*

*Limited Liability Partnership Act*

*Securities And Futures Act*

*Control Of Manufacture Act*

*Manufacture Of Optical Discs Act*

N.B. Details of all Singapore laws mentioned in this chapter are available at:

<http://statutes.agc.gov.sg>

## SECTOR SPECIFIC LAWS AND POLICIES

The Singapore Government actively encourages foreign investment and generally treats foreign capital the same as local capital. There are no restrictions on investment except for national security purposes and in certain industries in Singapore. Licences are required from certain specific sectors.

### (i) Finance

In 1999 the Monetary Authority of Singapore (MAS) announced a 5-year programme in phases to liberalize commercial banking and upgrade local banks in Singapore. Foreign banks' access to the domestic market was thus broadened with the award of Qualifying Full Bank and Qualifying Offshore Bank privileges as well as wholesale bank licences in phases. The lifting of the 40% aggregate foreign shareholding limit on banks in 1999 had led to improved trading liquidity and the removal of price distortions in the market value of bank shares without compromising the policy of MAS of not allowing foreign control of local banks. Following that, the 20% aggregate foreign shareholding limit on finance companies was lifted in 2002 allowing finance companies to merge their foreign and local share tranches, but left the policy of disallowing the foreign takeover of a finance company intact.

For further information see: <http://www.mas.gov.sg>.

Relevant laws:

*Banking Act*

*Finance Companies Act*

*Monetary Authority Of Singapore Act*

(ii) Telecommunications & Info-communications

The telecommunications sector in Singapore was thrown open in 2000, ending a long-standing monopoly and allowing full competition with no direct and indirect foreign equity limits for all public telecommunications service licences. With liberalization, there are no limits on the number and type of licences, except when there are physical/resource constraints. Licensees are free to decide on the types of networks, systems, facilities and preferred technology platform to offer their services. All persons operating telecommunications systems and providing telecommunications services in Singapore are required to be licensed by the Info-communications Development Authority (IDA) of Singapore. Licence applications, available online at <http://www.ida.gov.sg>, are assessed and granted on the merits of the licence applications.

The liberalization measures which aimed to encourage global info-communications players to participate actively in the market and locate their regional and global hubs in Singapore, has resulted in tremendous growth and advancement in telecommunications and info-communications, making Singapore a vibrant info-communications hub in the region and thereby furthering Singapore's development as a leading knowledge-based economy. To meet the challenges of the digital/information economy and growth in e-society, e-government and e-commerce, the Government has put in place relevant legal and regulatory policy measures.

For further information see: <http://www.ida.gov.sg>

Relevant laws:

*Telecommunications Act*

*Info-Communications Development Authority Act*

*Electronic Transactions Act*

(iii) Transport

Singapore's aviation policy, based on the fundamental belief in free and open competition, is to provide an extensive and liberal framework for more air services and city links to Singapore. Singapore has air services agreements with more than 90 countries. The Civil Aviation Authority of Singapore regulates the operations of Singapore-registered aircraft, regulates the operations of aerospace industries, licenses aircraft maintenance and flight personnel, and advises the Government on matters related to civil aviation. The Government does not impose foreign

ownership limits on Singapore designated airlines. Enterprises providing air transport services for both passenger and freight as a Singapore designated airline have to comply with the control and/or substantial ownership requirements of Singapore's bilateral and multilateral air services agreements which may stipulate a 49% limit on foreign ownership of their shares.

The Maritime and Port Authority is the regulatory body for port and maritime affairs in Singapore. As champion and driver of Singapore's ongoing development as an international maritime centre, it has in place a licensing regime for vessels operating in Singapore port waters to ensure the seaworthiness of vessels that are used for both commercial and pleasure purposes. It also issues licences to port and towage operators. The Singapore Registry of Ships registers merchant ships and pleasure craft sailing in foreign waters to accord them a nationality and protection under the United Nations Convention on the Law of the Sea. Ships to be registered in Singapore can be owned by citizens and permanent residents of Singapore and by companies incorporated in Singapore whether locally-owned or foreign-owned.

For further information see:

<http://www.mot.gov.sg> ; <http://www.caas.gov.sg> ; and <http://www.mpa.gov.sg>

Relevant laws:

*Air Navigation Act*

*Carriage By Air Act*

*Civil Aviation Authority Of Singapore Act*

*Tokyo Convention Act*

*Hijacking And Protection Of Aircraft Act*

*Merchant Shipping Act*

Merchant Shipping (Registration Of Ships) Regulations

*Maritime And Port Authority Of Singapore Act*

#### (iv) Media

Foreign investment limits exist in broadcasting and newspaper services in Singapore. Licences can be granted to a broadcasting company if the foreign shareholding is less than 49% for a broadcasting company unless otherwise waived by the Minister for Information, Communication and the Arts. A single holding of more than 5% of voting shares in newspaper companies requires clearance. All directors of newspaper companies have to be citizens of Singapore.

For further information see:

<http://www.mica.gov.sg> and <http://www.mda.gov.sg>

Relevant laws:

*Media Development Authority Of Singapore Act*

*Broadcasting Act*

*Newspaper And Printing Presses Act*

(v) Real Estate

Foreigners and foreign companies in Singapore can purchase commercial and industrial property, residential premises in buildings of 6 levels or more and apartments in approved condominium developments. Approval is required for the foreign purchase of landed residential property, residential premises in buildings of less than 6 levels and vacant land zoned for residential purposes. Applications on forms available online at <http://www.sla.gov.sg> are administered by the Land Dealings (Approval) Unit of the Singapore Land Authority.

Under a new option to the Global Investor Programme administered by the Economic Development Board, up to 50% of the S\$2 million investment required by a foreigner to qualify for Permanent Resident status can be in private residential properties.

For further information see:

<http://www.sla.gov.sg>; and <http://www.sedb.com>

Relevant laws:

*Residential Property Act*

*Planning Act*

## INVESTMENT PROTECTION

(i) Conversion, Repatriation and Transfers

The Singapore dollar is freely convertible. There are currently no currency exchange controls. Singapore residents (individuals and corporations) are free to move funds, import capital or repatriate profits without restriction.

Primarily with the objective of promoting price stability as a sound basis for sustainable economic growth, the Monetary Authority of Singapore manages the Singapore dollar against a basket of currencies.

In bilateral investment guarantee agreements with 35 countries and the 11 FTAs that Singapore has signed, there is provision to guarantee to investors the free transfer of their capital and the returns from their investments on a non-discriminatory basis.

(ii) Expropriation and Compensation

Under the *Land Acquisition Act*, the Singapore Government is empowered to acquire land for any public purpose and for residential, commercial and industrial purposes. The Act provides for payment of compensation to the owners of such land and for appeals against awards of compensation made by the Collector of Land Revenue. Appeals Boards hear appeals from such awards.

Other than the Land Acquisition Act, the provision for expropriation and compensation is usually included in bilateral investment guarantee agreements and in investment chapters of FTAs.

(iii) IPR

Intellectual property (IP) in the form of patents, trade marks, registered designs, copyrights, layout designs of integrated circuits, trade secrets and confidential information are protected in Singapore. The Intellectual Property Office of Singapore (IPOS) is the lead agency that formulates and regulates IP laws, promotes IP awareness and provides the infrastructure to facilitate the greater development of IP in Singapore. Formerly known as the Registry of Trade Marks and Patents and established on 1 April 2001 as a statutory board under the Ministry of Law, IPOS processes all applications for patents, trade marks and registered designs in Singapore. Applications may be filed online at <http://www.ipos.gov.sg>

Singapore is a member of the following international bodies/treaties (the year of accession is in brackets):

- WIPO (1990)
- TRIPS (1995)
- Patent Cooperation Treaty (1995)
- Paris Convention for the Protection of Industrial Property (1995)
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1995)
- Berne Convention for the Protection of Literary and Artistic Works (1998)
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1999)
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (2000)
- International Convention for the Protection of New Varieties of Plants since 2004

- Hague Agreement Concerning the International Registration of Industrial Designs (2005)
- WIPO Copyright Treaty (2005)
- WIPO Performance and Phonograms Treaty (2005)
- Singapore Treaty on the Law of Trademarks (2006)

The Singapore Copyright Tribunal serves as a forum for resolving certain disputes between copyright owners and users of copyright materials. Materials covered are original literary works, including computer programmes and dramatic, musical and artistic works.

Singapore has provided good protection of intellectual property with enforcements stepped up by the Singapore Police Force since the 1980s.

For further information see: <http://www.ipos.gov.sg>

Relevant laws:

*Patents Act* And Patent Rules

*Copyright Act*, Copyright (International Protection) Amendment Regulations and Copyright (Border Enforcement) Regulations

*Trade Marks Act*, Trademarks (Amendment) Rules and Trademarks (International Registration) Rules

*Registered Designs Act*

*Geographical Indications Act*

*Medicines (Amendment) Act* (Protection Of Undisclosed Information)

*Control of Plants (Amendment) Act* (Protection of Undisclosed Information)

*Layout-Designs of Integrated Circuits Act*

*Manufacture of Optical Discs Act* (A Regulatory System for the Manufacture of Optical Discs as a Further Safeguard to Protect the Rights of IPR Holders).

#### (iv) Dispute Settlement

Growth of international arbitration has been encouraged in Singapore with the ratification of international conventions, enactment of supporting laws and the creation of arbitration and mediation bodies.

In 1968 Singapore acceded to the Convention on the Settlement of Investment Disputes (the ICSID Convention) which established the International Centre for Settlement of Investment Disputes (ICSID) to provide facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. In 1986,

Singapore acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Singapore joined ASEAN to strengthen the available formal dispute settlement mechanism with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in November 2004.

Singapore enacted the *Arbitration Act* to provide for the conduct of arbitration, the *Arbitration (International Investment Disputes) Act* to implement the ICSID Convention and the *International Arbitration Act* to make provision for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration adopted by the UNCITRAL and conciliation proceedings and to give effect to the New York Convention.

The Singapore International Arbitration Centre was established in 1991 as an independent non-profit organization to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution. The Singapore Mediation Centre was set up in 1997 as a non-profit organization to promote mediation and to provide a full range of alternative dispute resolution services.

For further information see:

<http://www.siac.org.sg> ; and <http://www.mediation.com.sg>

Relevant laws:

Arbitration Act

Arbitration (International Investment Disputes) Act

## **INVESTMENT AND DEVELOPMENT**

There are no laws or policies stating performance requirements to impose limits on or target foreign investment or to affect indigenous persons to promote economic development objectives. All contracts are commercial dealings.

## **INVESTMENT PROMOTION AND INCENTIVES**

### **(i) Investment Promotion Agencies**

The Economic Development Board (EDB) was set up in 1961 to spearhead Singapore's economic development and as a one-stop agency to lead Singapore's industrialization drive by attracting and facilitating inward investment. The EDB continues to be the lead agency in charting and driving Singapore's economic growth to sustain Singapore as a compelling global hub for business and investment. There are 20 EDB offices located in key economic regions around the world. The EDB works closely with multinational and Singapore-based corporations to help them enhance and upgrade to higher value-creating operations across both manufacturing and internationally traded services. It also works as a catalyst and facilitator in nurturing an environment conducive to robust business and, together with related government agencies, promotes innovation and entrepreneurship alongside Singapore's human, intellectual, financial and cultural capital development.

The International Enterprise Singapore (IE Singapore) is the agency spearheading Singapore's efforts to develop its external economic wing. It has offices in 35 locations worldwide and offers a wide range of services, including providing market information and assisting enterprises to develop their business capabilities and find overseas partners and for foreign businesses to expand into the region in partnership with Singapore-based companies.

The Standards, Productivity and Innovation Board (SPRING Singapore) is the agency working to enhance the competitiveness of enterprises for a vibrant Singapore economy. Its focus is to champion enterprise formation and growth and to nurture a host of dynamic and innovative enterprises, including small and medium joint ventures.

(ii) Incentives

Companies are taxed a flat rate of 20% on chargeable income with effect from 2005. Singapore has signed Double Taxation Agreements with 58 countries up to September 2006. The *Economic Expansion Incentives (Relief from Income Tax) Act* was enacted to give effect to incentives for the establishment of pioneer industries and for economic expansion, generally, by way of providing relief from income tax. The EDB administers incentives for the promotion of new investments in industries and services, for encouraging existing companies to upgrade through mechanisation, automation and innovation for new products and services and for R&D. IE Singapore administers incentives for overseas investment, including for internationalization of business and for international alliances formation. SPRING Singapore promotes a pro-business environment, champions industry development and enhances enterprise capabilities.

Free Trade Zones were first established in Singapore in 1969 to facilitate entrepot trade in dutiable goods. All dutiable goods can be stored when they arrive in Singapore with payment of duties and taxes suspended in the Free Trade Zones or licensed warehouses except for liquors and tobacco (including cigarettes) which must be stored in licensed warehouses. Duty and taxes are payable when the goods leave the designated areas and enter into customs territory for local consumption. The areas may be used for storage and repacking of import and export cargo and goods transited in Singapore for subsequent re-export. The benefit is available to traders, whether local or foreign. The designated Free Trade Zones are in the Port of Singapore, the Jurong Port, the Sembawang Wharves, the Pasir Panjang Wharves and the Cargo Terminal Complex of Changi Airport.

For further information see:

<p>Singapore Economic Development Board 250 North Bridge Road #28-00 Raffles City Tower Singapore 179101 Phone: 65-68326832 Fax: 65-68326565 <a href="http://www.sedb.com">http://www.sedb.com</a></p>	<p>International Enterprise Singapore 230 Victoria Street 7<sup>th</sup> Storey Bugis Junction Officer Tower Singapore 188024 Phone: 65-63376628 Fax: 65-73376898 <a href="http://www.iesingapore.com">http://www.iesingapore.com</a></p>	<p>Spring Singapore 2 Bukit Merah Central Singapore 159835 Phone: 65-62786666 Fax: 65-62786667 <a href="http://www.spring.gov.sg">http://www.spring.gov.sg</a></p>
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Further tax information available at: <http://www.iras.gov.sg>

Relevant laws:

*Economic Development Board Act*

*International Enterprise Singapore Board Act*

*Standards, Productivity and Innovation Board Act*

*Economic Expansion Incentives (Relief from Income Tax) Act*

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

Foreign investors are free to move funds and repatriate capital and profits without restrictions. There is no capital gains tax. As part of the globalisation strategy, Singapore encourages its companies to invest abroad.

Singapore signed the WTO Information Technology Agreement in 1996. The members agreed to a move to bring down tariffs on IT items in stages to expand world trade in IT which is an engine of global economic growth.

## **LABOUR, MOVEMENT OF PEOPLE AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS**

### **(i) Labour Laws and Labour Relations**

The domestic labour laws in Singapore apply to all domestic and foreign companies alike. Industrial peace is promoted through the regulation of the conduct of industrial matters and impartial arbitration of trade disputes.

The Industrial Arbitration Court (IAC) of Singapore certifies collective agreements that set out the terms and conditions of service negotiated between unions and management in addition to minimum terms of employment and labour relations provided in the *Employment Act* and the *Industrial Relations Act*. Either party can refer disputes to the Labour Relations Department of the Ministry of Manpower for conciliation. If settlement fails, the parties may refer the disputes to the IAC for arbitration. Under the *Trade Disputes Act*, a strike or lockout action cannot take place when the IAC has taken note of the trade dispute.

<p>For further information see:</p> <p><a href="http://www.mom.gov.sg">http://www.mom.gov.sg</a> ; and <a href="http://www.iac.gov.sg">http://www.iac.gov.sg</a></p> <p>Relevant laws with summary follow.</p>	
<i>Employment Act</i>	This is the key legislation governing the terms and conditions of employment in Singapore. It spells out the rights and obligations of employers and employees and the basic terms and conditions of employment.
<i>Employment of Foreign Workers Act</i>	To discourage over-dependence on unskilled foreign workers, the act provides for the prohibition of employment of foreign workers without work permit. It also provides for the Manpower Minister (by order in a Government Gazette) to impose a monthly levy on each work permit holder employed. The rates vary between sectors.
<i>Central Provident Fund Act</i>	The central provident fund is a compulsory savings program. With effect from January 2003, employers contribute monthly 13% of wages and employees 20%. The fund includes provisions for retirement, medical benefits, education, home ownership and other investments.
<i>Workplace Safety &amp; Health Act</i>	Relates to the safety, health and welfare of persons employed in factories and other workplaces.
<i>Industrial Relations Act</i>	The act lays down the framework for amicable resolution of industrial disputes through conciliation and arbitration.
<i>Retirement Age Act</i>	The act prescribes a minimum retirement age. It was set at 62 with effect from 1 January 1999.
<i>Trade Disputes Act</i>	The act lays down the rules for industrial action, e.g. Strikes and lockouts.
<i>Workmen's Compensation Act</i>	The act provides for payment of compensation to workers injured or afflicted with occupational diseases in the course of work.

(ii) Movement of People and Management

Singapore has an open-door policy on foreign talent. To boost the population, the economy and competitiveness in the global market for talent, efforts are made to strengthen Singapore's attractiveness to highly-skilled foreigners.

Foreign entrepreneurs who are ready to start a new company/business and will be actively involved in the operation of the company/business in Singapore can apply for an employment pass under the EntrePass Scheme. At the point of submission of the EntrePass application, the applicant must not have registered in the business with ACRA for longer than 6 months. Applications on forms available at <http://www.business.gov.sg> are sent to the Ministry of Manpower which jointly administers the scheme with SPRING Singapore. Non-renewable Short-term Employment Passes are for foreigners who wish to work in Singapore on a specific project or assignment up to a maximum of one month.

Multiple Journey Visas valid for 1, 2 or 5 years are available for business executives who travel in and out of Singapore frequently either to attend to business matters and investments or to look for business opportunities in Singapore. Social Visit Passes are available for entrepreneurs to stay up to 6 months in Singapore to explore business opportunities, conduct feasibility studies or complete negotiations. To facilitate travel of business persons between APEC economies, Singapore implemented the APEC Business Travel Card Scheme on 1 October 2005. Foreign holders of the APEC Business Travel Card that are pre-cleared by Singapore can enjoy multiple-journey visa-free entry and expedited clearance through designated lanes provided at all checkpoints to Singapore. Further information on visas and social visit passes for business is available at <http://www.ica.gov.sg> and <http://www.sedb.com>

The various types of work passes issued to meet the foreign manpower needs of the economy are administered by the Work Pass Division of the Ministry of Manpower. Accompanying family members of certain work pass holders may apply for Dependant's Passes. Applications for the various passes issued by the Ministry of Manpower may be submitted online.

There are no nationality requirements on senior management positions. With recent changes in the *Singapore Companies Act*, every company needs to have at least one director who is ordinarily resident in Singapore. As defined in the *Income Tax Act*, persons who are physically present or employed in Singapore for at least 183 days during the year are considered resident. Residents can include Singapore citizens, permanent residents and employment pass holders. If a foreigner qualifies as a resident, he can be the only director of the company.

For further information see:

<http://www.business.gov.sg> ; <http://www.ica.gov.sg> ; <http://www.mom.gov.sg> ; and  
<http://www.sedb.com>

Relevant laws:

*Employment Of Foreign Workers Act*

*Immigration Act*

## **GOVERNMENT PROCUREMENT**

Singapore is party to the 1994 Agreement on Government Procurement under the WTO. The signatories agreed that suppliers of goods and services in other signatory countries are treated no less favourably than domestic suppliers in procurement covered by the Agreement, and that their laws, regulations and procedures relating to government procurement are transparent and fair. Singapore enacted the *Government Procurement Act* in May 2002 to give effect to the Agreement on Government Procurement and other international obligations of Singapore relating to procurement by the Government and public authorities, and for purposes connected.

The Singapore Government adopts the fundamental principles of:

### **Openness and Fairness**

There is no discrimination in favour of or against any supplier. Suppliers are treated fairly. All suppliers are given the same information for them to prepare their bids.

### **Transparency**

The procurement procedures and policies for supplying to the government are clear and made known to suppliers to help them understand how the Government buys goods and services. Necessary information, such as purchase requirements and bid evaluation criteria, is provided in the tender documents.

### **Value for Money**

To achieve value for money, the Government evaluates suppliers' offers not only in terms of price, but also whether they comply with all the requirements in the tender specifications, quality of the goods and services, timeliness in delivery, reliability and after sales service.

To ensure easy access to government procurement opportunities, suppliers can transact electronically with some 120 government agencies on the GeBIZ, the Singapore Government's one-stop e-procurement portal. All information on government procurement opportunities, including quotations, tenders and information on tender schedules of bids received and tender awards, can be found on the website. The Government Procurement Guide for SMEs prepared by the Ministry of Finance and SPRING Singapore and available on the website serves to help small and medium-sized suppliers understand better the rules to take part and bid for business opportunities and projects required by Government departments. The website also has information on business opportunities with foreign governments.

For further information see: <http://www.gebiz.gov.sg>

Relevant law: *Government Procurement Act*

## COMPETITION POLICY

Singapore's *Competition Act* came into operation on 1 January 2005. The Act prohibits anti-competitive activities that unduly prevent, restrict or distort competition. The provisions of the Act came into force in 3 phases:

1<sup>st</sup> phase on 1 January 2005 — those establishing the Competition Commission of Singapore

2<sup>nd</sup> phase on 1 January 2006 — those on anti-competitive agreements, decisions and practices, abuse of dominance, investigation, enforcement, appeal process and miscellaneous areas

3<sup>rd</sup> phase on 1 July 2007 — the remaining provisions pertaining to M&As.

The Competition Commission was established under the Act on 1 January 2005 to administer and enforce the Act. The Competition Commission conducted public consultation in stages on the draft guidelines providing the conceptual, analytical and procedural framework by which it would administer and enforce the Act. The Competition Appeals Board was also established under the Act on 1 September 2005 to hear appeals relating to decisions made by the Competition Commission.

For further information see: <http://www.ccs.gov.sg>

Relevant law: *Competition Act*



# CHINESE TAIPEI

## Acronyms

CRBGP	Complaint Review Board for Government Procurement
FSC	Financial Supervisory Commission
FTC	Fair Trade Commission
MOEA	Ministry of Economic Affairs
NT\$	New Taiwan Dollar
PRC	People's Republic of China
TSEC	Taiwan Stock Exchange Co.

## INTRODUCTION

Chinese Taipei has always welcomed FDI. We have established a stable and comprehensive legal system under which multinational enterprises are protected and afforded the same rights as domestic enterprises.

Chinese Taipei places great importance on foreign investment. Laws and regulations governing such investment are amended as necessary in accordance with domestic development conditions and the international economic and trade situation, and every effort is made to remove investment obstacles and improve investment conditions. The government also provides other assistance to foreign nationals in Chinese Taipei.

Chinese Taipei opened its door to foreign portfolio investment in 1983. A sequential policy was adopted to first allow the indirect investment of funds raised overseas by domestic investment trust companies, followed by direct investment by qualified foreign institutional investors (1991) and then finally by all foreign natural persons (1996). Now, all foreign investors can invest in the securities market after simply registering with the Taiwan Stock Exchange Co. (TSEC).

Chinese Taipei has been striving to further the goals of investment liberalization and facilitation and has made the following progress in terms of regulatory reforms:

- The *Business Mergers & Acquisitions Law* was revised again and the latest amendment was promulgated on 5 May 2004. In addition to relaxing restrictions on acquisition limits, the procedures for merging a parent company and its subsidiaries are also simplified.
- The National Immigration Agency has adopted measures to facilitate the mobility of business visitors from The People's Republic of China (PRC). These measures include relaxing restrictions on enterprises inviting people from the PRC to come to Chinese Taipei to engage in business activities; lifting the requirement that a senior foreign executive of the company that a foreign professional works for must act as a guarantor for that professional's PRC spouse who comes to Chinese Taipei; canceling the requirement that the PRC spouses of

foreign professionals leave their passports in the custody of the authorities upon arrival in Chinese Taipei; giving permission to PRC professionals who have resided in Chinese Taipei for more than six months to buy cars or apply for credit cards in Chinese Taipei; and simplifying the procedure for the spouses of PRC personnel to apply to join them in Chinese Taipei, including making it much easier for them to obtain entry-exit permits and to apply for extension of stay or re-entry.

- On 24 May 2005 and 2 May 2006, the Council of Labor Affairs lowered the threshold for foreigners working in Chinese Taipei by announcing a revision of the Qualifications and Criteria Standards for Foreigners Undertaking the Jobs Specified in Items 1 to 6, Paragraph 1 of Article 46 of the *Employment Service Act*.
- On 1 July 2004, the Financial Supervisory Commission (FSC), consisting of nine commissioners, was formally established. The establishment of the FSC is intended to strengthen the independence and the professional capabilities, and to enhance the effectiveness of financial supervision so as to bring Chinese Taipei's financial institutions and enterprises in line with the norms and standards of the international financial market.
- On 2 August 2005, the FSC issued the Regulations Governing Offshore Funds, which allows offshore funds to be offered, sold, advertised, and promoted in Chinese Taipei.
- Free Trade Zones: currently, five Free Trade Zones have been established in Chinese Taipei — Keelung Harbor, Kaohsiung Harbor, Taichung Harbor, Port of Taipei, and Taoyuan Air Cargo Park. The management of Free Trade Zones is designed on the concept of “within physical territory but outside customs territory”, with a high degree of autonomy in company operations replacing administrative control by the government through the establishment of a single-window facility to boost administrative efficiency.
- On 4 October 2006, the Ministry of Economic Affairs (MOEA) implemented a Stage I Industrial Development Package Program, which has the goals of achieving US\$20,000 per capita GDP by 2009 and US\$30,000 per capita GDP by 2015. In the area of “Building a Superior Investment Environment,” the government will implement measures providing land on preferential terms, ensuring an ample labor supply, providing financing assistance, improving the administration efficiency of Environmental Impact Assessment, and establishing mechanisms for encouraging corporate investment. Apart from these measures to establish a superior investment environment, the government will also help companies to eliminate investment barriers, thus laying a solid foundation for industrial development and economic growth.

## SCREENING OF FOREIGN INVESTMENT

### (i) Overview

Chinese Taipei maintains a pre-establishment foreign investment screening process to ensure that foreign investments in Chinese Taipei are not contrary to the national interest.

- Investors are prohibited from investing in industries that may negatively affect national security, public order, good customs and practices, or national health, and those that are prohibited by law.

- Investors who apply to invest in an industry in which investment is restricted by law, or by an order given under the applicable law, need to obtain approval or consent from the competent authority in charge of the industry in question.
- Restricted and prohibited investment areas are stipulated in the “Negative List for Investment by Overseas Chinese and Foreign Nationals”, which is based on the principles in the above two paragraphs.

### *FDI*

Investors should first submit the name chosen for their company in Chinese Taipei to the Department of Commerce, MOEA, for verification and recording. For investments in ordinary industrial zones (excluding export processing zones and science parks), investors should file their applications with the Investment Commission, MOEA.

There are two different application forms for foreign investors, depending on whether the investment is a newly established enterprise or existing enterprise, or a capital increase in an existing enterprise.

The applicant must submit the following documents:

- four copies of the application form;
- documents providing proof of the foreign investor's identity. Natural persons must submit proof of nationality, and juridical persons must submit proof of their qualification as juridical persons;
- in case of delegation of an investor's representative, authorization documents recognized by a Chinese Taipei overseas mission in the investor's local area, or by a foreign mission in Chinese Taipei, must be submitted.

After receiving approval of their investment, investors may use their letter of approval to apply for inward remittance of capital and, after the completion of capital verification by the Investment Commission, may carry out company registration, business registration, and application for factory construction and utilities.

### *Branches or Representative Offices*

- **Branch Office:** First apply to the Department of Commerce, MOEA for investigation and approval of the foreign company's Chinese-language name and its business within Chinese Taipei, and then apply to the same department for foreign-company recognition, investment verification, and registration of branch office in Chinese Taipei. (For the establishment of branches within science parks or export processing zones, following application to the Department of Commerce for investigation and approval, application for branch office registration should be submitted to the Science Park Administration of the National Science Council or the Export Processing Zone Administration of the MOEA.) Then register the business with the department of reconstruction of the city or county government in the jurisdiction of which the branch is located.
- **Representative Office:** Report the establishment of the representative office to the Department of Commerce and obtain a certificate of approval.

## *Foreign Portfolio Investment*

All foreign investors can invest in the securities market after simply registering with the TSEC. While foreign individual investors are subject to a US\$5 million investment quota, foreign institutional investors are free of an upper limit on investment.

Further information is available at

<http://www.moeaic.gov.tw>

<http://gcis.nat.gov.tw>

<http://www.sfb.gov.tw>

### (ii) Transparency of the Screening Process

The Government seeks to ensure that foreign investment proposals are dealt with quickly and efficiently. Investors can check the progress of the screening process on the Chinese website of the Investment Commission. The time taken from the filing of a proposal to a decision varies, depending on the nature of the proposal and the contents of the submission.

- For investments or capital increases that involve no more than NT\$500 million and are not in areas listed in the “Negative List for Investment by Overseas Chinese and Foreign Nationals”, the examination procedure will be completed within an average of just two days.
- For investments or capital increases that involve NT\$500 million to NT\$1.5 billion and are not in areas listed in the Negative List for Investment by Overseas Chinese and Foreign Nationals, the examination procedure will be completed within an average of just three days.
- For major investment or capital increase cases that involve NT\$1.5 billion or more, or are in areas listed in the Negative List for Investment by Overseas Chinese and Foreign Nationals, the examination procedure will be completed within an average of 14 days.
- The examination procedure for applications to invest via merger, acquisition, or corporate splits, but which do not involve investment in the PRC and are not extraordinary cases, the examination procedure will be completed in an average of 21 days.

Quarterly and yearly statistical reports on the outcome of investment screening are available on the website of the Investment Commission at <http://www.moeaic.gov.tw/>. The Commission also makes hardcopies of the quarterly and yearly statistical reports publicly available.

### (iii) Investment Laws

*Statute for Investment by Foreign Nationals*: Stipulates protection and application procedures for investment by foreign nationals.

*Statute for Investment by Overseas Chinese*: Stipulates protection and application procedures for investment by overseas Chinese.

*Statute for Upgrading Industries*: Contains stipulations regarding tax incentives for the promotion of agriculture, industry, and services and regulations for the development of industrial zones.

Regulations for Verification of Investment by Overseas Chinese and Foreign Nationals:  
Contains stipulations related to the verification of foreign Investment.

Regulations Governing Investment in Securities by Overseas Chinese and Foreign Investors:  
Contains stipulations related to foreign investment in the domestic stock market and the overseas issuance of corporate bonds and global depository receipts by domestic enterprises.

Further information is available at

<http://investintaiwan.nat.gov.tw>

<http://www.moeaic.gov.tw>

<http://law.moj.gov.tw>

## SECTOR-SPECIFIC LAWS AND POLICIES

### (i) Banking

Foreign banks operating in Chinese Taipei already receive national treatment. Based on “Regulations Governing Foreign Bank Branches and Representative Offices”, a foreign bank is merely required to allocate a minimum operating capital of NT\$150 million after it obtains approval from the competent authority to establish a branch in Chinese Taipei. With this capital, the foreign bank may conduct all operations for which it is licensed and may fairly compete with domestic banks. In keeping with the principles of prudent banking supervision, the government accords national treatment in its regulation of foreign banks that have been approved to establish branches in Chinese Taipei.

The government introduced the *Financial Holding Company Act* on 9 July 2001. According to Article 23 of that Act, if a foreign financial holding company meets the following requirements and obtains the approval from the competent authority in Chinese Taipei, it may be exempted from establishing a new financial holding company in Chinese Taipei. The requirements also apply to foreign financial institutions which are "universal banks" as defined in their home countries.

- The foreign financial holding company meets the requirements of Article 9 of the *Financial Holding Company Act*;
- The foreign financial holding company has sufficient experience in operating and managing a financial holding company and has good credit;
- The competent financial regulatory authority in the foreign financial holding company’s home country has approved its investment in Chinese Taipei and agreed to jointly share supervisory responsibility;
- The competent financial regulatory authority in the foreign financial holding company’s home country and the foreign financial holding company’s head office have the capacity to supervise the subsidiary in Chinese Taipei on a consolidated basis; and
- The head office of the foreign financial holding company has appointed an agent for litigious and non-litigious matters in Chinese Taipei.

In general, foreign financial holding companies enjoy the same treatment as domestic financial holding companies under the applicable law as described above.

(ii) Insurance

Foreign investment in the insurance sector needs to be consistent with the *Insurance Act* of 2007, Regulations on Granting Special Approval and Administration of Foreign Insurance Companies of 2002, and insurance regulation policy, including prudential requirements. Any proposed foreign takeover or acquisition of a local insurance company will be considered on its merits on a case-by-case basis.

A foreign insurer who applies for establishment of a branch to engage in the insurance business in Chinese Taipei shall at least have a record of healthy business operations and safe financial ability for over the previous three years and have no record of punishment for a major violation in the previous five years, as evidenced by the competent authority of the home country.

Further information is available at <a href="http://www.ib.gov.tw">http://www.ib.gov.tw</a>
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(iii) Shipping

Article 2 of the *Ships Act* requires that, for a ship to be registered in Chinese Taipei, it must be owned by either the government, citizens, or a corporation or body corporate established in accordance with the laws of Chinese Taipei. In the case of a corporation, at least two-thirds of the capital shall be owned by citizens of Chinese Taipei. However, if the ship is engaged in international voyages, national-owned capital need only exceed one-half of total capital. The above-mentioned regulations conform with the common view of maritime service negotiations in the WTO.

(iv) Civil Aviation

According to Article 49 of the *Civil Aviation Act*, a civil air transport enterprise must be formed as a company organization. For a company limited by shares, at least two-thirds of its capital must be owned by Chinese Taipei citizens, and its board chairman and two-thirds of its board directors must be Chinese Taipei citizens. Foreign persons (including foreign airlines) can be approved to acquire up to 33.3% of the equity in a Chinese Taipei carrier.

To achieve the goal of bringing in experienced foreign management teams and forging alliances with foreign airlines, Chinese Taipei has formulated an aviation policy that calls for lifting the ceiling on foreign equity to 49%. The amendment of the Act has passed its first Legislative Yuan reading and is under further review.

(v) Transport

Article 35 of the revised *Highway Law* reads, “Non-Chinese Taipei Nationals or juristic persons may not invest in or operate motor vehicle transportation businesses within Chinese Taipei.

However, a foreigner may apply to the Ministry of Transportation and Communications for approval to operate car rental services and freight transportation services.”

(vi) Telecommunications

According to our commitments made for WTO accession in 2002, the foreign direct shareholding ratio and aggregate foreign shareholding ratio, including direct and indirect, of Type I (facilities-based) telecom enterprises, except for Chunghwa Telecom, may not exceed 20% and 60%, respectively. For the Type II (non-facilities-based) telecom businesses, there is no limitation on foreign investment.

In July 2002, Chinese Taipei voluntarily raised the ceiling on foreign direct shareholding in Type I telecom business from 20% to 49% except for the incumbent, Chunghwa Telecom, and eliminated the restriction that the majority of board members must be local citizens. This modification has been listed in our WTO commitment for the Doha round accordingly.

(vii) Media

*Motion pictures*

In accordance with the Motion Picture Law and its implementation bylaws, investment by foreign nationals in the motion picture industry (including motion picture production, distribution, screening and film processing) is subject to restrictions in such areas as the educational background of the responsible person and company capitalization. All investment applications must be accompanied by proof of identity, a floor plan of the business site as well as deed or lease contract, building certification, and fire safety and sanitation approval. Application for investment in film processing operations must also include a list of machinery and equipment.

*Radio and television program supply*

According to the *Radio and Television Law* and the Regulations Governing Radio and Television Program Supply, foreign investment in radio and television program supply, including production of radio programs, production of television programs, distribution of radio programs, distribution of television programs, radio and television advertising, and production and distribution of videotape programs, must meet minimum capital requirements and equipment standards.

*System operators of cable radio and television*

According to the *Cable Radio and Television Law*, foreigners investing in or operating cable radio and/or television systems in Chinese Taipei must meet the following conditions:

- The organization operating a cable radio and/or television system shall be a company limited by shares, established in accordance with the *Company Law*.
- Foreign investment — both direct and indirect — in a company operating a cable radio and/or television system shall be less than 60% of the total shares issued by the company. Direct shareholding by foreigners is limited to legal entities, and the sum of shares held by foreigners shall not exceed 20% of the total shares issued.

- At least two-thirds of the directors and at least two-thirds of the supervisors of a company operating a cable radio and/or television system shall have Chinese Taipei citizenship. The chairman of the board of directors shall be a citizen of Chinese Taipei.
- The national regulatory agency may reject applications by foreign investors planning to establish or operate a cable radio and/or television system in Chinese Taipei, without resolution by the Review Committee, if it deems that the foreign investment would have an adverse effect on national security, public order, or social morals.
- Applications by foreigners for investment in a cable radio and/or television system which involve any of the conditions described in the previous paragraph, and applications which violate Paragraph 2 of Article 19, shall be rejected.

#### *Satellite broadcasting businesses*

According to the *Satellite Broadcasting Law*, foreigners investing in or operating satellite broadcasting businesses in Chinese Taipei shall meet the following conditions:

- The organization of a satellite broadcasting business shall be in the form of a company limited by shares that is established in accordance with the *Company Law*, or a foundation.
- The total shares of a satellite broadcasting business directly held by foreign shareholders shall be less than 50% of the total shares issued by the said business.

#### (viii) Agriculture

According to the *Statute for Investment by Foreign Nationals* and the “Negative List for Investment by Overseas Chinese and Foreign Nationals”, foreign investment is prohibited or restricted in agronomic and horticultural crop production (with the exception that overseas Chinese may invest in flower growing), the livestock industry, hunting and the raising of animals for hunting, forestry (overseas Chinese are not restricted), fishery, and the manufacturing of agricultural chemicals (unless approved by the Council of Agriculture). Also, according to the *Agricultural Products Marketing Act*, foreigners are not permitted to set up wholesale markets in agricultural products.

#### (ix) Mergers

For any merger that falls within any of the following circumstances, notification shall be made to the Fair Trade Commission (FTC) prior to the realization of the merger:

- as a result of the merger the enterprise(s) will have a one-third market share;
- one of the enterprises in the merger has a one-fourth market share; or
- sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

Any enterprise in Chinese Taipei under any of the situations above should act according to the related regulations of the Fair Trade Act without discrimination in regard to foreign enterprises.

The sales amount threshold referred to in the preceding paragraph refers to the total sales or operating revenues of an enterprise. The amounts announced at present are as follows:

- where an enterprise in a merger is a non-financial one, its sales for the preceding fiscal year exceed NT\$10 billion, and the enterprise it merges with has a sales amount exceeding NT\$1 billion; and
- where an enterprise in a merger is a financial enterprise, its sales for the preceding fiscal year exceed NT\$ 20 billion, and the enterprise it merges with has a sales amount exceeding NT\$ 1 billion.

If the FTC takes no action within the 30-day waiting period, the merging parties are free to proceed with the proposed merger. Should there be a need for further investigation, the FTC can extend the period for 30 days but must make a written decision on the proposed merger.

Further information is available at <http://www.ftc.gov.tw/EnglishWeb/English.html>

(x) Real Estate

Chinese Taipei has liberalized foreign investment in real estate. Foreigners may acquire rights or create interests over land in Chinese Taipei in accordance with Articles 17 to 20 of the *Land Act*. The restrictions and conditions of land acquisition in Chinese Taipei by foreigners are as follows:

- Principle of reciprocity: Only aliens from countries that allow citizens of Chinese Taipei to acquire land may enjoy the same rights to acquire land in Chinese Taipei.
- Types of land: Land for forestry, aquaculture, salt plants, mineral deposit exploitation, water resources, and military bases and areas, and land adjacent to the national frontiers, may not be transferred to, used as collateral by, or leased to foreigners.
- Purposes of land use: For the purposes of personal use, investment or public welfare, aliens may acquire land for residences, business premises, offices, shops, factories, churches, hospitals, schools for children of foreigners, embassies or consulates, public welfare institutions offices, or cemeteries. In addition, aliens may acquire land for investments helpful or useful to major infrastructure projects, overall economic development, or agricultural and animal husbandry industries that are approved by the government authorities concerned.

Based on the principle of reciprocity, foreigners are permitted to lease or purchase land for residences, business premises, offices, shops, etc.

Aliens may acquire land without prior consent of the competent central government authorities when the land is to be used for residences, business premises, offices, shops, factories, churches, hospitals, schools for the children of aliens, chancelleries, facilities of non-profit organizations and cemeteries. However, foreigners acquiring land for investments helpful or useful to major infrastructure projects, overall economic development, or agricultural and animal husbandry industries should receive approval from the government authorities concerned.

Further information is available at <http://www.land.moi.gov.tw>

## INVESTMENT PROTECTION

### (i) Conversion, Repatriation and Transfers (including any Balance of Payments Safeguards)

Prior to February 1979, management of foreign exchange in Chinese Taipei was characterized by a central clearing and settlement system. At that time, Chinese Taipei established the Taipei Foreign Exchange Market and a managed float exchange rate system was formally implemented. Since then, the NT\$ exchange rate has been determined by market forces. However, when the NT\$ exchange rate is disrupted by seasonal or irregular factors and becomes more volatile than can be explained by economic fundamentals, the Central Bank will step in to restore order in the foreign exchange market.

Chinese Taipei has gradually liberalized regulations governing the conversion of the NT\$ to foreign currencies for the overseas transfer of funds in recent years. Remittances related to transactions in goods and services as well as investments approved by competent authorities are completely liberalized. For other transactions

- total annual remittances not exceeding US\$50 million by a company, total annual remittance not exceeding US\$5 million by an individual, and a single remittance not exceeding US\$100,000 by a non-resident may be carried out directly through authorized banks.
- for amounts exceeding, those given in the preceding paragraph, prior approval from the Central Bank is required.

Remittances related to foreign investments approved by the competent authorities are completely liberalized. That is, a company incorporated in Chinese Taipei or a foreign company registered in Chinese Taipei may freely repatriate funds related to profits, dividends, etc.

### (ii) Expropriation and Compensation

In cases where the investor's investment is less than 45% of the total capital of the invested enterprise, the investor shall be reasonably compensated if the government acquires or expropriates the invested enterprise because of national defense reasons.

The compensation afforded under the preceding paragraph shall be allowed to be exchanged and remitted.

In cases where the investor's investment is 45% or more of the total capital of the invested enterprise, such an enterprise shall not be subject to requisition or expropriation for a period of 20 years after commencement of business as long as the investor continues to hold 45% or more of the total capital. If the investor's investment is made in conjunction with overseas Chinese investment conforming to the *Statute for Investment by Overseas Chinese*, and the aggregate amount of investment is 45% or more of the total capital of the enterprise involved, the provision of the preceding paragraph shall still apply.

(iii) IPR

IPR protection laws in Chinese Taipei consist of the *Copyright Act*, the *Trademark Act*, the *Patent Act*, the *Trade Secrets Act*, the *Plant Variety and Plant Seed Act*, the *Integrated Circuit Layout Protection Act*, the *Tobacco and Alcohol Administration Act*, and the *Fair Trade Act*.

Chinese Taipei's current IP-related laws and regulations have been in full compliance with the WTO/TRIPS Agreement since its accession to the WTO in 2002. In addition, though Chinese Taipei is not a WIPO member, its Copyright Act is generally consistent with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The Taiwan Intellectual Property Office (TIPO) is the Chinese Taipei government agency responsible for patents, trademarks, copyrights, integrated circuit layouts, trade secrets and other IP-related matters.

To establish a secure legal environment for foreign investment, Chinese Taipei has implemented the following enforcement measures:

- completion of the “Implementation Plan for Enhancing Computer Software Protection” and the “Implementation Plan for Strengthening Preventive Measures Against Internet Infringements”,
- establishment of the Joint Internet Infringement Inspection Special Taskforce (JIST),
- establishment of the Joint Optical Disk Enforcement Taskforce (JODE) and the IPR Police, implementation of campaigns for the enhancement of public awareness,
- establishment of an IP Court which was approved by the Legislative Yuan in March 2007.

Further information is available at <http://www.tipo.gov.tw>

(iv) Dispute Settlement

In view of the fact that it is not now a signatory of ICSID, Chinese Taipei has moved to protect the interests of foreign investors and its own outward investors by signing agreements for the promotion and protection of investment with 26 countries and FTAs with five countries. All of these agreements contain a mechanism for dispute mediation.

In the spirit of the bilateral investment protection agreements and FTAs signed by Chinese Taipei, any dispute or disagreement arising from investment by a foreign national should be solved by the parties to the dispute themselves through amicable discussion. When a dispute cannot be resolved in this way, the two sides may agree to turn it over to the International Court of Commerce Court of Arbitration or other dispute settlement agency that enjoys public credibility for an international mediation process that ends in a final and compulsory judgment, and that provides a basis for resolution of the dispute through legal action. Disagreements between foreign investors and the administrative authorities can be resolved through diplomatic channels or through general administrative relief appeal methods.

There has been no investment dispute in Chinese Taipei during the last three years.

## INVESTMENTS AND DEVELOPMENT

### (i) Performance Requirements

There are no performance requirements imposing limits on trade and investment or any TRIMS in Chinese Taipei.

### (ii) Other Policy Measures affecting Inward Foreign Investment

Chinese Taipei does not adopt policies affecting foreign investment that are used to promote broad economic development objectives.

## INVESTMENT PROMOTION AND INCENTIVES

### (i) Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)

The Department of Investment Services (DOIS, formerly known as the Industrial Development and Investment Center, IDIC) serves to promote Chinese Taipei an investment destination among foreign and Chinese Taipei businesses, and to consolidate the strength of public and private-sector businesses in Chinese Taipei. The DOIS carries out industrial assistance programs to help Chinese Taipei companies operating overseas to develop their businesses on both the local and international levels. In addition, the DOIS plans and formulates programs to recruit science and technology personnel from abroad and maintains a talent search database to assist Chinese Taipei companies in their recruitment efforts.

Department of Investment Services  
Ministry of Economic Affairs  
8th Fl., 71 Kuan Chien Rd., Taipei 100-47  
Taiwan  
Telephone (886 2) 2389 2111  
Facsimile (886 2) 2382 0497  
Email: [dois@moea.gov.tw](mailto:dois@moea.gov.tw)  
Website: <http://www.dois.moea.gov.tw>

The DOIS has no branches overseas. It works through commercial divisions under the MOEA in more than 60 different countries.

The names and addresses of these units are available at <a href="http://www.moea.gov.tw">http://www.moea.gov.tw</a>
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### (ii) Fiscal, Financial, Tax and Other Incentives

In order to create a favorable tax environment, different kinds of tax incentives and measures are offered through the *Statute for Upgrading Industries*. The incentives are as follows.

- Incentives for automation
  - Companies can enjoy a 5% to 20% tax credit against business income tax payable for

expenditures for purchasing automated equipment and production technologies. (The deduction rate in 2006 for automated equipment is 7% and that for automated technology is 5%).

- Companies are also eligible for low-interest loans for the purchase of automated equipment and machinery.
- Incentives for R&D and personnel training
  - Companies can enjoy a 30% tax credit against business income tax payable for expenditures on new-product R&D, improving production technology, and advanced technology for labor service and manufacturing processes.
  - Equipment and machinery exclusively used for R&D, experimentation or quality inspection can be fully depreciated over a two-year period.
  - When patent rights are provided or sold to companies in Taiwan, only 50% of the royalty payment is calculated as the taxable value for purposes of personal income tax.
  - Companies can enjoy a 30% tax credit against business income tax payable for expenditures on personnel training relevant to the company's business activities.
- Incentives for newly emerging and strategic industries
  - A tax credit of up to 20% of the capital investment made by a corporate investor in a newly emerging and strategic industry can be applied against its business income tax payable. In the case of an individual investor, the tax credit may be as high as 10%. (The deduction rate for individual investors in 2006 is 7%.)
  - Alternatively, companies in a newly emerging and strategic industry may choose to be exempted from business income tax for a five-year period (tax holiday). This exemption requires that shareholders waive their investment tax credit by passing a resolution to this effect at a shareholders' meeting within two years from the date of the first stock subscription by shareholders.
- Investment in disadvantaged regions
  - If a company makes an investment of up to a specific amount of its capital (more than NT\$ 25 million) or employs a specific number of employees (a monthly average for the year at least 50 employees) in specific industries of a county or township area with scarce natural resources or with slow development, then it may credit 10% or 15% of the total amount of its investment against the amount of profit-seeking enterprise income tax payable in each year for a period of 5 years from the then current year.
- Incentives for pollution control and energy conservation
  - Companies making investment in equipment and technology for pollution control and resource conservation can be granted a 5% to 20% tax credit against the business income tax payable for expenditures on the equipment and technology. (The deduction rate in 2006 for equipment is 7%, and that for technology is 5%.)
  - Exemptions from import tariffs are available for equipment (including components)

used exclusively for air-pollution prevention and control, noise and vibration control, water-pollution control, toxic chemical-substance pollution control, waste clean-up, soil and groundwater contamination remediation, and environmental analysis.

- Machinery and equipment purchased for pollution control and resource conservation or for the use of new and clean energy may be fully depreciated over a two-year period.
- Incentives for establishment of logistics and distribution centers
  - For any foreign profit-seeking enterprise or its branch office in Chinese Taipei which sets up, by itself or through a local profit-seeking enterprise on its behalf, a logistics or distribution center in Chinese Taipei to engage in the storage, elementary processing, and delivery of products supplied by the foreign company to its customers located in Chinese Taipei, the revenue derived from such activities shall be exempted from the profit-seeking enterprise income tax.
- Incentives for establishment of operations headquarters
  - For companies that establish operations headquarters in Chinese Taipei that reach a certain scale and that have a major economic effect, the income that they derive from the provision of management services or R&D to the related companies which they acquire in Chinese Taipei, as well as royalty income, profit from investment, and gain from the disposition of properties, are exempt from the profit-seeking-enterprise income tax; in addition, such companies may procure publicly owned land at preferential prices.
- Subsidies for encouraging the development of leading new products
  - In order to encourage new product development by private manufacturers with R&D potential, and to share some of the burden of risk, the government may provide a subsidy of up to 40% of the cost of development. If the applicant proposes to market its product internationally under own brand name, the government may provide a subsidy of up to 50% of the cost of development.
- Government participation in investment
  - Investors can ask the government to participate in their investment projects to a maximum of 49% of the total capitalization.
- Industrial development package program
  - Four years' rent-free and 6 years' half-rent for government-owned land. The government expects to be able to provide 100 hectares of national land to county and city governments in order to facilitate their promotion of investment.
  - Releasing Taisugar land. Taisugar plans to improve its land use efficiency by providing more than 4,374 hectares for the use of investing corporations.
  - Extending and expanding the “006688” land-lease program in Phase 2. The government projects that this measure can attract NT\$190.2 billion in investment from 2005 to 2008.

- The Development Fund will set aside NT\$20 billion for participation in investments involving conventional industries not considered emerging/important/strategic industries; the fund will generally provide 20% of the investment in each case.

(iii) Free Trade Zones or 'Special Investment Areas'

*Export Processing Zones*

Thanks to the highly efficient systems resulting from their unified authority and simplified procedures, Export Processing Zones (EPZs) have long played a major role in Chinese Taipei's economic development. The special incentives of EPZs are as follows:

- Exemption from import taxes, commodity taxes, business taxes, contract taxes, and trade promotion service fees.
- A 50% reduction of the building tax for self-use production facilities, lowering the taxation rate to only 1.5%.

Further information is available at <http://www.epza.gov.tw>

*Science Parks*

The objectives of the development of science parks are to establish a base for the development of high-tech industries and to mould a human-based environment for high-quality R&D, production, work, life, and leisure, and further to promote industrial upgrading. The special incentives of science parks are as follows:

- Exemption from import taxes, commodity taxes, business taxes, contract taxes, and trade promotion service fees.
- Investors can apply for government participation in investments, with the maximum investment amount capped at 49% of principal.
- The Science Park Administration may provide grants for innovative technology R&D work. Approved R&D projects may be awarded grants of up to NT\$5 million; so long as the amount of a grant does not exceed 50% of total funding required for the project.

*Free Trade Zones*

Free Trade Zones integrate the flow of information, funds, business, and goods needed for global logistics, allowing companies operating the zones to complete all of the transnational economic processes involved in product supply, ordering, shipping, and sale in Chinese Taipei. The special incentives of Free Trade Zones are as follows:

- Exemption from import taxes, commodity taxes, business taxes, tobacco and wine taxes, tobacco product health welfare donations, trade promotion service fees, and harbor service fees.
- Free Trade Zone enterprises can hire alien workers up to 40% of their total work force.

## MOBILITY OF CAPITAL AND TECHNOLOGY

Capital movements not involving the conversion of NT\$ are completely liberalized. If they involve the conversion of NT\$, capital movements relating to direct investment or portfolio investment approved by the competent authorities are completely liberalized. Other than that, individuals and groups whose foreign exchange payments, receipts, or transaction values do not exceed US\$5 million or an equivalent amount each year may apply to any authorized foreign exchange bank to make remittances. A company incorporated in Chinese Taipei and a foreign company registered in Chinese Taipei may freely settle up to US\$50 million or an equivalent amount each year without prior approval. A non-resident is allowed to buy or sell up to US\$100,000 or the equivalent against the NT\$ for each foreign exchange transaction. For capital movements exceeding the above-mentioned amounts, prior approval from the Central Bank is required.

To conform to international norms, strengthen the protection of strategic technology, and prevent unauthorized shipment to prescribed countries, the Board of Foreign Trade has promulgated “Export Control Lists for Strategic High-Tech Commodities”. Commodities and technology involved in commodities covered by the lists can be exported only upon issuance of an export permit by the competent authorities.

## LABOR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

Chinese Taipei’s main labor laws are the *Labor Union Law*, *Collective Agreement Law*, *Settlement of Labor Disputes Law*, *Protective Act for Mass Redundancy of Employees*, *Labor Standards Act*, *Gender Equality in Employment Act*, *Labor Pension Act*, *Employees’ Welfare Funds Act*, *Labor Insurance Act*, *Employment Insurance Law*, *Labor Safety and Health Act*, *Protection for Workers Incurring Occupational Accidents Act* and *Employment Services Act*. Chinese Taipei’s domestic law does not discriminate between foreign and locally owned enterprises. Accordingly, a foreign firm employing local workers has exactly the same legal obligations in relation to conditions of employment and related matters as any local firm in a similar situation.

According to the *Labor Insurance Act*, employers are required to participate in the labor insurance scheme for their workers. For the purpose of building a complete employment security system, unemployment insurance is combined with the vocational training and employment service system, and the *Employment Insurance Law* was implemented on 1 January 2003. An employed local worker, of 15 years of age and over and less than 60 years of age, is required to join the employment insurance program as an insured person through his or her employer or the establishment to which he or she belongs.

Further information is available at

<http://www.cla.gov.tw>

<http://www.bli.gov.tw/english>

(i) Domestic labor laws which apply to foreign firms in the context of labor disputes/relations

According to Chinese Taipei's labor laws and regulations, the *Settlement of Labor Disputes Law* applies to disputes arising between employer(s) or employing organizations and worker(s) or workers' organizations. The *Protective Act for Mass Redundancy of Employees*, promulgated on 7 February 2003, has the purpose of protecting the right to work of employees, moderating management rights, and preventing damage to the rights and interests of employees that may result from mass redundancy of employees by a business entity. For workers employed by enterprises (both foreign and local) covered by the Labor Standard Act, his/her wage (including minimum wage), work time, overtime work, work breaks, holidays and dismissal shall be handled according to regulations stipulated in that Act. Under the *Labor Pension Act* as implemented on 1 July 2005, all employers are required to deposit 6% (or more) of a worker's monthly wages into an individual labor pension account managed by the Bureau of Labor Insurance, with ownership going to the worker.

Further information is available at

<http://www.cla.gov.tw>

Information on the New Labor Pension System is also available at

<http://www.bli.gov.tw/english>

(ii) Permits/entry visa requirements for non-resident staff of foreign firms

Except for the 30-day visa-exempt entry provision that applies to citizens of specified countries, or unless otherwise stipulated, all foreigners wishing to enter Chinese Taipei are required to obtain a proper visa prior to entry.

According to Articles 12 and 13 of the Regulations for Issuance of Visas on Foreign Passports, a visitor visa may be issued to foreigners who intend to stay in Chinese Taipei for less than six months for the purpose of engaging in business. The holder of a visitor visa may stay in Chinese Taipei for a maximum of 90 days, and may, if necessary, apply at the nearest city/county police headquarters for an extension up to 90 days (if the duration of stay of visitor visa is 60 days, the holder may apply for a maximum of two extensions of up to 60 days each). In principle, no extension will be granted to holders of visas that bear a restrictive stamp reading 'NO EXTENSION WILL BE GRANTED', or a restrictive duration of stay of 14 or 30 days. Holders of the APEC Business Travel Card are entitled to multiple entries for up to 90 days' stay each time.

(iii) Restrictions on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members.

The employers of foreign nationals who come to Chinese Taipei to take up employment or who have been dispatched to Chinese Taipei to conduct business should first apply for a work permit from the Council of Labor Affairs in accordance with the stipulations of the *Employment Services Act*. For such persons who enter Chinese Taipei to engage in professional technical work needed to fulfill hire-of-work, buying or selling, or technical cooperation contracts, a visa for a stay of up to 14 days will be viewed as a work permit; for stays of 15 to 90 days, the person involved may carry out the necessary supplementary procedures after entering Chinese Taipei.

Foreign investors in charge of a foreign-invested enterprise or the branch office of a foreign company (including directors, supervisors, legal representatives, and non-legal representatives) may, with a letter of approval from the MOEA, apply for an alien resident certificate from the Bureau of Consular Affairs, Ministry of Foreign Affairs without first obtaining a work permit.

- (iv) Laws or policies that restrict appointments by foreign investors to senior management positions or the board of directors.

According to Article 15 of the *Statute for Investment by Foreign Nationals*, a foreign investor or a legal representative designated by him/her may assume the chairmanship or vice-chairmanship of the board of the business invested.

## **GOVERNMENT PROCUREMENT**

Since the enactment of the *Government Procurement Act* in 1999, Chinese Taipei's government procurement system has conformed to international norms. While conducting procurement, government entities are required to follow fair and open procurement procedures.

The enforcement of this Act has created a transparent and fair government procurement market and ensured more effective and efficient utilization of public resources. In addition, Chinese Taipei has established a Complaint Review Board for Government Procurement (CRBGP) as an impartial and independent mechanism for suppliers to seek resolution of complaints, with a view to providing a non-discriminatory, timely, transparent, and effective bid-challenge system.

If procuring entities are in breach of the *Government Procurement Act*, suppliers may use the bid-challenge procedures to protect their interests. All domestic and foreign suppliers who seek resolution of their complaints through CRBGP are treated equally.

According to Articles 17, 43 and 44 of the *Government Procurement Act*, local/foreign suppliers or local/foreign products may be accorded differential treatment except when otherwise prohibited by the treaties or agreements to which Chinese Taipei is a party.

Such treatment may include a required ratio of domestic procurement, technology transfer, investment, export facilitation or price preference to a maximum of 3%. The margin of price preference and the starting and the expiry dates of the price-preference period for particular tenders are published in the "Government Procurement Gazette". Since the *Government Procurement Act* came into effect, there has been no instance of such a price preference being published as the scope to which the preference may be applied has not yet been prescribed.

Further information is available at <http://www.pcc.gov.tw>

## COMPETITION POLICY

The *Fair Trade Act* was promulgated on 4 February 1991 and implemented a year later. The Act is meant to work in concert with the government's liberalization and internationalization policies.

It aims to maintain trading order, protect consumers' interests, ensure fair competition, and promote economic stability and prosperity. The entities subject to the regulation of the Act include companies, sole proprietorships or partnerships, trade associations, and any other person or organization engaging in transactions through the provision of goods or services.

The Act covers a wide range of anti-competitive behavior, including the anti-competitive practices of monopolies, concerted actions, mergers, price discrimination and other vertical restraints, and unfair trade practices such as passing-offs, counterfeiting, false and misleading advertising, commercial disparagement, multi-level sale schemes (i.e. pyramid sales) and deceptive or grossly unfair trade practices.

The Fair Trade Commission (FTC) was established on 27 January 1992 as a ministerial-level agency, to serve as the central competent authority in charge of competition policy and the Fair Trade Act in Chinese Taipei.

The Commission has nine full-time Commissioners, each appointed for a three-year renewable term. One of the Commissioners serves as the Chairperson and another as Vice-Chairperson. The Commissioners meet at least once every week to deliberate fair trade policies, laws and regulations related to fair trade, approvals and disciplinary actions, and all other matters related to the enforcement of the *Fair Trade Act*.

Decisions of the Commission are made by majority vote of a quorum of the membership. All Commissioners should be free from interference by political parties and exercise their authority independently according to the law. For the handling of any matter provided for in the *Fair Trade Act* that concerns the authority of any other ministry or commission, the FTC may consult with the ministry or commission involved.

Further information is available at <http://www.ftc.gov.tw/EnglishWeb/English.html>



## THAILAND

### Acronyms

ADRO	Alternative Dispute Resolution Office
BIBF	Bangkok International Banking Facilities
BOI	Board of Investment
BOT	Bank of Thailand
DvP	Delivery versus Payment
EPZ	Export Processing Zone
FBA	Foreign Business Act
IBF	International Banking Facilities
IEAT	Industrial Estate Authority of Thailand
JPPCC	Joint Public and Private Consultative Committee
JSCCIB	Joint-Standing Committee on Commerce, Industry and Banking
MAI	Market for Alternative Investment
MIGA	Multilateral Investment Guarantee Agency
MOU	Memorandum/a of Understanding
NTC	National Telecommunications Commission
OD	Optical disc
OSS	One-Stop Service
PAT	Port Authority of Thailand
ROH	Regional Operating Headquarters
SEC	Securities and Exchange Commission
SET	Stock Exchange of Thailand
TAFTA	Thailand-Australia Free Trade Agreement
TAI	Thai Arbitration Institute
TSD	Thailand Securities Depository Co., Ltd.

## INTRODUCTION

### (i) FDI

Thailand recognizes the important contribution of foreign investment to the domestic economy. The Board of Investment (BOI) was established to encourage foreign as well as local investment. Various measures have been initiated to attract more foreign investment that contributes to the country's industrialization process. Over recent years, strong emphasis has been placed on industrial decentralization to address the economic imbalance between urban and rural areas. Thailand's investment promotion policies are geared towards this goal.

Another major policy theme is liberalization and competitiveness enhancement; where recent focused areas for the latter are development of industrial clustering, skills and technology, and value chain. The Government continues to implement measures to encourage an active role for the private sector, both Thai and foreign.

Two major channels are open for foreign investors interested in doing business in Thailand. One is a special track under the investment promotion schemes of the BOI as mentioned above. Tax and non-tax incentives are provided to promoted companies. Although investment promotion is limited to businesses in the BOI List of Activities Eligible for Investment Promotion, it covers almost all manufacturing activities and several areas of services. Currently, the total number of business sub-sectors in the BOI promotion list is 273. See further details in the section on "Investment Promotion and Incentives".

The incentive package provided by the Industrial Estate Authority of Thailand (IEAT) is another scheme under the special track. Tax exemption and non-tax incentives are available for firms located in industrial estates run by the IEAT. See further details in the section on "Investment Promotion and Incentives".

The other channel is a normal track under the *Foreign Business Act* B.E. 2542 (1999) (FBA) which allows foreigners to own up to 100% of total shares in most businesses except those specified in the three lists of restricted business. The committee set up under the FBA is assigned to review the lists once a year, and presents its recommendations to the Commerce Minister. See further details in the section on "Screening of Foreign Investment".

Since the early 1990s, Thai companies have been investing overseas. Thailand has encouraged Thai investors to look for new sources of raw materials and diversified markets. Several Thai conglomerates have made extensive investment overseas, mostly in other countries in Asia, such as the People's Republic of China, the Indochinese states and Indonesia.

As for the Thai private sector, the Federation of Thai Industries welcomes foreign investors to its 35 industry clubs. As FDI would bring in new technology, provide access to new markets, and introduce new management skills to local companies, it is expected that these benefits would extend to local Thai companies. Especially, technology development is the main target for most Thai business people who are keen to do joint ventures with foreign investors.

In the past five years, Thailand has made considerable progress in liberalizing its services and manufacturing sectors, both on a general basis and to comply with its commitments under international agreements. Such progress may be evident from Thailand's signature to the following:

- The Protocol to Implement the Third Package of Commitments under the ASEAN Framework Agreement on Services (31 December 2001).

- The Thailand-Australia Free Trade Agreement (TAFTA) (5 July 2004).
- The Protocol to Implement the Fourth Package of Commitments under the ASEAN Framework Agreement on Services (3 September 2004).
- The Thailand-New Zealand Closer Economic Partnership Agreement (19 April 2005).
- In addition, the threshold of foreign equity participation in the telecommunications' business (for second and third category licensees) was raised from 25% to 49% in accordance with the *Telecommunications Business Act* No. 2 (January 2006).

(ii) Portfolio Investment

The Securities and Exchange Commission (SEC) is responsible for regulating securities businesses in Thailand. The SEC was established in 1992 under the *Securities Exchange Act* B.E. 2535 (1992) (SEA). Pursuant to the SEA, the SEC is empowered to supervise and develop the primary and secondary markets of the country's capital market system as well as finance or securities-related participants and institutions. Its primary role is to formulate policies, rules and regulations regarding supervision, promotion and development of the securities sector, as well as other activities relating to securities businesses, securities exchange, other organized securities trading centers, and entities related to securities businesses; including the issuance and offering of securities for sale to the public, the acquisition of securities for business takeovers, and the prevention of unfair securities trading practices.

SEC policy objectives in supervising and developing Thailand's capital market are to maintain fairness in the financial market, to develop and enhance the efficiency of the market, to maintain long-term stability of the financial system, and to strengthen international competitiveness of the market. In this regard, the three-year strategic plan (2006-2008) focuses on four major goals:

- to enhance accessibility to the capital market with quality products for capital mobilization and public investment;
- to promote integrity of market mechanisms;
- to complete market infrastructure and be able to compete in the international arena; and
- to maintain high professional standards for the SEC as a securities regulator.

Foreign investors are welcome to invest in the Thai securities market. Thailand's only authorized secondary securities market is the Stock Exchange of Thailand (SET), which is regulated by the SEC. The SET was established by a specific law in 1974 and began trading operations on 30 April 1975, long before the SEC came into existence. As defined in the *Securities Exchange Act*, the SET's primary roles are to serve as a center for the trading of listed securities, to provide essential systems needed to facilitate securities trading, and to undertake any businesses relating to the securities exchange; such as a clearing house, a securities depository center, a securities registrar, or similar activities as approved by the SEC. In 1998, the Market for Alternative Investment (MAI) was established as a business unit of the SET, with an objective to open up fund-raising opportunities for SMEs as well as to provide a greater range of investment alternatives for investors.

Trading on the SET has been fully computerized since April 1991. The trading system operated at the SET is the Automatic Order Matching system, which performs order-matching processes according to price and time priorities, without human intervention. All trading transactions on the

SET are cleared and settled within the third consecutive business day following the trading day (T+3). The clearing and settlement process is managed by Thailand Securities Depository Co., Ltd. (TSD), a wholly owned subsidiary of the SET. The TSD is the only clearinghouse and central securities depository in Thailand, implementing a multilateral netting system for the clearing and settlement of securities traded on the SET, in addition to being the industry's main share registrar. The TSD has implemented Delivery versus Payment (DvP) in its clearing and settlement system in order to reduce risks to the clearing house, as well as to increase liquidity in the secondary market.

At the end of 2005, the SET index closed at 713.73 points, up by 45.63 points or 6.8% higher than 2004 year-end. The annual turnover value for 2005 was recorded at 4,031 billion baht (US\$100 billion) with an average daily turnover of 16 billion baht (US\$409 million). At the end of 2005, 468 companies were listed on the SET and 36 companies on the MAI, with a total market capitalization of 5,119 billion baht (US\$127.13 billion), which was about 72% of GDP. From the beginning of 2005 until the end of the first quarter of 2006, there were 52 newly listed companies on the SET with a total offering value of 21 billion baht (US\$536.98 million). As of 2005, the SET's dividend yield grew to 3.4% compared to 2.8% at the end of 2004; and the MAI's dividend yield grew to 4.8% compared to 1.4% at the end of 2004.

Investors in the SET can be divided into three groups: local individual investors, local institutional investors and foreign investors. Local individuals make up the largest group. Their annual turnover in the market was as high as 62% of the market's total turnover in 2005. Foreign investors made up 28% of the market's total turnover, compared to 21% in 2004. The total buying and selling value for foreign investors was 2,248 billion baht (US\$56 billion) in 2005, compared to 2,121 billion baht (US\$53 billion) in 2004, evidencing the steady growth of interest shown by foreign investors in the Thai securities market.

### (iii) Flows of Capital and Loans

In terms of capital flows, both inward direct and portfolio investments are freely permitted. Non-residents may lend in foreign currency to residents without restriction. Both capital and loans can be freely transferred into the country and must be surrendered to an authorized bank or deposited in a foreign currency account with an authorized bank in Thailand within seven days of receipt. Repatriation of investment funds and repayments of overseas borrowing in foreign currency can be remitted freely upon submission of supporting evidence.

In the past five years, Thailand has made progress in liberalizing its control on capital flows as follows:

- Regulations on FDI by residents were relaxed in 2002 to allow residents to invest in offshore companies where they have 10% of shareholdings or more (previously 25% or more).
- Since 2003, some institutional investors have been allowed to invest in certain securities abroad within pre-approved annual limits.
- In 2006, the limit on balances in residents' foreign currency deposit accounts was raised from US\$10 million (or equivalent) to US\$50 million (or equivalent).

## SCREENING OF FOREIGN INVESTMENT

As mentioned above, there are two major channels for applying to do business in Thailand. One is the normal track under the FBA and the other is a special track under investment promotion schemes. This section provides brief information on these two channels.

### (i) Relevant Laws and Regulations

#### *Foreign Business Act B.E. 2542 (1999)(FBA)*

This legislation applies to the following: (1) natural persons not of Thai nationality; (2) juristic persons not registered in Thailand; (3) juristic persons registered in Thailand with at least half of their capital shares owned by foreigners; and (4) a limited partnership or a registered ordinary partnership having a foreigner as a managing partner or manager.

N.B. Revision of the FBA, particularly the definition of ‘foreign company’ was discussed at the beginning of 2007. Please refer to the Department of Business Development website for further details: [www.dbd.go.th](http://www.dbd.go.th)

The FBA sets out three categories of business activities where the above foreign persons and foreign legal entities are: (1) prohibited from operating, (2) permitted to operate by the Minister with the approval of the Cabinet or (3) permitted to operate by the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. No restriction on foreign equity participation is imposed on activities not covered by this Act. However, other specific laws that limit foreign equity ownership may apply to some businesses in Lists 1, 2 and 3 of the FBA. See further the section on “Sector-Specific Laws and Policies”.

#### *Investment Promotion Act B.E. 2520 (1977)*

This legislation sets out principles and procedures for investment promotion, including protection, guarantees, tax and non-tax incentives offered to investors in Thailand.

#### *BOI Announcement No. 1/2543 (2000)*

This announcement replacing the BOI Announcement No.1/2536 (1993) came into effect on 1 August 2000. It spells out the new policy and criteria for granting investment promotion, including joint-venture criteria and incentive schemes.

#### *Industrial Estate Authority of Thailand Act B.E. 2522 (1979)*

This legislation sets out the incentives granted by the IEAT to those who have a factory or operation in the industrial estates, including tax and non-tax incentives offered to investors at IEAT.

### (ii) Investment Review and Approval

#### Foreign Business Act

In general, foreign investors are welcome to invest in most businesses in Thailand, except those businesses listed in the FBA.

The FBA does not apply to foreigners engaging in business in Thailand by permission of the Thai Government for a definite duration or by an agreement between the Thai Government and a foreign government. Access to certain services sectors is on a reciprocal basis.

The FBA, which replaces the *Alien Business Law* of 1972, came into effect on 3 March 2000. Under the FBA, controlled businesses are divided into three lists:

Sectors	Nature of Exception (e.g. prohibition, limitation, special conditions and special screening)
<p><b>List 1: “Businesses not permitted for foreigners to operate due to special reasons”</b></p> <p>(1) Newspaper business, radio broadcasting or television station business</p> <p>(2) Rice farming, farming or gardening</p> <p>(3) Animal farming</p> <p>(4) Forestry and wood fabrication from natural forests</p> <p>(5) Fishery for marine animals in Thai waters and within Thailand’s specific economic zones</p> <p>(6) Extraction of Thai herbs</p> <p>(7) Trading and auctioning Thai antiques or national historical objects</p> <p>(8) Making or casting Buddha images and monks’ alms bowls</p> <p>(9) Land trading</p>	<p>Foreign equity participation must be lower than half of the registered capital.</p>
<p><b>List 2: “Businesses related to national safety or security or affecting arts and culture, tradition, folk handicraft or natural resources and environment”</b></p> <p>Group 1: National safety/security-related businesses</p> <p>(1) Production, selling, repairing and maintenance of:</p> <p>(a) Firearms, ammunition, gunpowder, explosives.</p> <p>(b) Accessories of firearms, ammunition and explosives.</p> <p>(c) Armaments, ships, aircraft or military vehicles.</p> <p>(d) Equipment or components, all categories of war materials.</p>	<p>Foreigners operating a business under this list must meet the following two qualifications:</p> <p>1. At least 40% of all the shares must be held by Thai persons or juristic persons who are not foreigners. (Given reasonable cause, the minimum may be lowered to 25% by the Minister with the Cabinet's approval)</p> <p>2. The number of Thai directors shall not be less than two-fifths of the total number of directors</p>

Sectors	Nature of Exception (e.g. prohibition, limitation, special conditions and special screening)
<p>(2) Domestic land, waterways or air transportation, including domestic airline business.</p> <p>Group 2: Businesses affecting culture, traditional and folk handicrafts:</p> <p>(1) Trading antiques or art objects of Thai arts and handicraft.</p> <p>(2) Production of carved wood.</p> <p>(3) Silkworm farming, production of Thai silk yarn, weaving Thai silk or Thai silk pattern printing.</p> <p>(4) Production of Thai musical instruments.</p> <p>(5) Production of goldware, silverware, nielloware and lacquerware.</p> <p>(6) Production of crockery using Thai arts and culture.</p> <p>Group 3: Businesses affecting natural resources or the environment:</p> <p>(1) Manufacturing sugar from sugarcane.</p> <p>(2) Salt farming, including underground salt.</p> <p>(3) Rock salt mining.</p> <p>(4) Mining, including rock blasting or crushing.</p> <p>Wood fabrication for furniture and utensil production.</p>	

Sectors	Nature of Exception (e.g. prohibition, limitation, special conditions and special screening)
<p><b>List 3: “Businesses which Thai nationals are not yet ready to compete with foreigners”</b></p> <p>(1) Rice milling and flour production from rice and farm produce.</p> <p>(2) Fishery, specifically marine animal culture.</p> <p>(3) Forestry from forestation.</p> <p>(4) Production of plywood, veneer board, chipboard or hardboard.</p> <p>(5) Production of lime.</p> <p>(6) Accounting services business.</p> <p>(7) Legal services business.</p> <p>(8) Architecture service business.</p> <p>(9) Engineering service business.</p> <p>(10) Construction except for:</p> <p>(a) Construction rendering basic services to the public in public utilities or transport requiring special tools, machinery, technology or construction expertise, where the foreigner’s minimum capital is 500 million baht or more; or</p> <p>(b) Other categories of construction prescribed by ministerial regulations.</p> <p>(11) Broker or agency business, except:</p> <p>(a) Broker or agent for underwriting securities or services connected with future trading of commodities or financing instruments or securities.</p> <p>(b) Broker or agent for trading or procuring goods or services necessary for production or rendering services among affiliated enterprises.</p> <p>(c) Broker or agent for trading, purchasing or distributing, or seeking both domestic and foreign markets, for selling domestically manufactured or imported goods in the manner of international business operations, where the foreigner’s minimum capital is 100 million baht or more.</p>	<p>Foreign equity participation must be lower than half of the registered capital, except in the case where permission is granted by the Director-General of the Department of Business Development with the approval of the Foreign Business Committee</p>

Sectors	Nature of Exception (e.g. prohibition, limitation, special conditions and special screening)
<p>(d) Broker or agent in other categories as prescribed by ministerial regulations.</p> <p>(12) Auction, except:</p> <p>(a) Auction in the manner of international bidding not being the auction of antiques, historical artifacts or art objects which are Thai works of arts, handicraft or antiques or having historical value.</p> <p>(b) Other categories of auction as prescribed by ministerial regulations.</p> <p>(13) Internal trade connected with native products or produce not yet prohibited by law.</p> <p>(14) Retailing all categories of goods with the total minimum capital less than 100 million baht, or less than 20 million baht per shop.</p> <p>(15) Wholesaling all categories of goods with a total minimum capital of each shop less than 100 million baht.</p> <p>(16) Advertising business.</p> <p>(17) Hotel business, except for hotel management services.</p> <p>(18) Guided tours.</p> <p>(19) Selling food or beverages.</p> <p>(20) Plant cultivation or propagation business.</p> <p>(21) Other categories of service business except those prescribed in ministerial regulations.</p>	

(iii) Investment Promotion Schemes

Under the *Investment Promotion Act* B.E. 2520 (1977), as amended by the *Investment Promotion Act* (No.2) B.E. 2534 (1991) and the *Investment Promotion Act* (No.3) B.E. 2544 (2001), the BOI may approve the promotion of investment projects in agriculture, animal husbandry, fishery, mineral exploration and mining, manufacturing, and service sectors when it considers that the products, commodities and services:

- (1) are either unavailable or insufficiently available in Thailand or are produced by an outdated process;

- (2) are important and beneficial to the country's economic and social development and to national security;
- (3) are economically and technologically appropriate, and have adequate preventive measures against damage to the environment.

The BOI reviewed Thailand's investment promotion policy, which has been effective since 1 August 2000. The new policy focuses on:

- (1) Enhancement of efficiency and effectiveness of tax privileges and good governance principles;
- (2) Encouragement of quality and production-standard development;
- (3) Compliance with international trade and investment agreements, such as the abolishment of export and local content requirements;
- (4) Decentralization of investment to low income and disadvantaged regions; and
- (5) Promotion of small and medium size industries.

In addition, the BOI has revised the list of activities eligible for promotion, which include some new activities to accommodate changes in technology and development. Details of the BOI Promotion List are available at: [www.boi.go.th/english/about/eligible\\_activities.asp](http://www.boi.go.th/english/about/eligible_activities.asp) Please see also the section on "Investment Promotion and Incentives".

Apart from the BOI schemes, foreign investors can choose to apply for investment support packages provided by the IEAT. Foreign companies can enjoy tax and non-tax privileges, apart from up-to-standard infrastructure and utility supply such as roads, power, water, wastewater treatment and facility maintenance. See also the section on "Investment Promotion and Incentives".

#### *Screening Conditions for Greenfield Investment / Expansion Business*

There is no different treatment for cases involving foreign takeovers or mergers as distinct from new business/greenfield investment.

Merger: Not subject to screening unless business activities specified in List 1, 2 or 3 of the FBA are involved.

Acquisitions: Not subject to screening unless business activities specified in List 1, 2 or 3 of the FBA are involved.

Greenfield investment: Not subject to screening unless business activities specified in List 1, 2 or 3 of the FBA are involved.

Joint ventures: Not subject to screening unless business activities specified in List 1, 2 or 3 of the FBA are involved. Only companies seeking investment promotion are subject to the following joint-venture criteria of the BOI. For investment projects in agriculture, animal husbandry, fishery, mineral exploration and mining, and service businesses under List 1 of the FBA, Thai nationals must hold shares totaling not less than 51% of the registered capital. For manufacturing business, foreign investors may hold a majority or all shares in promoted projects. (Please refer to the BOI Website: [www.boi.go.th](http://www.boi.go.th) for updated information).

Real estate/land: Subject to screening — foreign ownership in entities involved in land trade must be lower than half of the registered capital.

Others: Please refer to the FBA and the BOI joint-venture criteria.

### ***Application/Approval Forms***

***The following are the application/approval forms and additional documentation required for screening or the approval processes.***

*Foreign Business License*: Application form and the required documents are as follows:

- affidavit of company
- memorandum of Association and Article of Association (By laws)
- Power of Attorney appointing a person as a representative of the head office to register, establish and manage a branch office in Thailand
- copy of passport

All the foregoing documents, except passport, must be authenticated by a notary public or certified by Thai embassies or consulates at the nation where the head office is located.

### ***Investment Promotion of the BOI***

- two copies of the completed investment promotion application form
- feasibility study in the case of projects with investment of over 500 million baht, excluding working capital and land cost
- additional information as indicated by the Office of the BOI

The BOI application form is now available online. Please visit <https://boieservice.boi.go.th/IPS/Default.aspx?zLanguage=en> to register. One can change into the English language by using the scroll down menu. For queries regarding the online application, please contact the Investment Services Center, Office of the Board of Investment, Thailand; Tel: 66-2-537-8111 ext. 1101-1108.

### ***Industrial Estate Permission for Manufacturing***

The application and permission forms are divided into three main categories, namely, application for land use and operation, application for construction, and application for operation. These forms are available at the One Stop Service, or OSS, which is the center that provides information services and advice to investors on their operations in industrial estates.

### ***Time Frame for Approval***

Below is the average period of time it takes from the time of formal submission of all relevant/required documentation to the final approval/rejection of the application.

### *Foreign Business License*

Maximum time allowed for approving a foreign business license by the Department of Business Development:

1. For companies applying to operate businesses in List 2 and 3 and are recommended by the BOI, approval is given within 30 days from the date of submission of the completed application and documentation.
2. For companies applying to operate businesses in List 2 and 3, approval is given within 60 days from the date of submission of the completed application and documentation.

### *Investment Promotion Approval*

#### 1. Investment Promotion Approval

- a) For projects with investment up to 750 million baht, excluding land cost and working capital, within 40-60 working days from the submission of completed documentation.
- b) For projects with investment over 750 million baht, excluding land cost and working capital, within 90 working days from the submission of completed documentation.

#### 2. Issuance of Promotion Certificate

- a) Within 10 working days from the receipt of a letter accepting the terms of investment promotion approval and completed documentation.

### *Industrial Estate Permission for Manufacturing*

<b>Action</b>	<b>Number of working days</b>
1. Land Use and Operation Permit	a) On the same day of application submission of completed documentation and compliance with IEAT criteria  b) Within 30 days in the case where the application does not fully comply with the IEAT's criteria or the consideration of the IEAT Board is specified
2. Building Construction Permit	Within two days from the submission of completed documentation
3. Notification of Commencing	Within two days from the submission of completed documentation
4. Land Entitlement	Within eight hours of the submission of completed documentation.
5. Work Permits for foreigners to enter and work in Thailand	Within 16 hours of the submission of completed documentation
6. Importation/Exportation Permit in the export processing zones	Within eight hours of the submission of completed documentation

***Agency Address/telephone/fax/website for further information:***

Department of Business Development, Ministry of Commerce  
44/100 Nonthaburi 1 Rd. Bangkrasor  
Muang Nonthaburi 11000 Thailand  
Telephone: (662) 547-5050  
Fax: (662) 547-4459  
Website: [http://www.dbd.go.th/index\\_en3.phtml](http://www.dbd.go.th/index_en3.phtml)

Office of the Board of Investment (BOI)  
555 Vipavadee-Rangsit Road, Chatuchak  
Bangkok, 10900  
Telephone: (662)537-8111, 537-8155  
Fax: (662) 537-8177  
Email: [head@boi.go.th](mailto:head@boi.go.th)  
Website: <http://www.boi.go.th>

One-Stop Service (OSS)  
The Industrial Estate Authority of Thailand (IEAT)  
618 Nikhom Makkasan Rd.  
Rajthevi, Bangkok, 10400  
Telephone: (662) 253-0561 ext. 1185, 1112, 1175  
Fax.: (662) 253-2965, 650-0203  
Email: [ieat@ieat.go.th](mailto:ieat@ieat.go.th)  
[investment.1@ieat.go.th](mailto:investment.1@ieat.go.th)  
Website: <http://www.ieat.go.th>

**(3) Agencies responsible for dealing with appeals**

According to the FBA, in case of refusal to grant a permit, applicants have the right to appeal by means of a written submission to the Minister within 30 days of the date of receipt of the order of refusal.

According to BOI Announcement No. 1/1986, effective 5 March 1986, on the regulations of the Appeal Screening Subcommittee regarding appealing a Board decision, the applicant or promoted companies have the right to appeal a decision of the Office of the BOI, of a subcommittee, or of the Board itself, by means of submission of a letter addressed to the Secretary-General of the BOI, giving full details and specifying the reasons for the appeal within 60 days of the notification of the Board's decision to the applicant or promoted company. The Office of the BOI will not reconsider an appeal which has been withdrawn, or on which a conclusion has been reached, except in cases where an appeal is resubmitted for projects which may be subject to changes of policy regarding the type and/or size of activity.

***Agency Address/telephone/fax/website for further appeals and foreign investment-related complaints:***

Office of the Board of Investment — all investment-related matters  
555 Vipavadee-Rangsit Road  
Chatuchak, Bangkok 10900  
Telephone: (66 2) 537 8111, 537 8155  
Fax: (66 2) 537 8188, 537 8177

Department of Business Development — granting foreign business licenses  
44/100 Nonthaburi 1 Rd. Bangkrasor  
Muang Nonthaburi 11000 Thailand  
Telephone: (662) 547-5050  
Fax: (662) 547-4459  
Website: [http://www.dbd.go.th/index\\_en3.phtml](http://www.dbd.go.th/index_en3.phtml)

**(4) Opportunities for recommendations on foreign investment regulations**

Foreign and domestic investors can make proposals or recommendations related to foreign investment regulations through various channels, such as the Joint Public and Private Consultative Committee (JPPCC); Joint-Standing Committee on Commerce, Industry and Banking (JSCCIB), which comprises the Board of Trade of Thailand, the Federation of Thai Industries, and the Thai Bankers' Association; Foreign Chamber of Commerce, including each country's Chamber of Commerce; and several ad-hoc working groups consisting of representatives from public agencies and private sector institutions.

Memoranda of Understanding (MOU) have been signed among private-sector organizations and serve as guidelines for bilateral and multilateral cooperation on trade and investment promotion, as well as the elimination of barriers. Public hearings are a common channel through which the opinions of the private sector can be voiced. Moreover, the private sector has representatives in the BOI, which is responsible for establishing investment promotion policies and considering investment projects.

***For further information on JSCCIB, please contact:***

The Thai Chamber of Commerce  
150 Rachaborpit Road  
Pra-Nakorn, Bangkok 10200  
Tel: 66-2-622-1860-143

**(5) Role for sub-national agencies**

Regional offices of various agencies responsible for investment operations and providing information services, such as those of the BOI (Investment and Economic Centers), the Ministry of Industry (Provincial Industrial Offices) and the Ministry of Commerce (Provincial Trade Offices), are delegated a certain degree of authority to deal with investors in areas of their responsibility. Below is a list of the BOI's regional offices, where foreign investors can seek advice on the rules and regulations of local governments.

Office of the Board of Investment

Northern Region Investment and Economic Center 1  
112 Airport Business Park Tower 90 Mahidol Road,  
Haiya District, Amphor Muang, Chiang Mai 50100  
Tel.: (66 53) 203-400  
Fax: (66 33) 203 404  
Email: [chmai@boi.go.th](mailto:chmai@boi.go.th)

Northern Region Investment and Economic Center 2  
Thai Sivarat Building 3rd Floor  
59-15 Boromtrilokkanat 2 Road  
Naimuang District, Muang, Phitsanulok 65000  
Tel: (055) 248-111  
Fax: (055) 248-777  
Email: [phitsanulok@boi.go.th](mailto:phitsanulok@boi.go.th)

Northeastern Investment and Economic Center 1  
2112/22 Mittraphap Road  
Amphor Muang, Nakhon Ratchasima 30000  
Tel.: (66 44) 213-184  
Fax: (66 44) 213-182  
Email: [korat@boi.go.th](mailto:korat@boi.go.th)

Northeastern Investment and Economic Center 2  
177/54 Moo 17 Mittraphap Road  
Amphor Muang, Khon Kaen 40000  
Tel.: (66 43) 271-300 to 2  
Fax: (66 43) 271-303  
Email: [khonkaen@boi.go.th](mailto:khonkaen@boi.go.th)

Eastern Region Investment and Economic Center  
46 Moo 5, Sukhumvit Road, Laem Chabang Industrial  
Estate, Tambon Toongsukhla  
Sriracha District, Chonburi 20230  
Tel.: (66 38) 490-477, 491-820  
Fax: (66 38) 490-479  
Email: [chonburi@boi.go.th](mailto:chonburi@boi.go.th)

Southern Region Investment and Economic Center 1  
7-15 Chaiyong Tower, Jootee-Uthit 1 Road  
Hat Yai, Songkhla 90110  
Tel.: (66 74) 347-161 to 5  
Fax: (66 74) 347-160  
Email: [songkhla@boi.go.th](mailto:songkhla@boi.go.th)

Southern Region Investment and Economic Center 2  
49/21-22 Surat-Phunphin Road, Tambol Makamtia  
Amphor Muang, Surat Thani 84000  
Tel.: (66 77) 284-622, 284-637  
Fax: (66 77) 284-638  
Email: [surat@boi.go.th](mailto:surat@boi.go.th)

## SECTOR-SPECIFIC LAWS AND POLICIES

Thailand allows businesses to establish with foreign majority or wholly-foreign ownership in almost all manufacturing activities. Foreigners can apply for majority or 100% ownership for non-manufacturing businesses under the FBA as described in the section on “Screening of Foreign Investment”. To encourage foreign participation, the BOI may allow majority or 100% foreign ownership in service areas contained in Lists 2 and 3 of the FBA. However, limitations are imposed on foreign equity participation in certain activities under sector-specific laws. This section provides information on specific areas that are of interest to foreign business people. Detailed information on the rules and regulations relating to specific laws can be found in the Thailand’s latest Individual Action Plan on the APEC-IAP website (<http://www.apec-iap.org> )

### (i) Air Transport

Foreign ownership in air transport services is governed by the FBA, as this sector is included in List 2 of the FBA. Please refer to the section on “Screening of Foreign Investment” for details of sectors included in List 2. Others important legislative measures relating to air transport services are:

*Announcement of the Thai National Executive Council* No. 58, B.E. 2515 (1972);

*The Constitution of the Kingdom of Thailand* B.E. 2540 (1997);

*The Air Navigation Act* B.E. 2497 (1954);

*The Telecommunications Business Act* B.E. 2544 (2001);

International agreements relating to air services.

Further information is available at: [http://www.aviation.go.th/index\\_en.htm](http://www.aviation.go.th/index_en.htm)

(ii) Banking

Commercial banks in Thailand are regulated by the *Commercial Banking Act* B.E. 2505 (1962), as amended in 1979, 1985, 1992, 1997 and 1998. According to the Act, the Ministry of Finance has broad responsibilities for financial sector policies, while the Bank of Thailand conducts banking supervision. The Ministry of Finance also has the authority to grant commercial banking licenses based on the recommendations of the Bank of Thailand. Maximum foreign equity participation is limited to 25% of paid-up registered capital. Foreign banks may establish a commercial presence in the form of a full branch.

(iii) Education

*Kindergarten to High School Level*

Private schools are classified into three types:

1. Formal education are categorized into four types:
  - 1.1 General Education (Kindergarten to High School)
  - 1.2 Vocational Education (Lower Certificate of Vocational Education – Higher Certificate of Vocational Education)
  - 1.3 English Program Schools
  - 1.4 International Schools
2. Non-formal education covers special professional training education or a short-term curriculum
3. Special education which is for needy persons or those who have various educational disadvantages in the form of welfare education

Business licenses for private schools must be obtained from the Office of the Private Education Commission. Private school licensees must be Thai-born nationals. The size of foreign equity participation must be less than 50% of total shares. The manager of a private school must be a Thai national.

More than 50% of the members of a juristic person who is the licensee must have Thai nationality and possess other qualifications pursuant to the *Private School Act* B.E 2525 (1982), and meet the regulations specified by the Ministry of Education.

There are policies, regulations, and conditions that need to be followed under each type of private school. Visit <http://www.opec.go.th/Englishopec/types.htm> for further details of private school types and conditions.

Contacts for other general information on private schools:

- K-12 Education  
Tel: 66-2-628-7000-309,312
- Vocational Education  
Tel: 66-2-628-7000-329,332
- International Education  
Tel: 66-2-628-7000-502,507,508

***For other details and information, contact***

Office of the Private Education Commission  
319 Wang Jangrasem, Rachadamnernnok Road  
Dusit, Bangkok 10300

Tel: 66-2-628- 7000

Fax: 66-2-282 -8654

Email: [thanasap@opec.go.th](mailto:thanasap@opec.go.th)

Website: <http://www.opec.go.th/home.html> and <http://www.opec.go.th/Englishopec/concept.htm>

(English Page)

*Higher Education Level*

Under the *Private Higher Education Institution Act* B.E. 2546 (2003), a license for establishing a private higher education institution in the form of university, institute, and college must be obtained from the Ministry of Education. At least one half of the university council members must have Thai nationality. Foreign equity participation in this business is governed by the FBA (See the section on “Screening of Foreign Investment”).

(iv) Finance Companies

Finance companies in Thailand are regulated by the *Undertaking of Finance Business, Securities Business, and Credit Foncier Business Act* B.E. 2522 (1979), as amended in 1983, 1985, and 1992. Responsibility for licensing and regulating finance companies is divided between the Ministry of Finance and the Bank of Thailand in the same manner as the banking sector. Licensed financial companies are permitted to engage in the business of “procuring funds from the public” and to utilize such funds in a “commercial finance”, “development finance”, “consumer finance” or “housing finance” business (as those terms are defined in the Act) or other finance business as may be prescribed by regulations under the Act. Maximum foreign equity participation is limited to 25% of paid-up registered capital.

(v) Food and Drugs

*The Food Act* B.E. 2522 (1979) has been promulgated to protect consumers from being supplied with unsanitary food by ensuring that the food products and their production process are clean and healthy. The Act controls food producers, food producing premises, ingredients, and containers, as well as imposing strict regulations on food imports and food advertisements.

*The Drug Act* B.E. 2510 (1967) controls the production, importation, sale, registration and advertisement of drugs. The Act requires importers and producers to obtain import or manufacturing licenses and to register the drug's formulae with the Food and Drug Administration, Ministry of Public Health, Thailand before proceeding to import, produce or sell products in Thailand. Severe penalties are imposed on producers or importers if their drugs differ from the registered formulae.

Any factory established to produce and sell food and drugs must apply for production licenses from the Food and Drug Administration, Ministry of Public Health, Thailand. For further information and details, visit:

[http://www2.fda.moph.go.th/law/Law\\_Book.asp?productcd=1&lawid=100005&Contents=1&language=e&lawname=A+Compilation+of+Laws+on+Food+and+Drug&keyword=&keyword2=&codechhk=0](http://www2.fda.moph.go.th/law/Law_Book.asp?productcd=1&lawid=100005&Contents=1&language=e&lawname=A+Compilation+of+Laws+on+Food+and+Drug&keyword=&keyword2=&codechhk=0)

The following Ministry and government office should be contacted for information and procedures involving certain food products and types of drugs.

Ministry of Public Health  
Tiwanon Road, Tambon Taladkwan  
Muang, Nonthaburi 11000  
Tel: 66-2-590-1000  
Website: <http://eng.moph.go.th/>  
email to : [eng-webmaster@health.moph.go.th](mailto:eng-webmaster@health.moph.go.th)

Office of the Thai Food and Drug Administration  
Ministry of Public Health  
88/24 Tiwanon Road  
Muang, Nonthaburi 11000  
Tel: 66-2-590-7000  
Website: <http://www.fda.moph.go.th/eng/index.stm>

(vi) Insurance

The insurance industry in Thailand is regulated principally by the *Life Insurance Act* B.E. 2535 (1992), the *Non-life Insurance Act* B.E. 2535 (1992), and by ministerial regulations issued thereunder. These acts are administered by the Department of Insurance, Ministry of Commerce. No person may underwrite life or non-life insurance without a license. According to these Acts, an insurance business may be carried out by a locally incorporated company or by a branch of a foreign company. Brokers and insurance agents are also required to obtain a license under these Acts.

According to the FBA and the *Working of Aliens Act* B.E. 2521 (1978), the broker or agent business is restricted to Thai nationals. Further information on insurance in Thailand can be found at

<http://www.doi.go.th> Refer to the sections on “Screening of Foreign Investment” and “Labor, Movement of People, and Senior Management and Board of Directors” for these two Acts.

***For more information, visit or contact:***

Department of Insurance, Thailand  
44/100 Nonthaburi 1 Road  
Muang, Bangkrasor  
Nonthaburi 11000  
Tel: 66-2-547-4602  
Fax: 66-2-547-4538

(vii) Maritime Transport

*International Shipping*

International shipping business in Thailand is open to both Thai and foreign maritime transport operators. To operate a vessel internationally under the Thai flag, one has to fulfill specific operational requirements imposed by the following laws:

*The Thai Vessels Act* B.E. 2481 (1938), as amended by the Thai Vessels Act B.E. 2540 (1997). The operator must be a juristic person incorporated under Thai law with at least 51% Thai equity. The vessel must also be registered for flying the national flag at the Marine Department.

*The Navigation in Thai Waters Act* B.E. 2456 (1913), as amended by the Navigation in Thai Waters Act B.E. 2540 (1997). The operation of such vessels in Thailand’s territorial waters is under the supervision of the Marine Department for safety and marine environmental purposes.

*The Mercantile Marine Promotion Act* B.E. 2521 (1978). The operator referred to in (1) is also required to register as a maritime transport operator at the Maritime Department.

The competent authority responsible for the above-mentioned laws is the Marine Department, which is responsible for navigational safety, control of waterborne traffic, ship registration and inspection, maintenance of navigation channels, installing aids to navigation, providing pilot services for seagoing vessels, training and monitoring the quality of seamen, minimizing the environmental impact caused by navigation and ports, promotion and development of maritime transport and related business as well as enforcing the above-mentioned laws.

*Domestic Shipping*

For national security reasons, Thai domestic shipping is restricted to Thai vessels according to the following laws:

*The Thai vessels Act* B.E. 2481 (1938), as amended by the Thai Vessels Act B.E. 2540 (1997). The vessels must be owned either by natural persons of Thai nationality or juristic persons incorporated under the Thai Civil and Commercial Code, with at least 70% Thai equity. Foreign operators can invest in Thai domestic shipping companies, with their equity not exceeding 30% of the total equity. The Minister of Transport may allow the deployment of foreign vessels in domestic shipping under certain conditions on a case-by-case basis (e.g. when certain types of existing domestic vessels are insufficient to render services and which

cannot be efficiently replaced by other modes of transport). All vessels engaged in domestic shipping must be registered under a Thai flag at the Marine Department.

*The Navigation in Thai Waters Act* B.E 2456 (1913), as amended by the *Navigation in Thai Waters Act* B.E 2540 (1997). Like international shipping, the navigation of such vessels in Thai territorial waters is controlled by the Marine Department to ensure safety and minimize adverse effects on the marine environment.

### *Port Operations*

*The Port Authority of Thailand Act* B.E 2494 (1951) as amended by *The Port Authority of Thailand Act* B.E. 2543 (2000) lists work activities to be carried out by the Port Authority of Thailand (PAT), which include management, monitoring and control of Bangkok Port, Laem Chabang Port and other designated ports. Currently, there are five public ports under the supervision of PAT, namely, Bangkok Port, Laem Chabang Port, Ranong Port, Chiang-Saen Port and Chiang Khong Port. PAT is allowed to make decisions on appropriate management and operations of each port under its control, provided that such decisions correspond to PAT's work objectives, as stipulated by the Act.

In response to the government's privatization policy, the operations of Laem Chabang Port have been contracted out by means of concession.

For the operation of other major public ports as well as private ports, Thailand has maintained the policy that the private sector be allowed to participate in port services, either by operating existing facilities in such ports or by funding the development of and operation of new or additional facilities. To apply as a port operator, one must conform to the FBA, i.e. the operator must be a natural person of Thai nationality or a juristic person incorporated under the Thai Civil and Commercial Code, with at least 51% Thai equity. In addition, the private operator is required to obtain permission for the construction, safety and operation of the port according to the *Navigation in Thai Waters Act* B.E. 2540 (1970) and the *Law on Business Affecting Public Security and Well-being*.

More information is available at: <http://www.mot.go.th>

### (viii) Mining

*The Minerals Act* B.E. 2510 (1967) governs onshore and offshore exploration and mining, trading, dressing, transport and export of hard minerals. The Act is administered by the Ministry of Industry through the Department of Primary Industries and Mines. Various surface rentals and other fees are charged under the Act. In addition, royalties are assessed in accordance with the *Mineral Royalty Rates Act* B.E. 2509 (1966). *The Atomic Energy for Peace Act* B.E. 2504 (1961) regulates the possession, production, import, and export of certain nuclear materials and by-products. Other principal government agencies involved in obtaining rights to explore and exploit minerals are the Forestry Department and the Office of Natural Resources and Environmental Policy and Planning. At the local government level, investors may have to deal with the Tambon Administration Council. A Tambon is an administrative division. Mining business is a restricted activity for foreign equity participation under List 2 (Group 3) of the FBA. See more information on the FBA in the section on "Screening of Foreign Investment". Additional information is available at: <http://www.dpim.go.th/>

(ix) Road Transport Service

A foreign operator wishing to apply for a license to provide international road transport services to and from Thailand shall comply with the FBA and the *Land Transport Act* B.E. 2522 (1979) (LTA). The FBA deals with ownership by foreigners doing business in Thailand, where road transport services are included in List 2 (see the section on “Screening of Foreign Investment”). The LTA regulates and monitors road transport, such as transport operation, operational licenses and control, particularly by commercial vehicles (bus and truck).

(x) Telecommunications

The National Telecommunications Commission (NTC), which is Thailand’s first independent state telecommunications regulator, was established on 1 October 2004. The NTC’s duties and responsibilities are to regulate all telecommunication services in the country through formulation of a Master Plan on Telecommunications Activities, setting criteria and categories of telecommunications services, permitting and regulating the use of spectrum for telecommunications services, granting licenses to telecommunications operators, and perform other regulatory tasks. Further information is available at: <http://eng.ntc.or.th>

According to the *Telecommunications Business Act* B.E. 2544 (2001), foreign equity participation for business establishments was originally set at 25%. In January 2006, the equity threshold for foreigners was revised to be set at 49%. Section 7 of the Act prescribes the rules and procedures governing telecommunications business licensing in Thailand. Details of the Act are available at: <http://www.mict.go.th>

(xi) Tourism (Hotel, Restaurant, and Travel Agencies)

*The Hotel Act* B.E. 2478 (1935), amended as *The Hotel Act* B.E. 2547 (2004), stipulates that the operation of hotel business requires a license. To build a hotel of more than 80 rooms, it is required that the hotel investor should submit an Environment Impact Assessment, together with the hotel’s blueprint, to the Ministry of Interior for approval.

To operate a restaurant with an area exceeding 200 square meters, a license from the local administration official must be obtained. If the restaurant has an area not exceeding 200 square meters, the owner must notify the local official for a Certificate of Notification as stated in the *Public Health Act* B.E. 2535 (1992). Further information is available at: <http://www.anamai.moph.go.th>

Foreign participation in the accommodation and restaurant business is in principal restricted to a 49% share of capital under the FBA. To apply for permission to operate with foreign majority ownership, please refer to the FBA in the section on “Screening of Foreign Investment” and Thailand BOI’s scheme under the section on “Investment Promotion and Incentives”.

The law governing travel agencies and tour services, including tourist guide services, is the *Travel Agency Business and Guide Act* B.E. 2535 (1992). Under this Act, travel agents and tour operators are required to have a license granted by the Registrar of the Tourist Business and Guide Registration Office, the Tourism Authority of Thailand in the area. Under this Act, companies with foreign majority ownership are not allowed to operate in the field of travel agent and tour services.

Further information on regulations of the tourism business under the responsibility of the Office is available at: <http://www.tat.or.th/tbgr>

(xii) Real Estate

*Land Ownership and Foreign Investors*

A foreigner can acquire land ownership in accordance with four laws – *The Land Code*, the *Investment Promotion Act* B.E. 2520 (1977), the *Industrial Estate Authority of Thailand Act* B.E. 2522 (1979) and the *Petroleum Act* B.E. 2514 (1971).

The term “foreigner” under Sections 97 and 98 of the Land Code was defined as a company or public company in which foreigners hold more than 49% of the registered capital, or where more than half of all shareholders are foreign.

This definition also covers a company or public company in which juristic persons hold shares. If the shareholding ratio or the number of shareholders of those juristic persons falls within the above-mentioned criteria, all of the shares of those legal persons in the limited company or the public limited company will be deemed to be held by foreigners, and such a juristic person will be deemed a foreigner.

On the other hand, if the juristic person does not fall within the definition of those regulations, such juristic person will be considered Thai. If any limited company issues bearer shares, the shares shall be deemed to be held by foreigners.

*Land Code*

*The Land Code Amendment Act* (No.8) B.E. 2542 (1999) allows a foreigner who brings in a minimum investment of not less than 40 million baht (US\$1,081,081 at the exchange rate of US\$1 = 37 baht) to acquire land of not more than one rai (1 rai = 0.4 acres) for residential purposes. Such acquisition must be made in accordance with the procedures and conditions as prescribed in Ministerial Regulations.

These regulations require that the business must be of a type that is beneficial to the Thai economy and Thai society, and that the investment must remain in Thailand for at least five years. In addition, the land to be acquired must be located in the Bangkok Metropolitan area, Pattaya, or other municipality or other residential area as specified in the *Town Planning Act*, and it must not be located in a military security area.

*Investment Promotion Act B.E. 2520 (1977)*

Under Section 27 of the *Investment Promotion Act* B.E. 2520 (1977), as amended by the *Investment Promotion Act* (No. 2) B.E. 2534 (1991) and the *Investment Promotion Act* (No.3) B.E. 2544 (2001), a promoted person is permitted to own land for carrying on the promoted activity to the extent that the BOI deems appropriate, regardless of whether it is in excess of the permissible limit under other laws. If the promoted person is a foreign national under the *Land Code* and dissolves the promoted activity or transfers it to another person, the promoted person must dispose of the land within one year of the date of the dissolution or transfer. Otherwise, the Director-General of the Land Department has the power to dispose of it under the *Land Code*.

To help foreign-promoted people in doing business in Thailand, they are able to apply for permission to own land not only for the promoted project, but also for office and residence.

Permission to own land is granted to a promoted person on a case-by-case basis. In considering whether or not to grant permission, the reasons, appropriateness and necessity of ownership will be taken into consideration, and it will be granted in terms of *BOI Announcement No. 2/2546 (2/2003)*, which came into effect on 8 April 2003.

Under this announcement, a foreign-promoted juristic entity may be permitted to own land for his office, but not more than five rai; for an executive or expert resident no more than one rai; and for a labor resident not more than 20 rai. The land for the office and residence can be located in the same area as the promoted project. If a promoted person loses his status, the land must be disposed of within one year of the date of dissolution. This announcement is valid for applications submitted until 31 December 2007.

#### *Industrial Estate Authority of Thailand Act B.E. 2522 (1979)*

Under Section 44 of the *Industrial Estate Authority of Thailand Act B.E. 2522 (1979)*, export-oriented manufacturers and traders are allowed to own land in an industrial estate or in an export processing zone for carrying out their business activity to the extent that the IEAT may deem appropriate, regardless of whether it is in excess of the permissible limit under other laws.

If an operator who is a foreign national dissolves or transfers his business activity to another person, he must dispose of the land to the IEAT or a transferee, as the case may be, within three years of the date of the dissolution or transfer. Otherwise, the Director-General of the Land Department has the power to dispose of the land to the IEAT or elsewhere under the *Land Code*.

#### *Petroleum Act B.E. 2514 (1971)*

Section 65 of the *Petroleum Act B.E. 2514 (1971)* permits a petroleum concessionaire to own land essential to conducting petroleum operations, even if the amount is in excess of the permissible limits under other laws. The Act does not prevent one from transferring his land ownership in cases where that person has been permitted to do so by the Petroleum Board.

#### *Land Lease*

Some types of business activities do not require land ownership; a foreigner can lease land or immovable property. There are three relevant laws in these instances – the *Industrial Estate Authority of Thailand Act B.E. 2522 (1979)*, the *Civil and Commercial Code* and *The Act on the Lease of Immovable Property for Industrial and Commercial Purposes B.E. 2542 (1999)*.

Under Section 6 (3) of the *Industrial Estate Authority of Thailand Act*, it can lease, arrange hire purchase or sell immovable or movable property within the industrial estate.

Under Section 538 of the *Civil and Commercial Code* Section 538, a lease for immovable property is not enforceable unless there is written evidence signed by the party liable. If the lease is for a period of more than three years or for the life of the lessor or lessee, it is enforceable only for three years unless it is made in writing and registered by a competent land official. In addition, under Section 540 of the Code, the duration of a lease of immovable property cannot exceed 30 years. If it is made for a longer period, such period is to be reduced to 30 years. The aforesaid period may be renewed, but it must not exceed 30 years from the time of renewal.

*The Act on the Lease of Immovable Property for Industrial and Commercial Purposes B.E. 2542 (1999)* allows a foreigner to lease property for commerce or industry for a period of more than 30 years, but not more than 50 years. Upon completion of the initial term, the parties may agree to renew the lease term for another period of not more than 50 years from the date of renewal. In case

where foreigners or foreign legal entity pursuant to the Land Code Section 97 are lessees, sub-lessees or transferees of ownership of such land lease for commerce or industry, their investment must be not less than 100 million baht (excluding the amount of leasing fees).

The lease agreement must be in writing and registered with a competent land official. Otherwise, the lease will be null and void. The lessor must be the owner of the leased property. Any lease for an area of land larger than 100 rai requires approval from the Director-General of the Land Department. The rights and obligations under the lease agreement devolve to the heirs of the lessee, and the lessee may sublease or assign his rights, either in whole or in part, to a third party if it is clearly specified in the lease agreement.

### *Condominium Ownership*

The foreign investor, on acquisition of land, will automatically have ownership of any buildings constructed thereon. However, both foreign investors and other foreigners can acquire condominium ownership in Thailand.

A condominium in accordance with the *Condominium Act* B.E. 2522 (1979) means any building in which a person can separate portions of ownership for each part, including personal property ownership and mutual property ownership.

A foreigner can acquire condominium ownership if he or she meets two requirements as prescribed by the *Condominium Act*. The first requirement is that such a foreigner or foreign legal entity possesses the following qualifications:

- (1) have the right of permanent residency in Thailand pursuant to the immigration law;
- (2) have authorization to enter into Thailand pursuant to investment promotion laws;
- (3) is a foreign legal entity pursuant to the land law and is registered as a legal entity under Thai law;
- (4) is a foreign legal entity pursuant to the Announcement of the National Executive Council No. 281 as repealed and replaced by the FBA, and to which an Investment Promotion Certificate is granted pursuant to investment promotion laws;
- (5) is a foreigner or foreign legal entity that remits foreign currency into Thailand, or withdraws from a baht currency account of a person who resides abroad, or withdraws foreign currency from his deposit account.

The second requirement is that the total ownership by foreigners or foreign legal entity mentioned above must not exceed 49% of the total floor area of all the condominium units at the time of registration of the condominium complex, with the following exceptions.

- (a) Between 28 April 1999 and 28 April 2004, the above mentioned foreigners and/or foreign legal entity were able to acquire ownership of more than 49% if:
  - such condominium unit is located in the Bangkok Metropolitan area or in such other municipality or in the city of Pattaya;
  - total area of land on which the condominium is located and other areas for the purpose of common use or common benefits of owners of condominium units must not be more than five rai (1 rai = 0.4 acre, 1 hectare = 6.25 rai); and

- the condominium complex must have at least 40 units; and
  - the condominium complex must have been registered for at least one year prior to the acquisition of condominium ownership; and
  - the condominium complex is not located in any military security areas specified by the laws related to military security areas.
- (b) From 29 April 2004 onwards, the exceptions described under a) are repealed by law. Foreigners and foreign legal entity who acquired condominium ownership according to exceptions prescribed in a), or those who are transferees of condominium ownership in accordance with such exception, can maintain their rights, even though the ownership exceeds 49% of total floor area of all units in the condominium complex.

Foreigners or foreign legal entity in the above mentioned five categories, (1) to (5), can acquire condominium ownership by inheritance either by being an heir or through one's will or by other means. But if such acquisition leads to the ownership by foreigners or foreign legal entity in any condominium complex of more than 49% of the total floor area of all the condominium units, the beneficiary of such ownership must inform the competent land official in writing within 60 days of the acquisition, and must dispose of the excess of 49% of the total floor area within one year after the acquisition. Otherwise, the Director General of the Land Department has the power to dispose of such condominium units.

### *Immovable Property*

In addition to acquiring condominium ownership, a foreigner can also lease immovable property. Immovable property means land and things fixed permanently to land or forming a body therewith. Immovable property covers land and buildings.

Under Section 538 of the *Civil and Commercial Code*, a lease of immovable property is not enforceable unless there is written evidence signed by the party liable. If the lease is for a period of more than three years or for the life of the lessor or lessee, it is enforceable only for three years unless it is made in writing and registered by a competent land official. In addition, under Section 540, the duration of a lease of immovable property cannot exceed 30 years. This period may be renewed, but not for more than 30 years from the time of renewal.

*The Act on the Lease of Immovable Property for Industrial and Commercial Purposes*, B.E. 2542 (A.D.1999) allows a foreigner to lease immovable property for commercial or industrial purposes for a period of more than 30 years, but not more than 50 years. Upon completion of the initial term, the parties may agree to renew the lease term for another period of not more than 50 years from the date of renewal.

The lease agreement must be in writing and registered with a competent land official. The lessor must be the owner of the leased property. Any lease for an area of land larger than 100 rai requires prior approval from the Director-General of the Land Department, Ministry of Interior. The lessee may sub-lease or transfer, in whole or in part, the leased property to a third party if it is clearly specified in the lease agreement.

## INVESTMENT PROTECTION

### (i) Introduction

Thailand has concluded 39 agreements on the promotion and protection of investments,<sup>44</sup> two FTAs containing investment protection provisions,<sup>45</sup> and is now in the process of negotiating such agreements with a number of countries. These agreements guarantee protection of foreign investments and investors in accordance with generally acceptable international standards. In this sense they bind Thailand to maintain laws and regulations in keeping with those standards with regard to investments and investors of its treaty partners. Details of specific aspects of the protection regime are outlined below.

Protection under investment agreements is not automatically granted to foreign investment. To qualify for protection, investors must obtain a *Certificate of Approval for Protection* from the Committee on the Approval for the Protection of Investments between Thailand and other Countries in accordance with its Announcement No. MFA 0704/1/2546 dated 22 October 2003.

Under the Announcement, the Committee has the authority to exercise discretion in issuing the *Certificate of Approval for Protection* to investors from countries with which Thailand has an agreement on promotion and protection of investments that have applied for such *Certificate of Approval for Protection*. The following are deemed to be equivalent of the *Certificate of Approval for Protection*, thus granting protection to direct investments of countries with which Thailand has an agreement on promotion and protection of investments: licenses granted by the Minister of Commerce or the Director-General of the Department of Business Development in accordance with the FBA; Certificates of Promotion from the BOI; and government concession contracts.

For more information, investors can visit the website of the Department of International Economic Affairs, Ministry of Foreign Affairs (<http://www.maf.go.th/web/989.php>) to see the updated list and the texts of Thailand's IPPAs.

### (ii) Conversion, Repatriation and Transfers

#### *Foreign Exchange Regime*

The Bank of Thailand (BOT) has been entrusted by the Ministry of Finance with responsibility for administering foreign exchange. Under a managed-float regime, since 2 July 1997, the value of the baht is predominantly determined by market forces and moves in line with economic fundamentals. The BOT will intervene in the market only when necessary. All foreign exchange transactions are to be conducted through authorized banks. Authorized persons (money changers) can only buy foreign notes and travelers' cheques and sell foreign notes.

Repatriation of investment funds can be remitted freely upon submission of supporting evidence.

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<sup>44</sup> With the Netherlands, United Kingdom, China, ASEAN countries, Republic of Korea, Laos, Hungary, Vietnam, Peru, Poland, Romania, Czech Republic, Finland, Cambodia, the Philippines, Sri Lanka, Taiwan, Canada, Indonesia, Switzerland, Argentina, Croatia, Egypt, Israel, Slovenia, Sweden, Zimbabwe, India, North Korea, Bahrain, Belgo-Luxemburg, Germany, Bangladesh, Russia, Bulgaria, Turkey, Tajikistan, Hong Kong SAR and Jordan.

<sup>45</sup> With Australia and New Zealand

Thailand has no restrictions related to foreign investment. However, both capital and loans must be surrendered to an authorized bank (or deposited in a foreign currency account) in Thailand within seven days of receipt.

Thailand has signed a number of FTAs with obligations on the transfer of investment funds. Thailand's rights and obligations regarding the transfer of investment funds in any FTA depend not only on the provision on "Transfers", but also on the scope of investment, as well as other provisions that give the authority the rights to adopt necessary measures, namely:

- Provision on "Prudential Measures" which allows the authority to adopt measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.
- Provision on "Measures for Macroeconomic and Financial Stability" which allows the authority to adopt measures for the purpose as stated in the Provision on "Prudential Measures" and also to ensure macroeconomic stability (including exchange rate stability).
- Provision on "Restrictions to Safeguard the Balance of Payments" which allows the authority to adopt temporary restrictive measures on payments and transfers of funds in the event of serious balance of payments and external financial difficulties, or threat thereof.

The FTAs signed by Thailand with the above obligations are as follows:

- FTA between Thailand and Australia (effective 1 January 2005)
  - The scope of investment is limited to direct investment.
  - The Agreement contains a provision on "Restrictions to Safeguard the Balance of Payments" and the Article on "Prudential Measures".
- FTA between Thailand and New Zealand (effective from 1 July 2005)
  - The scope of investment is limited to direct investment.
  - The Agreement contains a provision on "Restrictions to Safeguard the Balance of Payments" and a provision on "Measures for Macroeconomic and Financial Stability".

Furthermore, Thailand has signed BITs with 39 countries (as of July 2006). In each of these treaties, protection regarding the transfer of funds is granted only to those direct investments that have been specifically approved in writing by the Thai competent authority and have been given CAPs.

***For further information on the transfer of capital, please contact:***

Bank of Thailand (Exchange Control Section)  
279 Samsen Road  
Bangkhunprom, Bangkok 10200, Thailand  
Tel. (66) 2-283-5171  
Fax. (66) 2-280-0449, 2-280-0626  
Website: <http://www.bot.or.th>

(ii) Expropriation and Compensation

The *Expropriation of Immovable Property Act* B.E. 2530 (1987) sets the guidelines for expropriation of immovable property. According to the Act, immovable property may be expropriated for the purpose of public interest, such as public utilities, national defense, agricultural development, etc. The Act also outlines the compensation of immovable property, expropriation methods and appeals consistent with international principles.

The *Investment Promotion Act* B.E. 2520 (1977) as amended provides investment projects promoted by the BOI guarantees against the following:

- Nationalization
- Competition from new state enterprises
- Monopolization of sales of similar products
- Price controls
- Export restrictions
- Duty-free imports by government agencies or state enterprises

Thailand enacted the Investment Promotion Act to accommodate the operations of the Multilateral Investment Guarantee Agency (MIGA). It was announced in the Government Gazette on 28 April 2000 and became effective on 29 April 2000. Thailand became MIGA's 154<sup>th</sup> member and is now eligible for MIGA's political risk coverage for Thai investment going overseas as well as other member countries' investment going into Thailand.

(iii) Investment Property Rights

*Trademark Act* B.E. 2534 (1991), amended by *Trademark Act* B.E. 2543( 2000)

The *Trademark Act* (1991) was amended by the *Trademark Act* of 2000, which came into force on 30 June 2000. The *Trademark Act* governs registration and provides protection for trademarks, service marks, certification marks and collective marks. The amended Act expands the definition of trademark to include "the combination of colors" and "figurative elements". The Act is intended to create more effective means to enforce rights of trademark owner by widening the power of search. That is, in the sense that the designated official under the Act could search and seize infringing items or any other evidence at any time, during daytime or night-time, according to the provisions set forth in the Act. It should be noted that well-known marks have now received protection under this Act, too. The owner of a well-known mark has the right to oppose any potentially misleading registration of any mark in any class of goods and services. The owner may also claim compensation for any damages caused by the infringer. Trademark protection is effective for a period of 10 years and renewable every 10 years.

*Patent Act* B.E. 2535 (1992), amended by the *Patent Act* B.E. 2542 (1999)

The *Patent Act* (1992) was amended in 1999. It gives protection to inventions (product and process) and industrial designs. Patents are valid for a period of 20 years for inventions and 10 years for industrial designs from the date of application. The amended Act expands the provision concerning a petty patent that is valid for the initial period of 6 years from the date of application

and may be extended twice, two years for each extension. An invention can be patented if it meets the criteria of being a new, inventive step, and industrial application. There are a few exceptions to patentability of an invention. Unprotected inventions are naturally occurring micro-organisms, animals, plants, scientific or mathematical theories, computer programs, methods of healing or diagnosis of human or animal diseases, and inventions contrary to public order and morality. It may be noted that the exclusive rights provided for the right holder are subject to certain compulsory license provisions.

#### *Copyright Act B.E. 2537 (1994)*

*The Copyright Act B.E. 2521 (1978)* was amended by *The Copyright Act B.E. 2537 (1994)* which came into effect on 22 March 1995.. It protects works of authorship such as literary, dramatic, audiovisual, cinematographic and artistic works for a certain period of time. It is unlawful to reproduce, adapt, communicate to the public, give benefits deriving from the work or license such works without the owner's consent, to rent the original or the copies of a computer program, an audiovisual work, cinematographic work and sound recordings. This Act complies with the standards of the TRIPS Agreement and the Paris Act of the Berne Convention. A copyright in literature, dramatic, artistic and musical work is valid throughout the life of the author plus another 50 years. Computer programs are also protected as literary works under *The Copyright Act*. In a case where the author is a juristic person, the copyright is valid for 50 years from the authorship; provided that the work is published during such periods, copyright is valid for 50 years from the first publication. A copyright in photographic works, audiovisual works, cinematographic work, sound recordings or audio and video broadcasting works is valid for 50 years from the authorship; provided that if the work is published during such period, copyright is valid for 50 years from the first publication. The copyright in works of applied art is valid for 25 years from the authorship; provided that the work is published during such period, copyright is valid for 50 years from the first publication. A performer's rights to his performance are also protected under this Act. The performer has the exclusive rights regarding sound and video broadcasting or communication to the public; recording the performance, which has not been recorded; and reproduction of recording material of the performance which has been recorded without the performer's consent. The performer's rights last for 50 years from the last day of the calendar year in which the performance takes place or in case the performance is recorded, the performer's rights last for 50 years from the last day of the calendar year in which the recording of the performance takes place.

#### *Layout-Designs of Integrated Circuits Act B.E. 2543 (2000)*

*The Act on the Protection of Layout-Designs of Integrated Circuits B.E. 2543 (2000)*, provides protection for creators of layout-designs of integrated circuits by granting them the exclusive right to prohibit others from reproducing, importing, selling or distributing the protected layout-designs for commercial purpose in the Kingdom. The Act was promulgated in the *Government Gazette* on 12 May 2000 and came into force on 10 August 2000.

#### *Trade Secrets Act B.E 2545 (2002)*

*The Trade Secrets Act B.E 2545 (2002)* was enacted to provide effective protection for commercial information. Under the Act, commercial information that qualifies for protection is information which is not generally known to the public or is not accessible by people who are generally connected with it. It is of commercial value owing to its secrecy, which the owner has taken reasonable measures to maintain. The owner and the controller of trade secrets have rights against unauthorized disclosure. However, certain exceptions to infringing acts include disclosure by the person who received the trade secret from another party without knowing that the third party acquired such a trade secret by improper means, disclosure by a government authority for the purpose of protecting public health or security, and discovery of the secret by way of reverse

engineering or by his own skill. In pursuance of this Act, trade secrets will be protected as long as they are not disclosed to the public. It should also be noted that no registration is required, but the owner of the secrets can obtain further evidentiary assurance by declaring general information about their trade secrets at the Department of Intellectual Property. It is possible to make trade secrets assignable by a written contract signed by both the assignor and the assignee.

*Geographical Indication Protection Act B.E. 2546 (2003)*

*The Geographical Indication Protection Act B.E. 2546 (2003)* provides protection against misleading use of geographical indications. To be eligible for registration, the geographical indication must be a name, symbol, or other indication which identifies goods as originating in a particular territory where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin. There are three groups of eligible applicants, namely, government authorities directly responsible for the area governed by such a geographical indication, the person carrying out business in connection with the goods using such a geographical indication and living in the area governed by such a geographical indication, and consumers of such goods using that geographical indication. Once registered, the geographical indication receives life-time protection. At present, there are four kinds of goods receiving additional protection: rice, silk, wine, and spirits. The additional protection guards against the use of the geographical indication for goods which do not originate in the place of the geographical indication, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or similar wording.

*The Optical Disc Production Act B.E. 2548 (2005)*

*The Optical Disc Production Act B.E. 2548 (2005)* aims to monitor optical disc (OD) – production industry, thus preventing the production of pirated ODs. Under this Act, any person who intends to produce ODs is required to notify the Department of Intellectual Property before commencing production. Any copyright owner who intends to produce or to commission others to produce ODs is also required to notify the Department of Intellectual Property before starting the production each time. Upon such notification, the Department will issue a certificate of receipt, and assign a source identification code for the OD producer and a copyright code for the copyright owner. In addition, the Act requires any person who acquires or possesses an OD production machine to notify the Director-General of the Department of Intellectual Property of such possession as well as any sale or transfer of the machine. Finally, any person acquiring or possessing polycarbonate, the raw materials used for producing ODs must notify the Director-General of the category, type, quantity and storing place of the polycarbonate.

***For further information on other laws related to IPR, please consult:***

*Plant Varieties Protection Act B.E. 2542 (1999)*

[www.biothai.org/cgi-bin/content/pvp/show.pl?0001](http://www.biothai.org/cgi-bin/content/pvp/show.pl?0001)

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*Protection and Promotion of Traditional Thai Medicinal Intelligence Act B.E. 2542 (1999)*

The Institute of Thai Traditional Medicine  
Ministry of Public Health  
Tel: 66-2-591-2500, 95, 86

(iv) Dispute Settlement

In addition to litigation in Thailand, there are two well-known alternative methods for dispute settlement resolution. These methods are mediation and arbitration, which are under the supervision of the Alternative Dispute Resolution Office (ADRO), Office of the Judiciary.

Mediation is a process in which a neutral third party, at the request of the parties to a dispute, meets with those parties and actively assists them in reaching a resolution of the dispute. This type of resolution is often called a settlement, which is made from the parties' self-determination and non-coerced decision regarding the possible resolution of any issue in dispute. Any party or parties wishing to start the mediation process shall send a written request for mediation to the Mediation Center, ADRO.

Domestic laws and procedures available for mediation in Thailand are:

- Code of Civil Procedure
- Regulations on Mediation, Office of the Judiciary (B.E. 2547: 2004)
- The Thai Arbitration Institute (TAI) of ADRO provides an arbitration service. If there is an agreement between parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, the party initiating recourse to arbitration may submit a statement of claim on the application form provided by the Institute to the Director of ADRO.

In most cases, consultation or negotiation between parties and mediation is introduced to the parties prior to the arbitration tribunal appointment. If the dispute cannot be settled within, in most cases, three months, it shall be submitted to an arbitration tribunal for hearing. The tribunal shall reach its decision by a majority of votes.

Disputes between a Contracting Party and a national or company of other Contracting Parties should be resolved as follows:

- through consultation between the parties concerned; and
- if the consultation does not result in a solution within the period of time (in most cases six months), the dispute can be submitted to the Arbitration Institute under the arbitration clause in the agreement which allows the Arbitration Institute to conduct arbitration and to apply the Arbitration Rules of the Institute to the dispute or to competent courts in the territory of which the investment has been made or the domicile of the submitting the claim.

## SUMMARY OF ARBITRATION DISPUTES FROM 2002 TO 2005

Year	Total Disputes	Pending Disputes	New Arrival Disputes	Category		Settled Disputes	Total of amount in disputes (Baht)
				<i>Investor-Investor Disputes</i>	<i>Investor-State Disputes</i>		
2002	137	88	45	17	28	45	22,627,766,527
2003	164	92	72	42	30	54	5,386,931,850
2004	238	110	128	85	43	69	133,140,758,810
2005	300	169	136	85	51	75	74,691,706,044

Domestic laws and procedures available for arbitration in Thailand:

- *Arbitration Act* B.E. 2545 (2002)
- *Arbitration Rules of the Arbitration Institute*, Office of the Judiciary, (B.E. 2546: 2003)
- *Thai Commercial Arbitration Rules*, Office of the Arbitration Tribunal, Board of Trade of Thailand, 1 July 1968.
- *Petroleum Act* B.E. 2514 (1971), Ministry of Industry.

It should be noted that foreign parties are now increasingly resorting to the Arbitration Rules of the Arbitration Institute of the ADRO and to the Thai Commercial Arbitration Rules, which are administered by the Board of Trade of Thailand. The services of the Arbitration Institute are entirely private and unrelated to the official duties of the Office of the Judiciary.

### **Contact for further information:**

Mediation Center & Thai Arbitration Institute  
 Alternative Dispute Resolution Office, Office of the Judiciary  
 Criminal Court Building, 5<sup>th</sup> Floor,  
 Ratchadapisek Road, Chatuchak,  
 Bangkok 10900  
 Telephone: (66 2)541- 2298-9,(66 2)512 -8502,(66 2)512- 8498-9,(66 2)512- 8473  
 Fax: (66 2)512 -8434  
 Email: [adro@judiciary.go.th](mailto:adro@judiciary.go.th)

Board of Trade of Thailand  
 150/2 Rajbopit Road, Bangkok 10200  
 Telephone : (66 2)662 -1860 to 70  
 Fax : (66 2)225 -3995,(66 2)226- 5563  
 Email: [bot@tcc.or.th](mailto:bot@tcc.or.th)

As for the ICSID, the Ministry of Finance has set up a working group to draft an Implementing Act on ICSID. The draft of the Implementing Act for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and concerned ministerial regulations are currently under review.

## **INVESTMENT AND DEVELOPMENT**

### **(i) Performance Requirements**

Under the FBA, referred to in the section on “Screening of Foreign Investment”, foreign investors who are permitted to operate businesses in Lists 2 or 3 with foreign majority ownership may be requested to comply with any of the following conditions:

- the ratio of the capital and loans to be used in the permitted business;
- number of foreign directors who must have domicile in Thailand;
- amount and period for keeping a minimum capital in the country;
- technology or assets; and / or
- other necessary conditions.

Under the *Investment Promotion Act* B.E. 2520 (1977), as amended by the *Investment Promotion Act* (No. 2) B.E. 2534 (1991), and the *Investment Promotion Act* (No. 3) B.E. 2544 (2001), the BOI may stipulate conditions in the promotion certificate for compliance by the promoted person in one or more areas, such as:

- amount and source of capital;
- nationality and number of shareholders;
- size of activity, including the types of products, commodities or services and the production or assembly processes, and capacity thereof;
- nationality and number of workers, technicians and experts;
- training and employment of manpower;
- prevention of harm to the environment;
- report on implementation of the project and operations;
- report on training provided by foreign technicians and experts to Thai personnel; and
- requirements that the cash, bank guarantee, Thai government securities or other securities deemed appropriate by the Board, be deposited with the Office of the BOI for the purpose of guaranteeing compliance with the conditions stipulated by the BOI.

(ii) Local Content Requirements

According to the TRIMs Agreement, Thailand had an obligation to phase out local content requirements by 1 January 2000. Since 1 April 1993, the BOI has lifted local content requirements on many products. For the remaining items, namely, milk and dairy processing, car engines and motorcycle manufacturing, the BOI made an announcement, effective from 1 January 2000 to abolish local content conditions previously enforced in these three industries for both existing and new projects.

(iii) Export Requirements

In 2000, the BOI launched a new investment promotion policy that does not contain **export requirements** or local content conditions, so that promotion criteria are in line with WTO obligations. The new policy came into effect on 1 August 2000.

## INVESTMENT PROMOTION AND INCENTIVES

(i) Investment Promotion Schemes

In Thailand, the BOI and the IEAT are the two major government agencies providing tax and non-tax incentives to both Thai and foreign investors to encourage private investment activities. While most companies can enjoy BOI privileges as long as they meet its criteria, the IEAT can offer incentives only to those located in the industrial estates. Please see also the sections on “Introduction” and “Screening of Foreign Investment” for the scope of the two agencies and their interaction with the screening mechanisms.

Incentives provided by the two agencies are quite similar, but the main difference is the exemption from corporate income tax which is available only under the BOI promotion schemes. Investors can apply for promotion to both agencies at the same time, but they are not allowed to enjoy the same incentives from both agencies for the same purposes. That is, incentives of the same kind for one particular goods have to be granted by either one of the agencies.

### *Nature of Incentives Provided by the BOI*

Tax and non-tax incentives are granted to local and foreign investors on a non-discriminatory basis. The present incentive scheme is geared towards industrial decentralization, resulting in the division of the country into three zones. The incentives granted vary according to project locations: the further from Bangkok the greater the incentives. Projects located in Zone 3 or in the Investment Promotion Zone receive maximum incentives.

- Major tax incentives include tax holidays, exemption or reduction of import duties on machinery and exemption on raw materials. No tax incentives are offered at a sub-national level.
- Non-tax incentives include permission to bring in foreign technicians and experts, permission to own land and permission to remit foreign currency abroad.

In 2000, the BOI revised its investment promotion policy and incentives to ensure that they satisfied the needs of both investors and the government and that they suited the prevailing economic situation. This new policy, which came into effect on 1 August 2000, increased efficiency in

granting tax incentives, relaxed joint-venture criteria for promoted projects and repealed export and local content requirements in line with WTO agreements.

***Contact point for queries:***

Investment Services Center, Office of the Board of Investment  
555 Vipavadee-Rangsit Road, Chatuchak, Bangkok 10900  
Tel: (66 2) 537-8111, 537-8155 ext. 1100-1108  
Fax:(66 2) 537-8177  
Email: [head@boi.go.th](mailto:head@boi.go.th)  
Website: <http://www.boi.go.th>

*Nature of Incentives Provided by the IEAT*

Tax and non-tax incentives granted by the IEAT are:

- 1) Tax incentives: exemption from import duty, VAT and excise tax on imported machinery, components, etc., and material imported for factory construction; exemption of import duty, VAT and excise tax on raw materials; exemption from export duty, VAT and excise tax for exported goods; and exemption from or refund of duties and VAT for local goods utilized for production
- 2) Non-tax incentives: foreign land ownership; work permit for foreign technicians and experts, re-entry visa for foreign technicians, experts and spouse or dependents; and foreign currency remittance

***Contact point for queries:***

One-Stop Service (OSS)  
Industrial Estate Authority of Thailand  
618 Thanon Nikhom Makkasan  
Ratchathewi, Bangkok 10400  
Tel: (66 2) 253-0561 ext. 1185, 1112, 1175  
Fax.: (66 2) 253-2965, 650-0203  
Email: [ieat@ieat.go.th](mailto:ieat@ieat.go.th) ; [investment.l@ieat.go.th](mailto:investment.l@ieat.go.th)  
Website: <http://www.ieat.go.th>

(ii) Regional Operating Headquarters

On 16 August 2002, the government introduced a new package to replace the one governing the establishment of regional offices in Thailand. The package became effective following the announcement of Royal Decrees Numbers 405 and 406. The Regional Operating Headquarters (ROH) package provides tax breaks and incentives to attract foreign companies to establish regional headquarters in Thailand.

An ROH means a company incorporated under Thai law in order to provide managerial, technical, or supporting services to its associated enterprise or its domestic or foreign branches.

Supporting services refers to the following:

- General management, business planning and business coordination.
- Sourcing of raw materials and parts.
- Product R&D.
- Technical support.
- Marketing and sales promotion.
- Human resource management and regional training.
- Financial consultation.
- Economic and investment analysis and research.
- Credit management and control.
- Other supporting services as stipulated by the Director General of the Revenue Department.
- *Criteria for a Qualified ROH:*
- Must be a company incorporated under the law of Thailand, and have a minimum paid-up capital of 10 million baht.
- Must have income from providing managerial, administrative, technical or any other prescribed supporting service to its branches or its associated enterprises.
- Must provide services to its branches or associated enterprises in at least 3 countries.
- Half of its total income must be from qualified services and royalties received from its branches or associated enterprises outside of Thailand.

(iii) Tax incentives

- Corporate income tax reduction from 30% to 10%.
- Tax exemption from dividends received from the ROH's associated enterprises and dividends paid out of the ROH's concessionary profit to its shareholders not conducting business in Thailand.
- Initial allowance for buildings at the rate of 25% on the date of acquisition.
- Expatriates working for ROH can select to be taxed at the rate of 15% for 4 years instead of the normal progressive tax system ranging from 5% to 37%.

(iv) Non-tax Incentives

- Permission to own land.
- Permission to bring in expatriates as required.

- Permission to take or remit foreign currency abroad.
- May be majority or totally foreign-owned.

A qualified ROH that wants to be granted **tax incentives** must apply directly to Revenue Department. For further information see <http://www.rd.go.th>

For **non-tax incentives**, the ROH must apply directly to the Office of the BOI. For further information contact: <http://www.boi.go.th>

(v) Free Trade Zones / Special Investment Areas

*Export Processing Zone*

Thailand has 10 Export Processing Zones (EPZs) developed by the IEAT and its joint venture industrial estate developer. The EPZs are developed under the *Industrial Estate Authority of Thailand Act* to serve as a key mechanism of export manufacturing promotion in Thailand. Firms located in the EPZs are exempt from import duties, VAT, excise tax and other taxes on factory construction materials, machinery and equipment including manufacturing input, with no time limitation. In addition, the BOI may approve corporate income tax exemption for a set period. Within the EPZ, foreign investors can own land and bring technicians and experts to work and stay in the country, including their spouses and dependents. EPZs are specially located within industrial estates. Therefore, they have full infrastructure and utilities and generally good access to transportation. (Detailed information is available at <http://www.ieat.go.th> )

*Free Trade Zones*

Free trade zones were established in 1997 to boost key export-oriented industries, such as electronics, automobiles and parts, and gems and jewelry. Industries located in these zones enjoy tax holidays on machinery imports and corporate tax exemption for a set period. The raw materials imported for export-oriented production are also exempt from duties. In addition, industries in these zones do not have to apply to the Industrial Works Department for licenses to operate factories.

(vi) Free Zones

In 2002, the Customs Department launched a “Free Zone” scheme, which is a new version of free trade zones. Free Zones are designed as duty-free areas to promote industrial and commercial activities, especially export manufacturing. Several privileges and incentives can be enjoyed by companies located in a free zone, such as:

- Exemption of import duties and taxes for every kind of goods (machinery and raw material included)
- Exemption of VAT, excise tax, alcohol tax, and tax stamps and fees
- Some other restricted regulations for import and export, e.g. Quality Control Regulations and License of the Food and Drug Administration.
- There will be no duty or taxes for products produced within free zones for export, except those sold domestically. (Further details are available at <http://www.customs.go.th> )

*Tax Incentives / Privileges for Free Zones*

Program	Incentives / Privileges	Contact Point
<p>A Free Zone is an area designated area for industrial or commercial operation or any other operations that contribute to economic growth and development. Foreign and domestic merchandise moving into Free Zone are eligible for tax and duty privileges as indicated by the law.</p>	<p>Tax and Duty Privileges of a Free Zone</p> <ul style="list-style-type: none"> <li>• Exemption from import and internal tax.</li> <li>• Exemption from export duty on Re-Exports</li> <li>• Exemption from the Standard/Quality Control requirements</li> <li>• Duty exemption on waste, scrap, and yield loss.</li> <li>• Refunds or exemption can be given when privilege goods enter a free zone, as if exported.</li> </ul>	<p>Free Zone Division Tax and Duty Privilege Bureau The Royal Thai Customs Sunthornkosa Road Klongtoey, Bangkok 10110 Tel: 66-2-672-7509 Fax: 66-2-672-8121 Website: <a href="http://www.customs.go.th">www.customs.go.th</a></p>

(vii) Bonded Warehouses

Bonded warehouses are another type of special investment area. Among various types of bonded warehouses under the *Customs Act* B.E. 2469 (1952), as amended from time to time, those for manufacturing have been used by investors for some time. Business operators whose factories are approved as a **bonded warehouse of the manufacturing type** are exempt from import taxes and duties, provided that the goods imported and stored in such warehouses are used in the process of producing, mixing or assembling, and then exported. However, imported goods are subject to taxes and duties if they are removed from the bonded warehouse for domestic consumption.

*Tax Incentives / Privileges for Bonded Warehouse*

<b>Program</b>	<b>Incentives / Privileges</b>	<b>Contact Point</b>
Bonded Warehouse	<ul style="list-style-type: none"> <li>• Exemption on import duty on raw materials.</li> <li>• Exemption on import duty on machinery parts, accessories and tools.</li> <li>• Exemption on excise tax.</li> <li>• Exemption on export duty.</li> <li>• Exemption on import duty if goods are sold to registered companies.</li> <li>• Exemption on bank guarantee can be used for guarantee.</li> <li>• Exemption on waste or defective materials; duty and tax are exempt if materials are destroyed.</li> <li>• Duty exemption on goods transferred among bonded warehouses.</li> <li>• Duty exemption on goods temporarily taken out for processing.</li> </ul>	Free Zone Division Tax and Duty Privilege Bureau The Royal Thai Customs Sunthornkosa Road, Klongtoey, Bangkok 10110 Tel: 66-2-672-7509 Fax: 66-2-672-8121 Website: <a href="http://www.customs.go.th">www.customs.go.th</a>

(viii) General Tax Schemes

The BOI provides tax incentives on a project-by-project basis. There is a time limit for the period of income tax holidays. Investors can apply for new privileges for expansion projects, but they have to pay tax for projects whose tax incentives have expired. A brief summary of corporate income tax and VAT in Thailand is presented below.

## Corporate Income Tax

The corporate income tax rate in Thailand is 30% on net profit. However, the rates vary depending on the type of taxpayers.

<b>Taxpayer</b>	<b>Tax Base</b>	<b>Rate</b>
1. Small company <sup>1</sup>	Net profit not exceeding 1 million baht Net profit over 1 million baht but not exceeding 3 million baht Net profit exceeding 3 million baht	15 % 25% 30%
2. Companies listed on the Stock Exchange of Thailand (SET)	Net profit for first 300 million baht Net profit for amount exceeding 300 million baht	25% <sup>2</sup> 30%
3. Companies newly listed on the SET	Net profit	25% <sup>3</sup>
4. Company newly listed on the Market for Alternative Investment (MAI)	Net profit for first five accounting periods after listing Net profit after first five accounting periods	20% 30%
5. Bank deriving profits from International Banking Facilities (IBF)	Net profit	10%
6. Foreign company engaging in international transportation	Gross receipts	3%
7. Foreign company not carrying on business in Thailand receiving dividends from Thailand	Gross Receipts	10%
8. Foreign company not carrying on business in Thailand receiving other types of income, <sup>4</sup> apart from dividends from Thailand	Gross receipts	15%
9. Foreign company disposing of profits outside of Thailand	Amount disposed	10%
10. Profitable association and foundation	Gross receipts	2% or 10%
11. Regional Operating Headquarters (ROH)	Net profit Dividends	10% <sup>5</sup> Exempt <sup>6</sup>

## *Notes*

1. A small company refers to companies with paid-up capital of less than 5 million baht at the end of each accounting period.
2. The reduced rate applies to currently listed companies (registered within 6 September 2001 - 5 September 2005) for five accounting periods beginning on or after 6 September 2001.
3. The reduced rate applies to newly listed companies (registered within 6 September 2001 – 5 September 2005) for five accounting periods beginning on or after 6 September 2001.
4. *These incomes are:*
  - Income by virtue of jobs, positions or services rendered;
  - That part of the value received from the amalgamation, acquisition or dissolution of juristic companies or partnerships which exceeds the cost of investment;
  - That part of the proceeds derived from transfer of partnership holdings, shares, debentures, bonds, or bills or debt instruments issued by a juristic company or partnership or by any other juristic person, which exceeds the cost of investment; and
  - Specified income.
5. The reduced tax rate is imposed on net profit for:
  - Income derived from services provided to the ROH's foreign branches or associated enterprises;
  - Royalties derived from the ROH's foreign branches or associated enterprises for the use of R&D done by ROH in Thailand;
  - Interest received from the ROH's foreign branches or associated enterprises for loans granted, provided that such loans are made from other sources and extended to the ROH's branched or associated enterprises.
6. The tax exemption is applied to dividends received by ROH from associated enterprises or dividends paid out of the ROH's concessionary profit to its shareholders not carrying on business in Thailand.

## *VAT*

The reduction of the VAT rate from 10% to 7% was extended for two more years from 1 October 2005 to 30 September 2007.

## *Double Taxation Agreements*

As of September 2006, Thailand had concluded 52 double taxation agreements, with Armenia, Australia, Austria, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hong Kong SAR, Hungary, India, Indonesia, Israel, Italy, Japan, Korea, Kuwait, Laos, Luxembourg, Malaysia, Mauritius, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Romania, Seychelles, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uzbekistan and Vietnam.

## MOBILITY OF CAPITAL AND TECHNOLOGY

### (i) Capital Exports

Regulations/institutional measures that limit capital exports or the outflow of foreign investment are as follows:

<b>Laws/Regulation</b>	<b>Scope of Application</b>
Foreign Exchange Control	<p>Resident:</p> <ul style="list-style-type: none"><li>• Direct foreign investments by residents not exceeding US\$10 million annually do not require approval by the Bank of Thailand.</li><li>• Thai entities can lend to their affiliated companies abroad up to US\$10 million per year without seeking approval of the Bank of Thailand.</li><li>• Some institutional investors have been allowed to invest in certain securities abroad within pre-approved annual limits.</li><li>• Residents can remit capital abroad for some other purposes, such as purchase of securities under employee stock ownership plans, or immovable assets up to certain limits.</li></ul> <p>Non-resident:</p> <ul style="list-style-type: none"><li>• No regulations/measures limit the repatriation of funds related to foreign investment. Such funds can be remitted freely upon submission of supporting documents.</li></ul>

### (ii) Regulations / Institutional Measures that Limit Technology Exports

Not applicable.

## LABOR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS

### (i) Labour Laws and Regulations

For Thailand's regulations relating to the management of personnel in foreign firms, e.g. labor laws, minimum wage laws, minimum requirements for training or employment of local staff, please refer to the following table.

Law	Summary
<i>Labor Relations Act</i> B.E. 2518 (1975)	The <i>Labor Relations Act</i> is designed to regulate labor-management relations and set out procedures for the presentation of demands. Negotiations between employers and employees, mediation by officials of the Ministry of Labor, and arbitration by the Labor Relations Committee.
<i>Labor Protection Act</i> B.E. 2541 (1998)	Protection, such as working hours and holidays; wages, overtime and holiday pay; female labor and child labor; severance pay; work safety; occupational hygiene and environmental conditions; employee assistance fund and welfare.
<i>Social Security Act</i> B.E. 2533 (1990)	This covers enterprises with one or more employee. The scheme is financed by three parties: employer, employee and the government. It provides protection to insured persons who are injured, sick, disabled or die from non work-related causes. The Act also covers maternity, child allowance, old-age pension and unemployment benefits for insured persons.
<i>Workmen's Compensation Act</i> B.E. 2537 (1994)	This covers enterprises with one or more employee. Employers pay contributions to the fund annually at the rate of 0.2 to 1%, depending on industrial classification and experience rates. It provides protection to employees who become injured, sick, disabled or die from work-related causes.

Minimum Daily Wage Rates, effective January 1, 2007	Baht
Bangkok, Nonthaburi, Nakhon Pathom, Pathum Thani, Samut Prakan and Samut Sakhon	191
Phuket	186
Chonburi	172
Saraburi	168
Nakhon Ratchasima	162
Rayong	161
Chachoengsao, Ayutthaya, Ranong	160
Chiang Mai, Pang-nga,	159
Krabi and Petchaburi	156

Kanchanaburi, Chanthaburi, and Lopburi	155
Ratchaburi, Samut Songkhram, and Sa Kaeo	154
Trang, Prachuab Khirikhan, Prachinburi, Songkhla, Singburi and Ang Thong	152
Loei and Udon Thani	150
Chumporn, Trat, Lampang, Lamphun, Sukhothai, Suphanburi	149
Kalasin, Khon Kaen, Nakhon Phanom, Nakhon Sri Thammarat, Narathiwat, Buriram, Pattani, Yala, Satun and Nong Khai	148
Kamphaeng Phet, Tak, Nakhon Nayok, Nakhon Sawan, Pattalung, Phitsanulok, Petchabun, Surat Thani and Utharadit	147
Chai Nat, Chaiyaphum, Chiang Rai, Maha Sarakham, Mukdahan, Yasothon, Roi-et, Srisaket, Sakon Nakhon, Nong Bua Lamphu and Uthai Thani	146
Pichit, Mae Hong Son, Surin, Ubon Ratchatani and Amnat Charoen	145
Phayao and Phrae	144
Nan	143

Source: Ministry of Labor ([www.mol.go.th](http://www.mol.go.th))

<b>Overtime Regulations (<i>The Labor Protections Act 1998</i>)</b>	
Overtime on regular working days	Time and a half
Regular work on public holidays	
For an employee who is entitled to wages on a holiday	Single time
For an employee who is not entitled to wages on a holiday	Double time
Overtime performed on public holidays	Triple time
Workers working more than eight hours	Time and a half
<i>Severance Payment Entitlement (The Labor Protection Act 1998)</i>	
Workers employed for:	
More than 120 days but less than one year	30 days
More than one year but less than three years	90 days
More than three years but less than six years	180 days
More than six years but less than 10 years	240 days
Ten years and up	300 days

Source: Ministry of Labor

Under the labor laws there is no requirement as to the minimum number of local staff that foreign firms have to hire or train.

Below is the law governing foreigners working in Thailand. Further information is available at: <http://www.doe.go.th>

<b>Restrictions</b>	<b>Description</b>
<i>Working of Aliens Act</i> B.E. 2521 (1978) requires that natural persons not of Thai nationality must obtain a work permit to work in Thailand	A Royal Decree lists 39 occupations and professions prohibited to foreigners

(ii) Prohibited Occupations for Foreigners

A Royal Decree in 1973 listed 39 occupations and professions that were then prohibited to foreigners. This list has been amended on several occasions by subsequent Royal Decrees, the latest was in 1979.

- 1) Manual work.
- 2) Work in agriculture, animal husbandry, forestry or fishery, excluding specialized work in each particular branch or farm supervision.
- 3) Bricklaying, carpentry or other construction work.
- 4) Wood carving.
- 5) Driving mechanical propelled carriers or driving non mechanically-propelled vehicles, excluding international aircraft piloting.
- 6) Shop attendance.
- 7) Auction.
- 8) Supervising, auditing or providing services in accountancy, excluding internal auditing on occasions.
- 9) Cutting or polishing jeweler.
- 10) Haircutting, hairdressing or beauty treatment.
- 11) Cloth weaving by hand.
- 12) Weaving of mats or making products from reeds, rattan, hemps, straw, or bamboo pellicle.
- 13) Making of Sa paper by hand.
- 14) Lacquerware making.
- 15) Making of Thai musical instruments.
- 16) Nielloware making.
- 17) Making of products from gold, silver or gold-copper alloy.
- 18) Bronzeware making.
- 19) Making of Thai dolls.
- 20) Making of mattress or quilt blankets.
- 21) Alms bowl casting.
- 22) Making silk products by hand.
- 23) Casting of Buddha images.

- 24) Knife making.
- 25) Making of paper or cloth umbrellas.
- 26) Shoe making.
- 27) Hat making.
- 28) Brokerage or agency, excluding brokerage or agency in international trade business.
- 29) Engineering work in civil engineering concerning designing and calculation, organization, research, planning, testing, construction supervision or advising, excluding specialized work.
- 30) Architectural work concerning designing, drawing of plans, estimating, construction-directing or advising.
- 31) Garment making.
- 32) Pottery or ceramic ware making.
- 33) Cigarette making by hand.
- 34) Guide or conducting sightseeing tours.
- 35) Street vending.
- 36) Type-setting of Thai characters by hand.
- 37) Drawing and twisting silk thread by hand.
- 38) Clerical or secretarial work.
- 39) Legal or lawsuit services.

(iii) Visas / Work Permit Requirements for Non-Resident Staff of Foreign Firms

Thailand provides efficient services to facilitate the entry of business people as well as the general public while maintaining a sufficient level of immigration control to ensure national security. All persons, other than those in transit and citizens of certain countries, are required to obtain a visa to enter Thailand.

There are nine types of visas, namely, tourist, non-immigrant, diplomatic, official, transit, immigrant, non-quota immigrant, courtesy, and visa on arrival. Non-resident staff of foreign firms must obtain a non-immigrant visa.

There are 10 categories of non-immigrant visas: Business (B), Official (F), Education (ED), Mass Media of Communication (M), Investment through BOI (IB), Investment through Ministry (IM), Religion (R), Research and Science (RS), Expert (EX) and Other (O). Business (non-immigrant) visas can be obtained from the Royal Thai Embassies and Consulates in respective countries.

Business visa holders (category B) are entitled to stay in Thailand for at least 90 days. As part of Thailand's effort to facilitate foreign investment, non-immigrant visas under the IB category are issued to foreign staff working under investment projects promoted by the BOI.

To facilitate the residence of foreign nationals, Thailand has introduced a multiple re-entry visa, which entitles holders of non-immigrant visas to multiple entries for one year.

However, the Immigration Bureau has a requirement that four Thai nationals be hired for each foreign national when granting a stay. This applies to any company in Thailand that plans to hire foreign staff, except those that are under investment promotion schemes provided by the BOI or the IEAT.

Please also refer to the chapter on Mobility of Business People in Thailand's Individual Action Plan on the APEC-IAP website at: <http://www.apec-iap.org>

A work permit is also required for foreign nationals intending to work or to conduct business in Thailand. The BOI facilitates applications for work permits for foreign staff working under investment projects promoted by the BOI.

To speed up the process of the issuance of visas, work permits and re-entry permits, the One-Stop Service Center for Visas and Work Permits was established in June 1997 to handle all aspects of visa extensions and issuance of work permits, including work permit extensions, issuance of re-entry permits, and changes in type of visa to non-immigrant. This process takes no longer than three hours, assuming all necessary supporting documents are provided. The issuance of visas is now open to all nationalities.

The OSS Center for Visas and Work Permit has constantly expanded its scope of services to improve the facilitation of residence for foreign investors. In 1999, the issuance of visas and work permits was extended to foreign research staff in science and technology, foreign officers of foreign bank branches, Bangkok International Banking Facilities (BIBF) offices of foreign banks and foreign bank representative offices certified by the Bank of Thailand. In 2001, the Center expanded its services to applicants who work for representative offices of foreign juristic persons and regional offices of multinational corporations. In 2002, foreign experts in information and technology, and foreign officers of ROHs were included in the list of expatriates entitled to use the service provided by the Center. Then, in 2004, the Center services were expanded to expatriates working in foreign companies whose countries have special arrangement with Thailand's government.

***For more information, please contact:***

One-Stop Service Center for Visas and Work Permits  
Rasa Tower 2, 16<sup>th</sup> Floor, 555 Phaholyothin Road  
Chatuchak, Bangkok 10900, Thailand  
Tel: (66 2) 937-1155  
Fax: (66 2)937-1191  
Email: [visawork@boi.go.th](mailto:visawork@boi.go.th)

(iv) Senior Management and Board of Directors

Under the FBA, referred to in the section on “Screening of Foreign Investment”, Section 15 of the FBA imposes criteria on the proportion of Thai directors of foreign companies that are allowed to operate businesses in List 2 with foreign-majority ownership. It states that the number of Thai directors shall not be less than two-fifths of the total number of directors.

Also, as mentioned in the section on “Investment and Development”, Section 18 of the FBA stipulates that a condition on the number of foreign directors who must have domicile in Thailand may be imposed on foreign companies permitted to operate businesses in List 2 or 3.

Under the investment promotion scheme of the BOI, foreign technician or experts are allowed to work in promoted companies. However, in certain cases, such as when the majority of the total shares in promoted companies is owned by Thai nationals, the companies may not be allowed to have foreigners as presidents or managing directors. Wholly foreign-owned promoted companies are allowed to have foreigners as their top management.

## **GOVERNMENT PROCUREMENT**

Government procurement in Thailand is governed by *Regulation of the Office of the Prime Minister on Procurement* B.E. 2535 (1992), as Amended. The core procurement principles include openness, transparency, fairness, efficiency and effectiveness of resource utilization.

In 2004, Thailand established the Government Procurement Information Centre, which provides information concerning government procurement. All government procurement information is accessible through the following website: [www.gprocurement.go.th](http://www.gprocurement.go.th) and [www.cgd.go.th](http://www.cgd.go.th)

In addition, Thailand introduced an electronic online real-time auction procedure in 2005 by launching the *Regulation of the Office of the Prime Minister on Electronic Procurement* B.E. 2549 (2006). Government procurement valued over 5 millions baht must be conducted through this Regulation, in line with the *Regulation of the Office of the Prime Minister on Procurement*.

## **COMPETITION POLICY**

One of the major economic policies guiding Thailand’s economic development for a long time is free and fair trade. In the latest amendment to the *Constitution of the Kingdom of Thailand* B.E. 2540 (1997), a provision has been included to serve as a guideline for the government’s economic policy (section 87). It states that the government must support an economic system that utilizes the free market mechanism. The government has to facilitate fair competition, consumer protection, and anti-monopoly practices, including deregulation of unnecessary rules and laws. Private businesses are allowed to conduct activities in Thailand under conditions of free and fair competition.

*Constitution of the Kingdom of Thailand B.E. 2540 (1997)*

Section 87: The State shall encourage a free economic system through market forces, ensure and supervise fair competition, protect consumers, and prevent direct and indirect monopolies, repeal and refrain from enacting laws and regulations controlling businesses which do not correspond with the economic necessity, and shall not engage in an enterprise in competition with the private sector unless it is necessary for the purpose of maintaining the security of the State, preserving the common interest, or providing public utilities.

Detailed information is available at the APEC website under Thailand's Individual Action Plan at:  
[www.apec-iap.org](http://www.apec-iap.org)

For further inquiries please contact:

Department of Internal Trade, Ministry of Commerce  
44/100 Nonthaburi 1 Rd.  
Muang District, Nonthaburi 11000  
Tel: 66-2-507-6111  
Fax: 66-2-547-5361  
Website: [www.dit.go.th](http://www.dit.go.th)



## UNITED STATES OF AMERICA

### Acronyms

CFIUS	Committee on Foreign Investment in the United States
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
EDA	Economic Development Administration
FCN	Friendship, Commerce and Navigation (treaty)
FTC	Federal Trade Commission
FTCA	Federal Trade Commission Act
GPA	Government Procurement Agreement
ITAR	International Traffic in Arms Regulations
NASDA	National Association of State Development Agencies
OFAC	Office of Foreign Assets Control
VWP	Visa Waiver Program

### INTRODUCTION

It is the policy of the United States government to regulate foreign investment as little as possible. An open investment regime fosters economic growth, increases the competitiveness of companies, and promotes job creation. As international competition for capital intensifies, it becomes increasingly important for countries to offer investors a stable, non-discriminatory policy and regulatory environment. The United States continues to offer such an investment environment, and it seeks to encourage the development of similar policy regimes in other countries.

The United States has the world's largest economy and is the world's largest source and recipient of FDI. Foreign investors are attracted by the talented U.S. labor force and by the opportunity to create strategic alliances with the country's strong, competitive industries.

U.S. policies on foreign direct and portfolio investment have changed little over the past several decades. The U.S. investment regime is characterized by a high degree of openness, and is based on the principle of national treatment. Foreign investors benefit from an open, transparent, and, with very few exceptions, non-discriminatory investment climate. The United States also offers foreign investors non-discriminatory legal recourse in the event of an investment-related dispute, free transferability of capital and profits, guarantees against uncompensated expropriation, and advanced physical and financial infrastructure.

## SCREENING OF FOREIGN INVESTMENT

### (i) Investment Screening

The United States does not screen foreign investment. The United States welcomes foreign investment and provides foreign investors non-discriminatory treatment both as a matter of law and policy. Foreign investors are generally free either to establish new businesses or to acquire existing ones, subject only to laws and regulations that are applicable to all firms, irrespective of nationality.

*The Omnibus Trade and Competitiveness Act* of 1988 added section 721 to the *Defense Production Act* of 1950, providing authority to the President to suspend or prohibit any foreign acquisition, merger, or takeover (collectively, “acquisition”) of a U.S. company that the President determines threatens to impair the national security of the United States. Section 721 is known as the Exon-Florio amendment, after its original congressional co-sponsors.

The Exon-Florio amendment authorizes the President, or his designee, to investigate foreign acquisitions of U.S. companies to determine their effects on the national security. It also authorizes the President to take such action as he deems appropriate to prohibit or suspend such an acquisition if he finds that (1) there is credible evidence that leads him to believe that the foreign investor might take action that threatens to impair the national security; and (2) existing laws, other than the *International Emergency Economic Powers Act* and the Exon-Florio amendment itself, do not in his judgment provide adequate and appropriate authority to protect the national security.

Following the enactment of the Exon-Florio amendment, the President delegated to the Committee on Foreign Investment in the United States (CFIUS), a government body, the responsibility to receive notices from companies engaged in transactions that are subject to Exon-Florio, to conduct reviews to identify the effects of such transactions on the national security, and, if necessary, to undertake investigations. As required by the Exon-Florio amendment, the President retained the authority to suspend or prohibit a transaction.

The Secretary of the Treasury is the Chair of CFIUS. The other CFIUS member agencies are the Departments of State, Homeland Security, Defense, Justice, and Commerce, and six offices within the Executive Office of the President: the Office of Management and Budget, the Council of Economic Advisers, the Office of the U.S. Trade Representative, the Office of Science and Technology Policy, the National Security Council, and the National Economic Council. Treasury receives notices of transactions, serves as the contact point for the private sector, establishes a calendar for review of each transaction in accordance with the statutory deadlines, and coordinates the interagency process.

Exon-Florio reviews generally commence with the voluntary submission of a notice by the parties involved in a proposed transaction. Once a notice is received, CFIUS has 30 days for a first-stage investigation. If issues remain after the 30-day investigation, the law provides for a 45-day second stage investigation, after which the President has up to 15 days to make a decision. CFIUS reviews fewer than ten per cent of foreign acquisitions of U.S. companies. CFIUS conducted 32 second stage investigations through the end of November 2006.

## (ii) Investment-Related Laws and Regulations of General Application

### *Constitutional Provisions*

The Constitution of the United States contains several provisions that guarantee economic freedom. These guarantees generally benefit foreign investors. Among these are Articles I and III, and the Fifth and Fourteenth Amendments. [Text should read “Article I and III,....”]

Article I, Section 8 provides, in part, that all duties, imposts, and excises shall be uniform throughout the United States; foreign and interstate commerce shall be regulated by the federal government, through Congress; there shall be a uniform bankruptcy law that would free assets that would otherwise be tied up in bankruptcy; and authors and inventors shall have exclusive rights for their works and inventions for a period of time. Article I, Section 9 provides that neither Congress nor the states can tax exports and prohibits regulatory or revenue preferences for the ports of one state over those of other states. Article I, Section 10 provides that the states generally cannot seek to impair contractual obligations through legislation. Article III authorizes the federal courts to resolve issues arising under the Constitution and federal law.

The “Takings Clause” of the Fifth Amendment of the Constitution provides that “private property” may not be “taken for public use without just compensation.” This constitutional requirement is consistent with international rules on expropriation. The Fifth Amendment also provides that no person shall be “deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

These and other constitutional provisions have been interpreted by the U.S. Supreme Court in numerous cases relating to the scope of economic freedom. For example, the guarantee of freedom of speech in the First Amendment has been interpreted to cover, in certain instances, “commercial” speech, though which manufacturers, retailers, and service providers transmit information to the general public. Analyzing the interstate commerce and equal protection clauses of the Constitution, the Supreme Court has also determined that foreign firms incorporated in one state cannot be charged a tax or fee as a condition for doing business in another state, and that states cannot impose regulations more burdensome for foreign corporations than for domestic corporations unless such regulations are rationally related to a legitimate state purpose.

### *Other Laws and Regulations of General Application*

The United States maintains a number of federal, state, and local laws and regulations of general application that affect investment. The vast majority of these laws are applied without regard to the nationality of investors. These include laws and regulations governing anti-trust, mergers and acquisitions, wages and social security, export controls, environmental protection, health, and safety.

Several federal-level laws of general application treat foreign and domestic investors differently. One such law, described above, is the Exon-Florio Amendment. Domestic and foreign investors may also be treated differently under laws relating to the protection of classified information and to investment reporting requirements.

*(a) Laws that protect classified information*

The executive orders and Department of Defense regulations that comprise the Industrial Security Program require U.S. and foreign persons and corporations carrying out contracts involving classified information to obtain security clearances. Both a facility clearance and individual clearances for key management personnel and others who may have access to classified information are required for any company in the United States carrying out a classified contract. Facilities under “foreign ownership, control, or influence” are generally ineligible for facility clearances, unless foreign management is excluded. A foreign-controlled U.S. subsidiary might obtain clearances by forming a “voting trust” or “proxy agreement,” under which day-to-day management is reserved to individuals approved by the Department of Defense, or by formally agreeing to other special management arrangements to ensure the security of the classified information.

*(b) Investment reporting requirements*

The United States maintains several reporting requirements with respect to foreign direct investments. These reporting requirements, which are administered by the Department of Commerce, apply only to established investments and are maintained only for purposes of data collection and analysis. Data or information attributable to specific foreign investors is not released to the public, but aggregate data may be made available in U.S. government reports. For additional information, see: <http://www.bea.gov/bea/surveys/fdiusurv.htm>

Other laws of general application that may have a differential impact on domestic and foreign investors in specific economic sectors are described in section 3 of this chapter.

***State- and Local-Level Measures***

State and local governments also maintain laws and regulations that affect the operations of investments located in their territory, but the ability of sub-federal governments to regulate investment in a manner that discriminates with respect to ownership or other matters between residents of the state or companies incorporated in it and residents or companies from other states or other countries is constrained by the Commerce Clause of the U.S. Constitution, which states that “Congress shall have power to...regulate commerce with foreign nations, and among the several states.” Accordingly, state laws outside the areas of company law, real estate, banking, and insurance (areas in which Congress has specifically delegated regulatory authority to the states) generally apply equally to all persons residing in a state and to all companies or other entities doing business in its territory. Most differences in the treatment of domestic and foreign investors at the state or local level are minor and can frequently be eliminated through simple incorporation in a particular state or locality.

**SECTOR-SPECIFIC LAWS AND POLICIES**

Foreign and domestic investors are treated alike in nearly all sectors of the U.S. economy. Federal-level measures treat foreign and domestic investors and investments differently in a small number of sectors. This differential treatment, for which the United States has taken exceptions in its international trade and investment agreements, is summarized below. The United States maintains relatively few measures affecting foreign ownership of investment at the state level. Please refer to the U.S. GATS schedule for more detail on such measures.

(i) Atomic Energy

*Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq.*

A license issued by the United States Nuclear Regulatory Commission is required for any person in the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, use, import, or export any nuclear “utilization or production facilities” for commercial or industrial purposes. Such a license may not be issued to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (42 U.S.C. § 2133(d)). A license issued by the United States Nuclear Regulatory Commission is also required for nuclear “utilization and production facilities,” for use in medical therapy or for research and development activities. The issuance of such a license to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government is also prohibited (42 U.S.C. § 2134(d)).

(ii) Mining

*Mineral Lands Leasing Act of 1920, 30 U.S.C. Chapter 3A, 10 U.S.C. § 7435*

Under the *Mineral Lands Leasing Act* of 1920, aliens and foreign corporations may not acquire rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across on-shore federal lands or acquire leases or interests in certain minerals on on-shore federal lands, such as coal or oil. Non-U.S. citizens may own a 100 per cent interest in a domestic corporation that acquires a right-of-way for oil or gas pipelines across on-shore federal lands, or that acquires a lease to develop mineral resources on on-shore federal lands, unless the foreign investor’s home country denies similar or like privileges for the mineral or access in question to U.S. citizens or corporations, as compared with the privileges it accords to its own citizens or corporations or to the citizens or corporations of other countries (30 U.S.C. §§ 181, 185(a)). Nationalization is not considered to be denial of similar or like privileges.

Foreign citizens, or corporations controlled by them, are restricted from obtaining access to federal leases on Naval Petroleum Reserves if the laws, customs, or regulations of their country deny the privilege of leasing public lands to citizens or corporations of the United States (10 U.S.C. § 7435).

(iii) Foreign Investment Insurance and Loan Guarantees

*22 U.S.C. §§ 2194 and 2198(c)*

Overseas Private Investment Corporation insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled domestic enterprises.

(iv) Air Transportation

*49 U.S.C. Subtitle VII, Aviation Programs*

*14 C.F.R. Part 297 (foreign freight forwarders)*

*14 C.F.R. Part 380, Subpart E (registration of foreign passenger charter operators)*

*14 C.F.R. Part 375*

Only air carriers that are “citizens of the United States” may operate aircraft in domestic air service (cabotage) and may provide international scheduled and non-scheduled air service as U.S. air carriers.

U.S. citizens also have blanket authority to engage in indirect air transportation activities (air freight forwarding and passenger charter activities other than as actual operators of the aircraft). In order to conduct such activities, non-U.S. citizens must obtain authority from the Department of Transportation. Applications for such authority may be rejected for reasons relating to the failure of effective reciprocity, or if the Department of Transportation finds that it is in the public interest to do so.

“Foreign civil aircraft” require authority from the Department of Transportation to conduct specialty air services in the territory of the United States. In determining whether to grant a particular application, the Department will consider, among other factors, the extent to which the country of the applicant’s nationality accords U.S. civil aircraft operators effective reciprocity. “Foreign civil aircraft” are aircraft of foreign registry or aircraft of U.S. registry that are owned, controlled, or operated by persons who are not citizens or permanent residents of the United States.

Under 49 U.S.C. § 40102(a)(15), a “citizen of the United States” means an individual who is a U.S. citizen; a partnership in which each member is a U.S. citizen; or a U.S. corporation of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, which is under the actual control of U.S. citizens, and in which at least seventy-five per cent of the voting interest in the corporation is owned or controlled by U.S. citizens.

(v) Customs Broker Services

*19 U.S.C. § 1641(b)*

A customs broker’s license is required to conduct customs business on behalf of another person. Only U.S. citizens may obtain such a license. A corporation, association, or partnership established under the law of any state may receive a customs broker’s license if at least one officer of the corporation or association, or one member of the partnership, holds a valid customs broker’s license.

(vi) Registration of Securities

*Securities Act of 1933, 15 U.S.C. §§ 77C(b), 77f, 77g, 77h, 77j, and 77s(a)*

*17 C.F.R. §§ 230.251 and 230.405*

*Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78m, 78o(d), and 78w(a)*

*17 C.F.R. § 240.12b-2*

Foreign firms, except for certain Canadian issuers, may not use the small business registration forms under the *Securities Act* of 1933 to register public offerings of securities or the small business registration forms under the *Securities Exchange Act* of 1934 to register a class of securities or file annual reports.

(vii) Radiocommunications

*47 U.S.C. § 310*

*Foreign Participation Order 12 FCC Rcd 23891 (1997)*

The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting.

(viii) Satellite Communications

Pursuant to bilateral agreements and/or regulatory findings that the countries in question would offer U.S. operators effective competitive opportunities to provide satellite transmission of direct-to-home (DTH) television and digital audio services, the United States has granted satellite providers from Mexico, Argentina, and Japan the opportunity to provide DTH services in its market.

(ix) Alaska Native Claims

*43 U.S.C. §§ 1601 et seq.*

The *Alaska Native Claims Settlement Act* settled native land claims in Alaska, in part by establishing a number of regional, urban, and village corporations to be owned by Alaska natives and to hold title to certain lands in Alaska. Only Alaska natives are entitled to receive shares in these corporations, and the shares may not be purchased by non-Alaska native citizens of the United States or by foreign citizens. Only shareholders of a regional corporation are eligible to serve on that corporation's board.

(x) Maritime Services

*The Jones Act* (Section 27 of the *Merchant Marine Act* of 1920) reserves cargo service between two points in the United States (including most territories and possessions), either directly or via a

foreign port, for ships that are registered under the U.S. flag, U.S.-crewed, and built in the United States. Vessels registered under the U.S. flag must be owned by a U.S. corporation, of which 75 per cent of the employees must be U.S. citizens (as defined in the *Shipping Act* of 1916, Sec. 2(a)-(c) and 46 U.S.C. 12106, as amended). In general, the same requirements apply to domestic passenger services, which are reserved for U.S. crews and ships built and registered in the United States.

(xi) Banking and other Financial Services (Excluding Insurance)

All directors of a national bank must be U.S. citizens, except that the Comptroller of the Currency may waive the citizenship requirement for not more than a minority of the total number of directors.

(12 U.S.C. § 72)

Foreign ownership of Edge corporations<sup>46</sup> is limited to foreign banks and U.S. subsidiaries of foreign banks, while domestic non-bank firms may own such corporations.

(12 U.S.C. § 619)

Federal and state laws do not permit a credit union, savings bank, or savings association (both of the latter two entities may also be called thrift institutions) in the United States to be established through branches of corporations organized under a foreign country's law.

(12 U.S.C. § 1463 et seq. and 12 U.S.C. § 1751 et seq.)

In order to accept or maintain domestic retail deposits of less than \$100,000, a foreign bank must establish an insured banking subsidiary. This requirement does not apply to a foreign bank branch that was engaged in insured deposit-taking activities on December 19, 1991.

(12 U.S.C. § 3104(d))

Foreign banks are required to register as investment advisers under the *Investment Advisers Act* of 1940 to engage in securities advisory and investment management services in the United States, while domestic banks<sup>47</sup> (or a separately identifiable department or division of a domestic bank) do not have to register unless they advise registered investment companies. The registration requirement involves record maintenance, inspections, submission of reports, and payment of a fee.

(15 U.S.C. §§ 80b-2, 80b-3)

Foreign banks cannot be members of the Federal Reserve System, and, thus, may not vote for directors of a Federal Reserve Bank. Foreign-owned bank subsidiaries are not subject to this measure.

(12 U.S.C. §§ 221, 302, 321)

Establishment of a federal branch or agency by a foreign bank is not available in the following states that may prohibit establishment of a branch or agency by a foreign bank:

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<sup>46</sup> Specialized banking institutions, authorized and chartered by the U.S. Federal Reserve Board of Governors, that are allowed to engage in transactions of a foreign or international character and that are not subject to restrictions on interstate banking.

<sup>47</sup> For greater clarity, "domestic banks" include U.S. bank subsidiaries of foreign banks.

- Branches and agencies may be prohibited in Alabama, Kansas, Maryland, North Dakota, and Wyoming.
- Branches, but not agencies, may be prohibited in Delaware, Florida, Georgia, Idaho, Louisiana, Mississippi, Missouri, Oklahoma, Texas, and West Virginia.

Certain restrictions on fiduciary powers apply to federally licensed bank agencies.

(12 U.S.C. § 3102(a)(1); 12 U.S.C. § 3103(a); 12 U.S.C. § 3102(d))<sup>48</sup>

The authority to act as a sole trustee of an indenture for a bond offering in the United States is subject to a reciprocity test.

(15 U.S.C. § 77jjj(a)(1))

Designation as a primary dealer in U.S. government debt securities is conditioned on reciprocity.

(22 U.S.C. §§ 5341-5342)

A broker-dealer registered under U.S. law that has its principal place of business in Canada may maintain its required reserves in a bank in Canada subject to the supervision of Canada.

(15 U.S.C. § 78o(c))

The United States may grant advantages to one or more of the following Government-Sponsored Enterprises (GSEs): Federal Home Loan Banks (12 U.S.C. § 1421 *et seq.*); Federal Home Loan Mortgage Corporation (12 U.S.C. § 1451 *et seq.*); Federal National Mortgage Association (12 U.S.C. § 1717 *et seq.*); Farm Credit Banks (12 U.S.C. § 2011 *et seq.*); Federal Agricultural Mortgage Corporation (12 U.S.C. § 2279aa-1 *et seq.*); and the Student Loan Marketing Association (20 U.S.C. § 1087-2 *et seq.*). These advantages include, but may not be limited to, the following:

- Capital, reserves, and income of the GSE may be exempt from certain taxation.
- Securities issued by the GSE may be exempt from registration and periodic reporting requirements under federal securities laws.
- The U.S. Treasury may, in its discretion, purchase obligations issued by the GSE.

(xii) Insurance

Branches of foreign insurance companies are not permitted to provide surety bonds for U.S. federal government contracts.

(31 U.S.C. § 9304)

When more than 50 per cent of the value of a maritime vessel the hull of which was built under federally guaranteed mortgage funds is insured by a non-U.S. insurer, the insured must demonstrate that the risk was substantially first offered in the U.S. market.

(46 C.F.R. § 249.9)

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<sup>48</sup> The federal measures cited here provide that certain state law restrictions shall apply to the establishment of federally licensed branches or agencies.

(xiii) Foreign Ownership of Real Property

A few U.S. states restrict foreign ownership of land. Please refer to the U.S. GATS schedule for more detail on such restrictions.

## **INVESTMENT PROTECTION**

(i) Conversion, Repatriation, and Transfers

### *Foreign Exchange Regime*

The United States formally accepted the obligations of Sections 2, 3, and 4 of Article VIII of the International Monetary Fund Agreement on 10 December 1946. The U.S. dollar is a freely usable currency as defined in Article XXX(F). The United States does not maintain margins in respect of foreign exchange transactions, and spot and forward exchange rates are determined on the basis of demand and supply conditions in the exchange markets. There are no taxes or subsidies on purchases or sales of foreign exchange.

### *Repatriation of Investment-Related Funds*

The United States generally imposes no restrictions on the repatriation of investment-related funds. In support of national security or foreign policy objectives (e.g. combating terrorism, limiting the proliferation of weapons of mass destruction, or restricting cross-border flows of illegal narcotics), the United States sometimes imposes restrictions on transactions between U.S. persons and designated foreign governments, entities, or persons. These restrictions could affect the repatriation of funds by foreign investors in the United States. Please see section 7 of this chapter for more information on restrictions affecting foreign transactions.

### *Currency Convertibility*

The U.S. dollar is freely convertible.

### *Bilateral/Plurilateral Agreements that Guarantee Repatriation of Funds*

All U.S. FTAs and BITs include an obligation to permit inward and outward transfers relating to an investment. The text of the transfers article that has been included in the investment chapters of recent U.S. FTAs and in recent U.S. BITs obliges each party to permit all investment-related transfers into and out of its territory to be made freely, without delay, and in a freely-usable currency valued at the market rate of exchange prevailing at the time of the transfer. U.S. FTAs and BITs since NAFTA do not include balance of payments safeguards, but they permit parties to restrict investment-related transfers in limited circumstances, including through the equitable, non-discriminatory, and good-faith application of national laws relating to bankruptcy, insolvency, or the protection of the rights of creditors; dealings in securities and other portfolio investments; criminal or penal offenses; financial reporting or record-keeping in relation to law enforcement or financial regulation; and ensuring compliance with orders or judgments in judicial or administrative proceedings.

## (ii) Domestic Laws, Regulations, and Policies Relating to Expropriation

The United States has long recognized that a key attribute of sovereignty is the power of governments to take private property for public use without the owner's consent (sometimes called the power of eminent domain or the power to expropriate). The "Takings Clause" of the Fifth Amendment of the U.S. Constitution limits the federal government's power of eminent domain by providing that private property shall not "...be taken for public use, without just compensation."

Although the Fifth Amendment is not by its own terms applicable to state governments, the U.S. Supreme Court has held that the Takings Clause is applicable to the states through the due process requirements of the Fourteenth Amendment of the Constitution.<sup>49</sup> Within its own jurisdiction, each state also possesses the power of eminent domain, subject to the limits in its constitution and the limits imposed by the Fifth Amendment.

### *Legislative Authorization*

The legislature normally determines what constitutes "public use" for purposes of a government's execution of its eminent domain power. Courts are usually deferential to the legislature's "public use" determination.<sup>50</sup> The legislature may authorize the exercise of this power of eminent domain directly, may delegate this power to another governmental entity, or may delegate the power to private corporations promoting a public interest (e.g. public utilities).

### *Property Subject to the Takings Clause*

Tangible interests clearly constitute property that falls within the purview of the Takings Clause. All types of interests in real or personal property may be taken, including leasehold interests in real property, property held in trust, and the capital stock of a corporation. In addition, various forms of intangible property may be taken. The Supreme Court has held that trade secrets protected under state law are property under the Takings Clause.<sup>51</sup> Likewise, the Court has found other intangible interests to be property for the purposes of the Takings Clause, including various types of liens, patents, and valid contracts. State courts have also recognized tangible and intangible property as property that can be "taken."

### *What Constitutes a Taking?*

U.S. trade and investment agreements and U.S. takings jurisprudence address two types of expropriation: direct and indirect. Direct takings involve physical invasion of property; indirect takings may occur through regulation. Under U.S. jurisprudence, a direct taking has been found to occur when the government has initiated a condemnation proceeding to acquire a specific piece of property or when governmental action has caused "[a] permanent physical occupation" of the property by the government or others.<sup>52</sup> Not all Takings Clause cases, however, have concerned actual physical invasion of real property by the government. Instead, in some Takings Clause cases, an owner of property has sought compensation for the diminution in the value of property caused by a particular governmental regulation.

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<sup>49</sup> Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897).

<sup>50</sup> Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

<sup>51</sup> Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

<sup>52</sup> Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

The U.S. Supreme Court has not established a fixed standard or test for determining the point at which regulation of property becomes a taking for which just compensation is due. The Court has, however, identified several factors that it will examine when determining whether governmental regulation of property constitutes a taking: 1) the economic impact of the regulation on the owner; 2) the extent to which the regulation interferes with the owner's reasonable, investment-backed expectations; and 3) the character of the governmental action.<sup>53</sup> In addition, a governmental action that interferes with an owner's land use may not give rise to a compensable taking if such land use was not permitted at the time the owner took title to the property.<sup>54</sup> Only in rare circumstances have non-discriminatory regulatory actions that were designed and applied to protect legitimate public health and welfare objectives, such as public health, safety, and the environment, been found by U.S. courts to constitute indirect expropriations.

#### *What is "Public Use?"*

In order to fall within the Takings Clause of the Fifth Amendment, a taking must be for a "public use." The Supreme Court has construed "public use" broadly. As long as the legislature has authority over an activity, it may exercise its eminent domain power with respect to that activity.<sup>55</sup> In other words, the public use requirement is coterminous with the scope of the powers granted Congress by the Constitution and with the power of the states to enact regulations for the health, safety, and welfare of the public.<sup>56</sup>

#### *What is Just Compensation?*

The just compensation provision of the Takings Clause has been interpreted by U.S. courts to require that the owner of taken property be restored to the same pecuniary position he occupied just prior to the taking.<sup>57</sup> Just compensation for a permanent taking is typically the fair market value of the property at the time of the taking.<sup>58</sup> Factors that are not normally considered a part of market value are excluded from the calculation of that value, and property owners are not entitled to compensation for consequential damages, such as future business losses.<sup>59</sup> The Supreme Court has indicated that the calculation of just compensation can deviate from the market value when the market value is too difficult to identify or if failure to do so would cause manifest injustice to the owner or the public.<sup>60</sup> Federal and state courts have generally been quite permissive with respect to the evidence that may be presented to demonstrate market value. For example, courts seeking to determine the market value of taken property have considered opinions by qualified experts, the values of comparable properties, the price paid for the property, and the cost of reproduction or replacement of the property.

When compensation occurs after a taking, interest is typically paid to the owner to compensate for the delay.<sup>61</sup> Determining the appropriate rate of interest is a judicial function, and U.S. courts have discretion in making such determinations. In federal condemnation proceedings pursuant to the *Federal Declaration of Taking Act*, as amended (40 U.S.C. § 3116), the interest rate applicable to compensation is based on the "weekly average one-year constant maturity Treasury yield."

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<sup>53</sup> Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

<sup>54</sup> Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

<sup>55</sup> Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

<sup>56</sup> Ruckelshaus, supra; Hawaii Housing Authority, supra.

<sup>57</sup> United States v. Miller, 317 U.S. 369 (1943).

<sup>58</sup> Kirby Forest Indus. v. United States, 467 U.S. 1 (1984).

<sup>59</sup> U.S. v. 50 Acres of Land, 469 U.S. 24 (1984); United States v. General Motors Corp., 323 U.S. 373 (1945).

<sup>60</sup> U.S. v. 50 Acres of Land, 469 U.S. 24 (1984).

<sup>61</sup> Kirby Forest Industries v. U.S., 467 U.S. 1 (1984).

Finally, when a taking occurs, the property owner is entitled to be reimbursed for those reasonable costs and expenses of litigation, including attorney fees, that were actually incurred as a result of the takings litigation.<sup>62</sup>

### *Takings Proceedings*

Federal and state laws provide procedures by which governments can take various forms of property. In many cases, the government will affirmatively proceed under its power of eminent domain. In other cases, the owner has the right to bring an inverse condemnation suit to recover the value of the property as of the date of the taking. Jurisdiction over inverse takings claims against the United States for a taking in excess of \$10,000 is vested exclusively in the United States Court of Federal Claims under the *Tucker Act* (28 U.S.C. § 1491(a)(1)), while the “*Little Tucker Act*” (28 U.S.C. § 1346(a)(2)) grants concurrent jurisdiction to the United States District Courts and the Court of Federal Claims in cases where the amount in controversy is less than \$10,000.

#### (iii) Expropriation Cases Involving Foreign Investors during the Past Three Years

A significant number of claims alleging that a regulatory or zoning decision constituted a compensable expropriation of private property are filed in U.S. courts every year, some involving the U.S. federal government and many more involving state or local authorities. Government agencies often prevail in these cases, but compensation is awarded in some of them.

A takings claim brought by a foreign person would be subject to the same rules that apply to a claim by a U.S. person. Because of the significant overall number of takings actions, the fact that there is no special process for claims by foreign persons, and the fact that the takings decisions of U.S. courts generally do not indicate the nationality of the plaintiff (because nationality has no relevance to the court’s decision), there is no reliable method by which to estimate the number of expropriation claims by foreign investors against the United States over the last three years.

In light of the large volume of business activity by foreign entities in the United States, it is likely that some recent takings cases were brought by or on behalf of foreign owners. We are not aware, however, of specific takings cases brought by foreign entities during the past three years.

#### (iv) Protection of Intellectual Property

Intellectual property is effectively protected by a comprehensive system of federal and state laws in the United States. The federal government has exclusive competence regarding patents, copyrights, and integrated circuit layout designs. Trademarks and service marks are principally protected by federal law, although state laws and common law also provide additional protection, particularly for unregistered marks. In addition, many states provide protection for trade names, either by statute or through the common law. Trade secrets are protected by state statute or common law. The majority of states have adopted the *Uniform Trade Secrets Act*.

The United States is a party to a large number of international intellectual property conventions, including the Paris Convention for the Protection of Industrial Property (Stockholm, 1967); the Berne Convention for the Protection of Literary and Artistic Works (Paris, 1971); the Universal Copyright Convention (Paris, 1971); the Patent Cooperation Treaty; the Convention Relating to the

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<sup>62</sup> Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. § 4654(c).

Distribution of Programme-Carrying Signals Transmitted by Satellite; the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty; the International Convention for the Protection of New Varieties of Plants (1991); the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms; and the Convention Establishing the World Intellectual Property Organization.

The United States has fully implemented its obligations under the WTO Agreement on Trade Related Aspects of IPR (TRIPS Agreement). The United States, for example, provides twenty years of patent protection from date of filing for all inventions, whether products or processes, in all fields of technology, provided that they satisfy statutory requirements for novelty, utility, and non-obviousness. The United States provides ten years of renewable protection for registered trademarks and service marks and imposes no special requirements encumbering the use of such marks. Geographical indications are protected in the United States through the trademark system. Federal statutes also protect industrial designs and plant varieties. The United States provides copyright protection consistent with the Berne Convention for literary and artistic works, including computer programs and data bases. For works created after 1978, the duration of copyright protection is the life of the author plus 70 years; where the work is anonymous, pseudonymous, or a work for hire, copyright protection extends 95 years from first publication or 120 years from creation, whichever expires first. Sound recordings are protected by copyright law in a manner fully consistent with the TRIPS Agreement. Integrated circuit layout designs are protected for a term of 10 years by federal statute. The states provide TRIPS-consistent levels of protection for trade secrets by statute and common law.

The United States provides extensive enforcement, both internally and at the border, for IPR. Severe criminal penalties (including prison sentences) are imposed on copyright pirates and trademark counterfeiters. Damages and injunctive relief (including provisional remedies) are available for infringement of patents, trademarks, service marks, copyrights, trade secrets, geographic indications of origin, plant varieties, industrial designs, and integrated circuit layout designs. The United States also provides extensive border enforcement measures for trademarks and copyrights through U.S. Customs and Border Protection and for patents and other forms of IPR through administrative proceedings before the U.S. International Trade Commission. The United States has provided the WTO with a detailed notification of its laws and regulations on IPR, as required by the TRIPS Agreement.

(v) Dispute Settlement under U.S. Law and International Agreements

In general, all investment dispute settlement mechanisms available to a domestic investor are available to a foreign investor. Investment disputes are usually resolved in domestic courts, although arbitration may be available depending on local law and practice and the wishes of the parties to the dispute. Investor-state disputes are also usually resolved in domestic courts, where available, although U.S. BITs and the investment chapters of U.S. FTAs permit foreign investors to opt for international arbitration in certain disputes. Under these agreements, an investor may choose to submit certain claims either to local courts or to international arbitration, but, in making such a choice, the investor may forfeit the right to bring the dispute before the other forum.

The United States is a party to the ICSID convention, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Inter-American Convention on International Commercial Arbitration (Panama Convention).

Since the beginning of 2003, the United States has participated as a respondent in nine arbitral disputes initiated by investors under the Investment Chapter of NAFTA, and final awards have been

issued in three of these cases. During this period, the United States has not been subject to any investor-state claims under a U.S. BIT or any investment-related state-state claims under either a U.S. BIT or an FTA.

## **INVESTMENT AND DEVELOPMENT**

### **(i) Performance Requirements**

The United States imposes no performance requirements in the context of granting approval for foreign investment. To promote development and employment, sub-federal governments in the United States sometimes offer tax abatements or other benefits to foreign investors in exchange for establishing certain investments in their territory. More information on incentives and benefits that may be offered to foreign investors by state and local governments can be found in section 6 of this chapter.

### **(ii) Economic Development Measures**

Federal and sub-federal governments in the United States maintain numerous environmental, health, consumer safety, and other laws and regulations that are designed and applied to promote sustainable economic development and public welfare. These laws and regulations are applied in a non-discriminatory fashion to domestic and foreign investors.

In its trade and investment agreements, the United States reserves the right to adopt or maintain measures according rights or preferences to socially or economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the *Alaska Native Claims Settlement Act* (43 U.S.C. § 1601 *et seq.*).

## **INVESTMENT PROMOTION AND INCENTIVES**

### **(i) Activities at the Federal Level**

The U.S. federal government encourages foreign investment as a matter of policy, but does not maintain an investment promotion agency. As noted above, the federal government maintains no approval process for foreign investment. There is thus no “one-stop-facility” for foreign investors.

As part of their work on broader issues of economic development, several federal government agencies engage in activities that encourage investment in the United States. The Economic Development Administration (EDA) of the U.S. Department of Commerce is the primary federal government agency for promoting economic development. The EDA provides financial assistance to economically disadvantaged regions in the form of business loan guarantees and revolving loan funds. Other federal agencies that provide financial assistance for economic development are the Small Business Administration and the U.S. Department of Agriculture under its Farmers Home Administration. Federal financial programs can be accessed by contacting the sponsoring agency. There are no significant programs at the federal level that provide non-financial economic development incentives.

The U.S. federal government maintains no incentive programs specifically designed to encourage foreign investment in the United States. Foreign-owned firms and foreign investors in the United

States generally receive national treatment, however, with respect to the limited number of federal government fiscal or financial incentives that are used to stimulate investment, productivity, and employment in the domestic economy.

(ii) Activities at the Sub-Federal Level

*Investment Promotion*

The economic development agencies of U.S. state governments often administer programs aimed at promoting investment within their territory. State economic development agencies normally are cabinet-level agencies (e.g. departments of commerce) headed by a senior official who reports directly to the state governor. Although these agencies have a wide range of functions, two primary responsibilities are common to all of them: promoting economic growth and creating jobs within the state. Many U.S. state governments and some city governments also maintain investment and export promotion offices in foreign cities. Information on the investment-related activities of state economic development agencies is easily accessible on state government websites.

*Investment Incentives*

The vast majority of incentives and other policy initiatives aimed at promoting domestic and foreign investment in the United States are maintained by state and local governments. The rationale for this approach is that states and local communities are in the best position to determine the specific needs and priorities of their own economies. Many U.S. state, city, and county governments actively recruit domestic and foreign investors to establish within their borders. State-level incentives are offered on a national treatment basis. State governments typically offer some combination of the following incentives to potential investors:

- Financial incentives, such as direct state loans, loan guarantees, grants, and industrial development bond programs.
- Incentives in relation to corporate income taxes, sales and use taxes, and property taxes. Examples include credits for job creation; property tax abatements; and various exemptions and deductions for business inventory, research and development, pollution control equipment, industrial machinery and equipment, and fuels and raw materials.
- Special incentives, such as “enterprise zones” (which offer packages of incentive for businesses locating in a certain area); development credit corporations (which offer capital for business construction and expansion); and employment training.
- Issue-specific programs, such as export promotion, small business development, and high technology development.
- Non-financial assistance, such as business consulting, management seminars, one-stop licensing and permit centers, research and development assistance, and market studies.
- Some states also offer special services to foreign firms in the areas of language training, relocation assistance, and cultural assimilation.

Detailed information on the investment incentives offered by U.S. states can be found in the *Directory of Incentives for Business Investment and Development in the United States: A State by State Guide*, a publication of the National Association of State Development Agencies (NASDA). The latest edition of the guide can be found on the NASDA website, at <http://www.nasda.com/>

## MOBILITY OF CAPITAL AND TECHNOLOGY

### (i) Limitations on Capital and Investment Outflows

The United States restricts certain transactions involving countries, entities, or persons subject to sanctions imposed for national security or foreign policy reasons. The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces sanctions involving outflows of capital and investment. Acting under presidential wartime and national emergency powers, as well as under authority granted by specific legislation, OFAC imposes controls on transactions and freezes foreign assets under U.S. jurisdiction. Sanctions administered and enforced by OFAC target terrorism, international narcotics trafficking, the proliferation of weapons of mass destruction, persons contributing to certain civil conflicts, and other activities. Many U.S. economic sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

### (ii) Limitations on Technology Exports

The export of technology and technical data for items designed, developed, produced, modified, or configured for military use is controlled through the export licensing system managed by the State Department's Office of Defense Trade Controls pursuant to the U.S. Government's International Traffic in Arms Regulations (ITAR) (Title 22, Code of Federal Regulations (CFR) Parts 120-130). The Department of Energy controls exports of technology related to the production of Special Nuclear Material pursuant to section 57b of the *Atomic Energy Act*; the relevant regulations may be found in 10 CFR Part 810. The Department of Commerce processes applications for licenses to export certain dual-use commodities and technologies pursuant to the Export Administration Regulations (15 CFR Parts 730-774). The dual-use commodities and technologies that are subject to licensing requirements are primarily those civilian technologies that can make a significant contribution to the design, development, or production of weapons of mass destruction, advanced conventional weapons, and the means of delivery of such weapons systems.

Information on technology export controls administered by the Department of Commerce may be found at <http://www.bis.doc.gov/licensing/exportingbasics.htm>. The text of the ITAR may be found at [http://www.pmdtc.org/itar\\_index.htm](http://www.pmdtc.org/itar_index.htm). Information on controls on exports of technology relating to the production of Special Nuclear Material can be found at <http://www.nrc.gov/materials/sp-nucmaterials.html>.

## LABOUR, MOVEMENT OF PEOPLE, AND SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

### (i) Personnel Management

U.S. labor laws generally apply to all foreign employers operating within the territorial jurisdiction of the United States.<sup>63</sup> Major labor statutes such as the *National Labor Relations Act* and Title VII

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<sup>63</sup> See, e.g. *Avagliano v. Sumitomo Shoji Americana, Inc.*, 457 U.S. 176 (1982) (*Civil Rights Act* of 1964, 42 U.S.C. Sec., 200e applied to a foreign corporation doing business in the United States unless specifically exempted by the terms of a treaty); *Wirtz v. Healy*, 227 F. Sup. 123 (M.D. Ill. 1964). Cf. *Goethe House New York v. NLRB*, 869 F.2d 75 (2d Cir. 1989), cert. denied, 493 U.S. 810 (1989).

of the *Civil Rights Act* of 1964 apply to an “employer,” and that term is defined in a manner that does not exclude foreign corporations.<sup>64</sup>

There are several exceptions to the general applicability of U.S. labor laws to foreign employers. International organizations, such as the International Monetary Fund, the World Bank, and the Inter-American Development Bank, are exempt from the jurisdiction of U.S. labor law by virtue of the *International Organization Immunities Act* (22 U.S.C. Sec. 288). Agencies or instrumentalities of foreign governments are also exempt from the jurisdiction of U.S. labor laws by virtue of the *Foreign Sovereign Immunities Act* of 1976 (28 U.S.C. Sec. 1602), except where such entities engage in commercial activities.<sup>65</sup> Another exception relates to the employees of foreign-flagged vessels. The U.S. Supreme Court has held that the *National Labor Relations Act* (29 U.S.C. Sec. 151), does not apply to foreign-flagged vessels even when they are voluntarily within U.S. ports.<sup>66</sup>

Many of the more than 130 treaties on Friendship, Commerce and Navigation (FCN) to which the United States is a party contain a limited exemption from U.S. labor laws for foreign nationals. The typical FCN provision gives foreign companies the right to hire “accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.”<sup>67</sup> These treaty provisions may affect the application of U.S. labor law to such foreign nationals. Other than the exceptions noted above, foreign-owned or foreign-controlled companies operating within the United States remain subject to the same legal obligations and may seek the same protection from abuses, such as illegal strikes, as U.S. corporations.

## (ii) Labor Disputes and Labor Relations

The U.S. laws applicable to labor disputes cannot easily be summarized in this document. It may be most important to note, however, that the *Labor-Management Relations Act*, which includes amendments to the *National Labor Relations Act* (29 U.S.C. Sec 141), governs the relationship between most private employers and their employees in the United States. The major exceptions are the railway and airline industries, which are covered by the *Railway Labor Act*, and agriculture, which is not covered by federal labor law. Covered employees have a right to choose freely a collective bargaining representative and to seek recognition by their employer of such representative as their exclusive bargaining representative. Employees have the right to engage in “concerted activities,” including the right to strike. In collective bargaining, employers and employees have a mutual obligation to meet at reasonable times and to confer in good faith regarding conditions of employment, but that obligation does not include a duty to make concessions or to reach an agreement. Complaints of unfair labor practices committed by either party during collective bargaining, during a strike, or during other times may be addressed in administrative proceedings before the National Labor Relations Board. Foreign companies are not required to follow any special procedures by virtue of their status.

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<sup>64</sup> See *National Labor Relations Act*, Sec. 2(2) and (3), 29 U.S.C. Sec. 152(2) and (3); Title VII of the *Civil Rights Act* of 1964, Sec. 701(b), 42 U.S.C. 200e(b).

<sup>65</sup> See *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

<sup>66</sup> See *Benz v. Campana Maviera Hidalgo, S.Z.*, 353 U.S. 138, 142 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

<sup>67</sup> See *McNamara v. Korea Air Lines*, 863 F.2d 1135, 1138 (3rd Cir. 1988); *Wickes v. Olympic Airways*, 745 F.2d, 363 (6th Cir. 1984).

(iii) Entry Requirements for Foreign Personnel

The *United States Immigration and Nationality Act* and accompanying implementing regulations establish a clear process through which aliens may apply for entry to engage in business activities in the United States. The United States has four main entry categories applicable to the temporary entry of business persons: business visitors, traders and investors, intra-company transferees, and professionals.

*Business Visitors*

Most non-immigrants are temporary visitors coming for business or pleasure. A temporary visitor for business must establish that he or she has a residence abroad which he or she does not intend to abandon; is coming to the United States for a defined temporary period; will depart upon the conclusion of the visit; has permission to enter a foreign area after his or her stay in the United States; and has access to sufficient funds to cover the expense of the visit and return travel. "Business" does not generally include gainful employment (although there are exceptions), but it does include almost any other legitimate commercial activity. A business visitor may come to consult with business associates, negotiate a contract, buy goods or materials, settle an estate, appear as a witness in a court trial, participate in business or professional conventions or conferences, or undertake independent research. Spouses and dependent children are not permitted entry based on the principal alien, and must qualify for entry independently.

*Traders and Investors*

The entry categories for treaty traders and treaty investors are made available to nationals of countries that are parties to FCN treaties with the United States. Nationals of countries that are parties to certain other agreements, including free trade agreements and BITs, may also qualify. The treaty trader entry category allows a foreign national to enter the United States to carry on substantial trade, which may include trade in services or technology, principally between the United States and the treaty partner. The treaty investor entry category allows a foreign national to enter the United States for the purpose of developing and directing the operation of a substantial and active investment in a commercial enterprise. The investor must have committed or be in the process of committing a substantial amount of capital to the investment. If the applicant is an employee of the treaty trader or treaty investor, the applicant must be employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the enterprise. Ordinary skilled or unskilled workers do not qualify. Spouses and dependent children are permitted to enter the United States along with the principal alien. Spouses of treaty traders and treaty investors are permitted to work in the United States.

*Intra-Company Transferees*

U.S. law provides for the temporary entry into the United States of managers, executives, and employees of a multinational firm with specialized knowledge. In order to qualify for entry, the U.S. employer must file a petition with the Department of Homeland Security (DHS) demonstrating that the employee has been employed overseas by the transferring organization for at least one year within the past three years and that the employee will be performing duties in the United States for the same employer or a subsidiary or affiliate. Upon approval of the petition, the alien may apply for the requisite non-immigrant visa. Spouses and dependent children are permitted to enter the United States along with the principal alien. Spouses of intra-company transferees are permitted to work in the United States.

## *Professionals*

Citizens of Mexico and Canada may be able to qualify for entry to the United States as professionals under the NAFTA. Citizens of Chile and Singapore may be able to qualify for entry to the United States as professionals under the U.S.-Chile and U.S.-Singapore FTAs.

Under the NAFTA, a citizen of a NAFTA country in a professional occupation may work in another NAFTA country, provided that the profession is on the NAFTA list (NAFTA Chapter 16, Appendix 1603.D.1); the alien possesses the specific qualifications for that profession; the prospective position requires someone in that professional capacity; and the alien will work for a U.S. employer. Mexican citizens seeking entry as a professional under the NAFTA must receive a visa from a U.S. consulate overseas. Spouses and dependent children of NAFTA professionals are permitted to enter the United States along with the principal alien, but they are not permitted to work in the United States unless they qualify for employment authorization independently.

Under the U.S.-Chile and U.S.-Singapore FTAs, a citizen of Chile or Singapore may work in the United States in occupations that require the theoretical and practical application of a body of specialized knowledge and completion of a bachelor's or equivalent degree in the specialty or, in some cases, experience equivalent to such a degree. U.S. employers must file an attestation of compliance with U.S. labor laws with the Department of Labor. Following that, the alien may apply for a non-immigrant visa at a U.S. consulate overseas. Annual numerical limitations apply to professionals under these FTAs: for the U.S.-Chile FTA the numerical limitation is 1,400, and for the U.S.-Singapore FTA the numerical limitation is 5,400.

Citizens of other countries may qualify to enter the United States as temporary workers. With respect to professionals, the United States allows for the entry of temporary workers in specialty occupations. A specialty occupation is defined as one that requires the theoretical and practical application of a body of highly specialized knowledge and completion of a bachelor's or equivalent degree in the specialty, or experience equivalent to such a degree. U.S. employers must file an attestation of compliance with U.S. labor laws with the Department of Labor. Following that, the U.S. employer must file a petition with the DHS. Once the petition has been approved, the alien may apply for a visa at a U.S. consulate overseas.

The United States has an annual numerical limit on the number of approvals of petitions for workers in specialty occupations. The current annual petition cap is 65,000, plus 20,000 for workers with a master's- or higher-level degree from a U.S. academic institution. Spouses and dependent children are permitted to enter the United States along with the principal alien, but they are not permitted to work in the United States.

Citizens of Australia may also qualify to enter the United States "to perform services in a specialty occupation" under a special visa classification. No petition is required, and the annual cap is 10,500. No numerical limitation applies to the spouse or children of a principal alien. Spouses are permitted to work in the United States.

### (iv) Visas and Visa Waivers

Under U.S. law, a visa is simply permission to apply for entry into the United States. Persons issued a visa are subject to inspection at the port of entry by DHS officers. DHS officers allow entry to the great majority of applicants with visas, but they also have authority to deny admission. The validity of a visa issued at a consular post abroad is not related to the length of stay DHS may authorize upon an alien's entry, nor is it related to the length or number of extensions of stay that

DHS may grant subsequently. The principle of reciprocity – the treatment that the applicant’s country affords to American citizens (for the same purpose) – determines the maximum number of entries and the maximum period of the visa’s validity. Visas may not have a validity of more than ten years.

The Visa Waiver Program (VWP) enables citizens of certain countries to travel to the United States for up to 90 days for tourism or business without obtaining a visa. Twenty-seven countries are participating in the VWP.

To enter the United States under the VWP, travellers from participating countries must:

- Be seeking entry for 90 days or less, as a temporary visitor;
- Be a citizen (not merely a resident) of the Visa Waiver country;
- Have a valid passport issued by the participating country. Passports issued prior to October 26, 2005 must be machine-readable. Passports issued on or after October 26, 2005 are required to have a digital photo. Passports issued on or after October 26, 2006 must be “e-Passports,” meaning they possess integrated computer chips containing information on their holders;
- If entering by air or sea, possess a round-trip transportation ticket issued by a carrier that has signed an agreement with the U.S. government to participate in the VWP, and arrive in the United States aboard such a carrier; and
- Hold a completed and signed Nonimmigrant Visa Waiver Arrival-Departure Record and a completed and signed Form I-94W, on which he/she has waived the right of review or appeal of an immigration officer’s determination about admissibility or deportation. These forms are available from participating carriers, from travel agents, and at land-border ports-of-entry.

Entry at a land border crossing point from Canada or Mexico is permitted under the VWP. Travelers who apply for entry at a land border crossing point are not required to present round-trip transportation tickets or arrive at the border entry point aboard a carrier that has signed an agreement with the United States to participate in the VWP. All other VWP requirements apply to such travelers.

#### (v) Nationality-Based Restrictions on Senior Managers and Board Members

The United States maintains restrictions on the nationality of senior managers and board members in two sectors: air and maritime transportation.

##### *Air Services*

As noted above, only air carriers that are “citizens of the United States” may operate aircraft in domestic air service (cabotage) and may provide international scheduled and non-scheduled air service as U.S. air carriers. U.S. citizens also have blanket authority to engage in indirect air transportation activities (air freight forwarding and passenger charter activities other than as actual operators of the aircraft). Under U.S. law (49 U.S.C. § 40102(a)(15)), a “citizen of the United States” means an individual who is a U.S. citizen; a partnership in which each member is a U.S. citizen; or a U.S. corporation of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, which is under the actual control of U.S. citizens, and

in which at least seventy-five per cent of the voting interest in the corporation is owned or controlled by U.S. citizens.

### *Maritime Services*

*The Jones Act* (Section 27 of the *Merchant Marine Act* of 1920) reserves cargo service between two points in the United States (including most territories and possessions), either directly or via a foreign port, for ships that are registered under the U.S. flag, U.S.-crewed, and built in the United States. Vessels registered under the U.S. flag must be owned by a U.S. corporation, of which 75 per cent of the employees must be U.S. citizens (as defined in the *Shipping Act* of 1916, Sec. 2(a)-(c) and 46 U.S.C. 12106, as amended). In general, the same requirements apply to domestic passenger services, which are reserved for U.S. crews and for ships built and registered in the United States.

## **GOVERNMENT PROCUREMENT**

Ensuring fully open and competitive tendering is the fundamental principle of the U.S. procurement system. Federal law (10 U.S.C § 2304 and 41 U.S.C. § 253) requires, with certain limited exceptions, that U.S. Government procurement officials promote and provide for full and open competition in soliciting offers and awarding government contracts. The *Competition in Contracting Act* of 1984 (CICA) (U.S. Code Titles 10, 31, and 41, accessible at <http://www.gpoaccess.gov/uscode/>) and the *U.S. Federal Acquisition Regulation* (accessible at <http://www.arnet.gov/far/>) codify uniform policies and procedures for acquisition by almost all U.S. executive branch agencies.

At the same time, U.S. law and policy restrict participation in procurement by foreign suppliers whose governments have not agreed to provide procedural safeguards and comparable market access opportunities for U.S. suppliers in their government procurement markets. The President has the authority, which has been delegated to the United States Trade Representative, to waive the purchasing prohibition in the *Trade Agreements Act* of 1979, as amended, and other purchasing restrictions, such as the *Buy American Act* of 1933 (41 U.S.C. § 10 *et seq.*), for suppliers of any government that agrees to provide procedural safeguards and reciprocal access for U.S. suppliers. For example, these purchasing restrictions are waived for parties to the WTO Government Procurement Agreement (GPA), NAFTA, and other U.S. FTAs for procurements valued above the applicable thresholds.

The *Small Business Act* requires that certain contracts be set aside for small and minority-owned businesses, including small businesses in historically under-utilized business zones, small businesses owned by disabled veterans, and *Small Business Act* Sec. 8(a) participants. Certain contracts related to goods or services produced by handicapped persons, philanthropic institutions, or prison labor are also set aside.

Under the GPA, NAFTA, and other FTAs the United States and its partners have committed to provide national treatment for contracts covered by the agreements and to implement transparent, non-discriminatory procurement practices for federal agencies and certain government enterprises.

## COMPETITION POLICY

U.S. antitrust laws prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices and inferior products and services. There are three major federal antitrust laws.

The *Sherman Act* (1890) prohibits all contracts, combinations, and conspiracies that unreasonably restrain the interstate or foreign trade or commerce of the United States. Certain such restraints, characterized as “hard core” cartel conduct, such as agreements among competitors to fix prices, rig bids, and allocate customers, are prosecuted criminally. The *Sherman Act* also makes it illegal to monopolize any part of interstate or foreign trade or commerce.

The *Clayton Act* (enacted in 1914 and substantially amended in 1950) is a civil statute that prohibits mergers or acquisitions that are likely to substantially lessen competition. Such substantial lessening of competition is usually reflected in increased prices to consumers or other reductions in consumer choice. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division of the Justice Department and the Federal Trade Commission. In addition to prohibiting anticompetitive mergers and acquisitions, the *Clayton Act* also forbids unreasonable vertical restraints between buyers and sellers, unjustified price discrimination, and interlocking directorates. Finally, the *Clayton Act* provides for private rights of action for injunctive relief and treble damages relief for antitrust violations.

The *Federal Trade Commission Act* (FTCA) (1914) created the Federal Trade Commission (FTC), an independent regulatory commission that, as part of its competition mission, enforces the FTCA and the *Clayton Act*. Section 5 of the FTCA, as amended, prohibits, *inter alia*, unfair methods of competition in or affecting interstate and foreign commerce. Although the FTC cannot directly enforce the *Sherman Act*, the courts have interpreted “unfair methods of competition” to cover *Sherman Act* violations and conduct that falls short of, but might ultimately lead to, *Sherman Act* violations. The FTC is empowered to issue cease and desist orders and may seek civil penalties in federal district court for violations of its orders. It may also seek injunctions or other equitable relief in federal district court in certain other circumstances.



# VIET NAM

## INTRODUCTION

Viet Nam is committed to building up an attractive, transparent, stable and equal investment environment for all economic sectors, and FDI is regarded as an integral part of the Vietnamese economy. The *Law on Investment* and the *Law on Enterprises* were adopted by the Legislature XI of the National Assembly on 29 November 2005, and have been in effect since 1 July 2006. The Laws affirm the fundamental policies of the State of Viet Nam on investment activities, as well as regulating the rights and obligations of investors. Likewise, unless otherwise provided for under the international treaties to which Viet Nam is a signatory, the Laws set out the following fundamental provisions:

- Applying non-discriminatory principles and ensuring the autonomy of investors in doing business in industries which are not prohibited or limited by law.
- Ensuring the opening up of the investment market in manufacturing and services sectors in compliance with the schedules of commitments in international treaties to which Viet Nam is a signatory.
- Ensuring the autonomy of investors in selecting the sector of investment, the form of investment, capital raising methods, geographical location and the scale of investment, an investment partner and the duration of investment.
- Ensuring the equal access of investors to sources of credit capital, foreign exchange, land and natural resources; access to legal instruments and policies, data on the national economy, and investment opportunities; ensuring the right of investors to lodge claims, to make denunciations or to initiate legal proceedings relating to breaches of the law by organizations and individuals in accordance with the laws of the State of Viet Nam.
- Ensuring the implementation of Viet Nam's obligations under the TRIMs Agreement (with a broader scope) upon accession to the WTO. Accordingly, investors are not compelled to satisfy conditions on compulsory sales markets (exports or domestic sales), localization ratios, development of domestic resources or other requirements relating to technology transfer and labour recruitment.
- Ensuring full implementation of Viet Nam's commitments on eliminating discrimination in terms of prices or charges of goods and services upon WTO accession.
- Taking effective measures to protect all lawful assets of investors, including IPR; making a commitment not to nationalize or confiscate investors' assets either directly or indirectly, except for cases of public interest in accordance with the law provided that fair and adequate compensation has been made; permitting foreign investors to remit abroad investment capital, profits and other legitimate income; applying the principle of non-retroactivity in case of changes in policies having adverse impacts of the lawful rights of investors. At the same time, the Law has instituted a mechanism for dispute resolution and enforcement of court judgments in line with international practices to enhance the confidence of investors in the safety and reliability of the investment environment in Viet Nam.

## SCREENING OF FOREIGN INVESTMENT

In order to simplify administrative procedures, to raise the sense of initiative and self responsibility of investors for investment decisions, the *Law on Investment* provides for two types of procedures as follows.

### (i) Investment Registration Procedures

*With respect to domestic investment projects which have an investment capital of below VD15 billion and which are not included in the list of sectors of investment subject to conditions, the investors shall not be required to perform the procedures for investment registration. With respect to domestic investment projects which have an investment capital of between VD15 billion and below three hundreds VD300 billion and which are not included in the list of sectors of investment subject to conditions, the investors shall perform the procedures for investment registration in the sample form at a provincial State administrative body for investment. Where an investor requests issuing an investment certificate, the provincial State administrative body for investment shall issue an investment certificate. Items of investment registration shall comprise the following:*

- (i) legal status of the investor;
- (ii) objectives, scale and location for implementation of the investment project;
- (iii) investment capital, project implementation schedule;
- (iv) land use requirements and undertakings on environmental protection; (v) proposal for investment incentives (if any);

*With respect of foreign investment projects which have an investment capital of below VD300 billion and which are not included in the list of sectors of investment subject to conditions, the investors shall perform the procedures for investment registration at a provincial State administrative body for investment for issuance of an investment certificate. The file for investment registration shall comprise:*

- (i) document on the above-mentioned items (i), (ii), (iii), (iv) and (v);
- (ii) Report on financial ability of the investor;
- (iii) joint venture contract or business co-operation contract and charter of the enterprise (if any). The provincial State administrative body for investment shall issue an investment certificate within a time-limit of 15 days from the date of receipt of the complete and valid file for investment registration.

### (ii) Procedures for Evaluation of Investment Projects

These procedures apply for domestic investment projects or foreign investment projects which have an investment capital of VD300 billion or more and projects on the list of sectors of investment subject to conditions.

*With respect to projects which have an investment capital of below VD300 billion and which are not included in the list of sectors of investment subject to conditions, the project file shall include:*

- (i) written request for issuance of an investment certificate;
- (ii) document certifying the legal status of the investor;
- (iii) Report on financial ability of the investor;
- (iv) eco-technical explanatory statement containing the items in relation to objectives and location of the investment, land use requirement; investment scale; investment capital; project implementation schedule, technological or environmental solutions.

With respect to foreign investors, in addition to the above documents, the file shall include joint venture contract or business co-operation contract, charter of the enterprise (if any). Items to be evaluated shall comprise:

- compliance with master planning/zoning for technical infrastructure, master planning/zoning for land use, master planning for construction, master planning for utilization of minerals and other natural resources;
- land use requirements;
- project implementation schedule;
- environmental solutions.

*With respect to projects with an investment capital of below VD300 billion and on the list of sectors of investment subject to conditions, the project file shall comprise the explanatory statement of conditions which the investment project must satisfy, and the other same items which apply for domestic investment projects or foreign investment projects which are not included in the list of sectors of investment subject to conditions, and have an investment capital of below VD300 billion.*

*With respect to projects with an investment capital of VD300 billion or more and on the list of sectors of investment subject to conditions, the project file shall comprise the explanatory statement of conditions which the investment project must satisfy, and the other same items which apply for domestic investment projects or foreign investment projects which are not included in the list of sectors of investment subject to conditions, and have an investment capital of VD300 billion or more.*

The time-limit for evaluation of investment shall not exceed 30 days from the date of receipt of a complete and valid file. In necessary cases, the above time-limit may be extended, but not beyond 45 days.

## SECTOR SPECIFIC LAWS AND POLICIES

The Investment Law prohibits investments detrimental to national defense and security, historical and cultural ethics, Vietnamese traditions and fine customs, and the ecological environment.

On the other hand, in order to increase the transparency of the legal system and ensure the autonomy of investors in selecting investment sectors, the Law defines the principle sectors in which investment is conditional, including:

- sectors impacting on national defense and security, social order and safety;
- banking and finance;
- sectors impacting on public health;
- culture, information, press and publishing;
- recreation services;
- real estate business;
- survey, prospecting, exploration and mining of natural resources and the ecological environment;
- development of education and training;
- a number of other sectors in accordance with law.

Applicable to foreign investors, in addition to the above sectors, the sectors in which investment is subject to conditions shall comprise investment sectors in accordance with the schedule for implementation of international undertakings in international treaties of to which Vietnam is a signatory.

## INVESTMENT PROTECTION

### (i) Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)

Viet Nam has committed to implement its obligations with respect to foreign exchange matters in accordance with the provisions of the WTO Agreement and related declarations and decisions of the WTO that concerned the IMF. Accordingly, unless otherwise provided for in the IMF's Articles of Agreement, Viet Nam will not resort to any laws, regulations or other measures, including any requirements with respect to contractual terms, that would restrict the availability to any individual or enterprise of foreign exchange for current international transactions within its customs territory to an amount related to the foreign exchange inflows attributable to that individual or enterprise.

After a foreign investor has discharged fully its financial obligations to the State of Vietnam, it shall be permitted to remit abroad the following:

- its profits derived from business activities;
- payments received from the provision of technology and services and from intellectual property;

- the principal of and any interest on foreign loans; investment capital and proceeds from the liquidation of investments;
- other sums of money and assets lawfully owned by the investor.

A foreigner working in Vietnam for an investment project shall be permitted to remit abroad his or her lawful income after having discharged fully his or her financial obligations to the State of Vietnam. The remittance of the above sums of money shall be made in a freely convertible currency in accordance with the trading exchange rate published by a commercial bank selected by the investor.

(ii) Expropriation and Compensation

Lawful assets and investment capital of investors shall not be nationalized or confiscated by administrative measures. In a case of real necessity for the purpose of national defence and security and in the national interest, if the State acquires compulsorily or requisitions an assets of an investor, such investor shall be compensated or paid damages at the market prices at the time of announcement of such compulsory acquisition or requisition. Payment of compensation or damages must ensure the lawful interests of investors and be made on the basis of non-discrimination between investors. Any compensation or damages payable to foreign investors as stipulated in clause 2 of this article shall be made in a freely convertible currency and shall be permitted to be remitted abroad. Procedures and conditions for compulsory acquisition and requisition shall be implemented in accordance with law.

(iii) IPR

As of 1 January 2006, the new Civil Code came into force in place of the old Civil Code and on 1 July 2007 the Law on Intellectual Property, as codifying the current government regulations on intellectual property. Both pieces of legislation become the principal legislation that governs protection of IPR. Such new legislation has been enacted in an attempt by Viet Nam to adopt the WTO standard for intellectual property protection.

In addition to these laws, Viet Nam is also a signatory of and, therefore subject to, the provisions of the Paris Convention, the Madrid Agreement and the Stockholm Convention of 1967 (which established the WIPO). Vietnam also recently joined the Berne Convention for the Protection of Literary and Artistic Works with effect from 26 October 2004 and the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms with effect from 6 July 2005.

Though embodied in the intellectual property laws, the industrial property regime is regulated and implemented separately from the copyright regime. Vietnam's industrial property regime is administered principally by the MOST acting through the NOIP while the copyright regime is administered by the Ministry of Culture and Information, acting through the Copyright Department.

Generally, IPR are protected in Vietnam upon registration on a first to file priority basis, except for trade secrets, geographic indications and trade names (which are entitled to legal protection as far as they fulfill their own conditions of formation and usage). Registration is not a prerequisite for copyright protection although it is a prima facie evidence for protection.

Below is a summary of the various types of IPR protected and the duration of the protection:

<b>Type</b>	<b>Brief Description</b>	<b>Duration of Protection</b>
Patent for Invention	A technical solution presenting worldwide novelty, an inventive step applicable in socio-economic fields	20 years from the date of application
Patent for Utility Solution	A technical solution new in comparison with existing technology and achievable in current economic technological conditions	10 years from the date of application
Industrial Design	The external appearance of a product embodied by lines, three dimensional forms, colours or a combination thereof, novel and inventive throughout the world and capable of serving as a pattern for an industrial or handcrafted product	5 years from the date of application (renewable for an additional 2 periods of 5 years = 15 year maximum)
Layout Design of Integrated Circuit	A three dimensional disposition of circuit elements and their interconnections in the integrated circuit which is original and not widely known in the relevant field	10 years since the date of application (or the earlier of the expiration of: (i) 10 years from its first commercial use; or (ii) 15 years from its creation)
Trademark	Marks used to distinguish goods or services of one person from goods and services of the same kind of another person. They may take the form of words, images or any combination presented in one or more colours	10 years from the date of application (renewable for successive 10 year periods without limit)
Geographic Indication	Information indicating territorial origin of a product with characteristics or qualities pertaining to the territory	Perpetuity from the certification of protection
Trade Name	Names of individuals or entities used in business activities	As long as its formation and usage
Trade Secret	Confidential information capable of applying in trade and gaining economic advantages	As long as its formation and usage
New Plant Variety	New plant variety as created by selection or development which is of distinctiveness, uniformity and stability for plantation and has a recognizable name among relevant species	20 years from the certification of protection (25 years for trees and vines)
Copyright	Moral and material rights in respect of original literary, artistic and scientific works including software	Author's life plus 50 years (except for movies, photographs, plays, applied fine art works, which enjoy 50 year protection)
Copyright-related rights	Moral and material rights in respect of performance, audio record, visual record, radio program and satellite program-coded signal	50 years

(iv) Dispute Settlement

Any dispute relating to investment activities in Viet Nam shall be resolved through negotiation and conciliation, or shall be referred to arbitration or to a court in accordance with law. Any dispute as between domestic investors or as between a domestic investor and a State administrative body of Viet Nam relating to investment activities in the territory of Viet Nam shall be resolved at a Vietnamese arbitration body or court. Any dispute to which one disputing party is a foreign investor or an enterprise with foreign owned capital, or any dispute as between foreign investors shall be resolved by one of the following tribunals and organizations:

- A Vietnamese court;
- A Vietnamese arbitration body;
- A foreign arbitration body;
- An international arbitration body;
- An arbitration tribunal established pursuant to the agreement of the disputing parties.

Any dispute between a foreign investor and State administrative body of Viet Nam relating to investment activities in the territory of Vietnam shall be resolved by a Vietnamese arbitration body or court, unless otherwise provided in a contract signed between a representative of a competent State body of Viet Nam with the foreign investor or in an international treaty of which the Socialist Republic of Viet Nam is a member.

(v) Other Investment Protection Measures:

If a newly promulgated law or policy contains higher benefits and incentives than those to which the investor was previously entitled, then the investor shall be entitled to the benefits and incentives pursuant to the new law as from the date the new law or policy takes effect.

If a newly promulgated law or policy adversely affects the lawful benefits enjoyed by an investor prior to the date of effectiveness of such law or policy, the investor shall be guaranteed to enjoy incentives the same as the investment certificate or there shall be resolution by one, a number, or all of the following methods:

- continuation of enjoyment of benefits and incentives;
- there shall be a deduction of the loss from taxable income;
- there shall be a change of the operational objective of the project;
- consideration shall be given to paying compensation in necessary circumstances. \

## **INVESTMENT AND DEVELOPMENT**

### **(i) Performance requirements**

There are no performance requirements imposing limits on trade and investment or any TRIMs in Viet Nam. Accordingly, investors are not compelled to satisfy conditions on compulsory sales markets (exports or domestic sales), localization ratios, development of domestic resources or other requirements relating to technology transfer and labour recruitment.

### **(ii) Other policy measures affecting inward foreign investment**

Viet Nam does not use policies targeting foreign investment in the area of the environment or sustainable development, or affecting indigenous persons, to promote broad economic development objectives.

## **INVESTMENT PROMOTION AND INCENTIVES**

Subject to certain investment sectors and geographical areas, investors shall be entitled to investment incentives in the form of preferential tax rates, land use, training or technology transfer. Such incentives are uniformly and non-discriminatorily applicable to investors of all economic sectors, to both domestic and foreign investors in line with Viet Nam's international commitments, especially those under the SCM Agreement. Accordingly, investment incentives contingent on export performance and the use of domestic resources have been eliminated.

## **MOBILITY OF CAPITAL AND TECHNOLOGY**

There are no restrictions on the repatriation of capital and earnings by foreign investors related to foreign investment (see also section on Investment Protection).

There are no laws or regulations that restrict the import and export of technology.

## **LABOUR, MOVEMENT OF PEOPLE AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS**

Foreign investors shall have the right to recruit domestic and foreign employees to fulfill management tasks, to provide technical labor and to provide expertise in accordance with production and business requirements, unless otherwise provided in an international treaty of which Viet Nam is a signatory.

## PROCUREMENT

Viet Nam has made efforts to improve the legal framework for government procurement to enhance its transparency and to harmonize the tender process and procedures with international practice. The Ministry of Planning and Investment has recently set up a website providing information on bidding procedures and opportunities.

In November 2005, a new *Law on Procurement* was been adopted. The Law provided for greater transparency in the procurement process. It foreshadows the creation of a “Procurement Gazette” to provide general information on tendering activities, invitations for tender, lists of tenderers participating in limited tendering proceedings, selection of bids, information on enterprises prohibited from participating, or restricted, in the bidding process, etc. The parties calling for tenders are required to publish the terms and conditions of the tender in the “Procurement Gazette”. The Law also aims at decentralizing procurement decision-making to the ministries, agencies and local authorities. It also identifies bad practices and fraudulent behaviour, stipulates penalties for violations, and includes provisions concerning rights of appeal and the settlement of disputes.

## COMPETITION POLICY

The *Competition Law* deals with two specific issues: practices in restraint of competition and unfair competitive practices. Companies familiar with Western antitrust laws and trade regulations will find that Viet Nam’s *Competition Law* draws on some similar concepts.

### (i) Unfair Competition

Vietnamese Competition Law broadly defines “unfair competition activities” as activities which contravene normal standards of business ethics to customers, other companies, or the State. The Law enumerates specific activities that are considered "unfair competition activities", including:

- infringement of an owner’s business secrets, including breaches of confidential agreements;
- coercion of customers or other business counterparts;
- misleading information on other companies;
- misrepresentation in relation to trade name, slogan, symbol, packaging design, geographic indications and other factors;
- deceptive advertising and promotion;
- discriminating against enterprises by professional associations;
- illegal multi-level selling or pyramid schemes.

## (ii) Practices in Restraint of Competition

Under the Law, activities in restraint of competition are defined as those which will reduce, deviate or restrain competition in the market including agreements in restraint of competition, abuse of dominant or monopoly position in the market and economic concentration.

All enterprises are prohibited from entering into agreements which restrain the entrance and development of business, abolish other enterprises from the market or collaborate to manipulate bids. Other agreements restraining competition are prohibited only where the parties to the agreement have a combined market share of 30% or more of the relevant market. It is not clear how subsidiaries of parent companies count towards market share.

Parties with a combined market share of 30% or more are prohibited from entering into:

- agreements fixing prices directly or indirectly;
- agreements dividing markets or distribution or supplies;
- agreements limiting or controlling the volume of products or services from production or supply;
- agreements for the restraint of technical or technological development or for the restraint of investment.
- agreements imposing conditions on other businesses to enter into contracts for sale of goods or services, or forcing other businesses to accept contractual obligations which are not related to the subject matter of the contract.

Exemptions are generally available where a prohibited agreement provides economic benefits to consumers that outweigh the restriction on competition. These exemptions are specified by the MOT upon recommendation by the Competition Commission. An exemption must be obtained before execution of the agreement and lasts for the duration of time the exemption granted for only. These exemptions include:

- rationalising organisation structure, business model, raising business efficiency;
- promoting technical and technological advances, raising goods and service quality;
- promoting the uniform application of quality standards and technical norms of products of different kinds;
- harmonising business, goods delivery and payment conditions, which have no connection with prices and price factors;
- enhancing the competitiveness of small-and medium-sized enterprises;
- enhancing the competitiveness of Vietnamese enterprises on the international market.

## (iii) Monopolies and Market Dominance

The *Competition Law* defines a monopoly as a company holding a position in the market with no competitor of the same goods or services. A company is deemed to be in a dominant position in the

market if it holds a share of 30% or more or is capable of restraining competition significantly. A group of companies is considered holding a dominant position in the market if they attempt to restrain competition in one of the following circumstances:

- two companies hold a combined market share of 50% or more in the market in question;
- three companies hold a combined market share of 65% or more in the market in question; or
- four companies hold a combined market share of 75% or more in the market in question.

Market dominance and monopolies are not prohibited by the Law; it is the abuse of these positions that is unlawful. A dominant company or group of companies is prohibited from the following activities considered to be an abuse of dominance or monopoly position:

- artificially lowering prices to exclude competitors;
- fixing prices unreasonably (“unreasonably” is defined in Article 27 of Decree 116 dated 15 September 2005) or setting minimum prices which cause damage to customers;
- limiting production, distribution, market scale or obstructing technological improvement which causes damage to customers;
- imposing discriminatory conditions for similar transactions to cause inequality in competition;
- imposing conditions before signing the contract on contractual parties or imposing condition on other enterprises unrelated to the purpose of the contract; and
- discouraging new competitors from entering the market.

Monopolies are subject to the same prohibitions for parties in a dominant position listed above. They are also prohibited from imposing unfavorable conditions on customers and abusing the monopoly position to unilaterally and unreasonably modify or cancel a contract.

The Law defines a relevant market of products as a “market of goods or services which are interchangeable in terms of characteristics, user purposes and prices.” A geographical market is a “specific geographical area in which exist goods or services which exist are interchangeable under similar conditions of competition, and which are considerably differentiated from neighboring areas” determined by the Competition Commission.

#### (iv) Economic Concentration

When a merger, consolidation, acquisition (with some exceptions), joint venture, or other type of “economic concentration” results in market share between 30% to 50%, the Competition Commission must be notified, unless the concentration results in a small or medium enterprise.

An economic concentration resulting in 50% or above of a market share is prohibited, unless the concentration results in a small or medium sized enterprise or an exemption is granted. Exemptions are available when one of the parties is at risk of being dissolved or insolvent or where economic concentration enhances export, socio-economic development or technical progress. So far, enhancement of export, technical progress, and socio-economic development interpretation remains at the discretion of the Competition Commission and MOT.



## ANNEX 1 —SURVEY QUESTIONNAIRE

*This outline forms the basis of the 6<sup>th</sup> Edition of the Guide to the Investment Regimes of the APEC member economies. We believe that the change in format provides business with the best opportunity to be able to assess the investment climate of member economies.*

### 1. Introduction

- General statement about attitude towards foreign investment (FDI and portfolio).
- Any major liberalisations which have been undertaken in the last five years.

### 2. Screening of Foreign Investment<sup>68</sup>

- Outline any screening/review/notification mechanisms either pre-establishment or post-establishment that operate at all levels of government. These include:
  - any guidelines/conditions that apply for screening (e.g. voluntary or mandatory notification, equity or monetary thresholds, etc.);
  - where to find relevant application or approval forms and statements of documentation required; and
  - a description of any different treatment applied in cases involving foreign takeovers or mergers as distinct from new business/greenfield investment.
- Provide a statement of the transparency of the screening process covering:
  - average time taken for screening process decisions;
  - how investors can expedite the approval process;
  - avenues for consultation about decisions before they are made;
  - avenues for appeal and how to lodge them; and
  - any published statistics on the outcomes of investment screening (i.e. numbers of approvals, rejections and approvals subject to conditions).
- Provide a list and summary of all general relevant laws/regulations and policies pertaining to investment (i.e. that may impact before or after entry) including website reference for up-to-date information.

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<sup>68</sup> If you feel this section does not apply to your economy, please go to 3(a) 'Other Investment Regimes'.

### **3. Sector-Specific Laws and Policies<sup>69</sup>**

- Under sectoral headings, present all sector specific laws, regulations and policies that affect the establishment, expansion or operation of foreign investment:
  - outline any sensitivities/different treatment for sectors;
  - any differential treatment between foreign takeovers and mergers and new greenfields investment;
  - any different investment towards direct or portfolio investment;
  - any specific exceptions to most favoured nation or national treatment under these laws, regulations or policies; and
  - any specific sub-federal measures that limit foreign ownership in specific sectors.
- A separate section detailing laws, regulations and policies pertaining to foreign ownership of real property:
  - describe whether there are any limits on freehold ownership;
  - any differential policies regarding ownership of land for commercial purposes or residential uses; and
  - any specific sub-federal measures that limit foreign ownership of real property.

#### **3(a). Other Investment Regimes**

- If you feel that your investment regime does not fit neatly into the approach outlined above (overall screening regime and sectoral-specific mechanisms) please provide as much detail as possible here, taking into account the elements mentioned in questions 2 and 3 as far as possible.

### **4. Investment Protection**

#### *Conversion, Repatriation and Transfers (including any Balance of Payments safeguards)*

- Briefly describe the foreign exchange regime.
- Identify and describe any regulations which restrict the repatriation of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidation.
- Identify any restrictions on the convertibility of currencies for the overseas transfer of funds.
- Have you entered into any bilateral/plurilateral agreements (e.g. BITs) that guarantee repatriation of funds? If so, what are the limits on this guarantee (e.g. balance of payments' safeguards, subject to any domestic laws and policies).

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<sup>69</sup> If you feel this section does not apply to your economy, please go to 3(a) 'Other Investment Regimes'.

### *Expropriation and Compensation*

- Provide a list of and a summary of all domestic laws, regulations and policies (including at the sub-federal level) relating to expropriation (regulatory “takings”) including the terms for providing compensation both for domestic and foreign investors. Is national treatment the basic standard applied under these laws etc.?
- Over the last three years, how many cases of expropriation involving foreign investors under domestic law have there been?
- Briefly describe these recent instances, including what compensation was paid (if any).

### *IPR*

- List and briefly describe current intellectual property protection laws and recent enforcement efforts that have contributed to the security of the legal environment for foreign investment.

### *Dispute Settlement*

- Describe all means of dispute settlement and processing of grievances existing under laws, regulations and administrative procedures to which foreign investors have recourse.
- Has your economy signed or acceded to the ICSID Convention?
- Over the last three years, how many disputes have been settled? (Provide separate data for state-state and investor-state.)

## **5. Investment and Development**

- Briefly describe how performance requirements (local content, employment, export orientation) are imposed in the context of granting approval for foreign investment:
  - how are these used to promote industrial or regional development?
  - to what extent do they limit trade or investment by the intending investor?
- Briefly describe any other policy measures affecting inward foreign investment used to promote broad economic development objectives (e.g. measures affecting the environment or sustainable development, and policies affecting indigenous persons).

## **6. Investment Promotion and Incentives**

### *Investment Promotion Agencies (scope of Agencies and interaction with any screening mechanisms)*

- Briefly describe the institutional arrangements for investment promotion in your economy including contact information.
- If there is a one-stop-facility for foreign investors, provide details of this service.

### *Incentives*

- Briefly describe any fiscal, financial, tax or other incentives offered at both the national sub-national level (e.g. tax incentives, grants, etc.) provided to foreign investors. Provide a

summary of these programs including the nature of incentives offered and links to where detailed information can be found.

- Please describe briefly any free trade zones or 'special investment areas' where special incentives may be offered to foreign investors to establish in your economy.

#### **7. Mobility of Capital and Technology**

- List and briefly describe any regulations/institutional measures that limit capital exports or the outflow of foreign investment.
- List and briefly describe any regulations/institutional measures that limit technology exports.

#### **8. Labour, Movement of People, and Senior Management and Boards of Directors**

- Describe any regulations relating to personnel management of foreign firms (e.g. minimum wage laws, minimum requirements for training or employment of local staff).
- List and provide a summary of domestic labour laws which apply to foreign firms in the context of labour disputes/relations.
- Identify any permits/entry visa requirements for non-resident staff of foreign firms and briefly describe the nature of the entry restriction.
- List and briefly describe any restrictions by law or regulation on the entry/sojourn of foreign technical/managerial personnel and their accompanying family members.
- List and briefly describe any laws or policies that restrict appointments by foreign investors to senior management positions or the board of directors.

#### **9. Government Procurement (Optional Question)**

- Describe briefly your Economy's procurement policy framework including the extent to which potential suppliers are discriminated against on the basis of their degree of foreign affiliation. Describe all exceptions to the principle of non-discrimination.
- Are there any special laws or policies for specific sectors, such as procurement of information and communications technologies? If so, please describe them.

#### **10. Competition Policy**

- Briefly outline the competition policy regime.

## ANNEX 2 — APEC NON-BINDING INVESTMENT PRINCIPLES

Jakarta, November 1994

In the spirit of APEC's underlying approach of open regionalism,

Recognising the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia-Pacific region,

Emphasising the importance of promoting domestic environments that are conducive to attracting foreign investment, such as stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of IPR,

Reflecting that most APEC economies are both sources and recipients of foreign investment,

Aiming to increase investment including investment in SMEs, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalisation of their investment regimes,

Without prejudice to applicable bilateral and multilateral treaties and other international instruments,

Recognising the importance of fully implementing the Uruguay Round TRIMs Agreement,

APEC members aspire to the following non-binding principles:

### Transparency

- Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner.

### Non-discrimination between Source Economies

- Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favourable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles.

### National Treatment

- With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.

### Investment Incentives

- Member economies will not relax health, safety, and environmental regulations as an incentive to encourage foreign investment.

### Performance Requirements

- Member economies will minimise the use of performance requirements that distort or limit expansion of trade and investment.

### Expropriation and Compensation

- Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.

### Repatriation and Convertibility

- Member economies will further liberalise towards the goal of the free and prompt transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidations, in freely convertible currency.

### Settlement of Disputes

- Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties.

### Entry and Sojourn of Personnel

- Member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

### Avoidance of Double Taxation

- Member economies will endeavour to avoid double taxation related to foreign investment.

### Investor Behaviour

- Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should.

### Removal of Barriers to Capital Exports

- Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimised.

## **ANNEX 3 — EXCERPT FROM THE OSAKA ACTION AGENDA**

### **INVESTMENT**

#### **OBJECTIVE**

APEC economies will achieve free and open investment in the Asia-Pacific region by:

- (a) liberalizing their respective investment regimes and the overall APEC investment environment by, inter-alia, progressively providing for MFN treatment and national treatment and ensuring transparency; and
- (b) facilitating investment activities through, inter-alia, technical assistance and cooperation.

#### **GUIDELINES**

Each APEC economy will:

- (a) progressively reduce or eliminate exceptions and restrictions to achieve the above objective, using as an initial framework the WTO Agreement, the APEC Non-Binding Investment Principles, any other international agreements relevant to that economy, and any commonly agreed guidelines developed in APEC; and
- (b) explore expansion of APEC's network of bilateral investment agreements.

#### **COLLECTIVE ACTIONS**

APEC economies will:

- (a) increase, in the short-term, the transparency of APEC investment regimes by (i) updating the *APEC Guidebook On Investment Regimes* as appropriate to reflect changes in regimes; (ii) establishing software networks on investment regulations and investment opportunities; and (iii) improving the state of statistical reporting and data collection;
- (b) promote, in the short-term, an on-going mechanism for dialogue with the APEC business community on ways to improve the APEC investment environment;
- (c) identify, in the short-term, on-going technical cooperation needs in the Asia-Pacific region and organize training programs which will assist APEC economies in fulfilling APEC investment objectives;
- (d) establish, in the short-term, a dialogue process with the Organization for Economic Cooperation and Development (OECD) and other international fora involved in global and regional investment issues;
- (e) define and implement, in the short-term, follow-on training to the Uruguay Round implementation seminars;
- (f) undertake an evaluation of the role of investment liberalization in economic development in the Asia-Pacific region;
- (g) study, in the medium-term, possible common elements between existing sub-regional arrangements relevant to investment;

- (h) refine, in the medium-term, APEC's understanding of "free and open investment"; and
- (i) assess, in the long-term, the merits of developing an APEC-wide discipline on investment in the light of APEC's own progress through the medium-term as well as developments in other international fora.

## ANNEX 4 — MENU OF OPTIONS

### **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies — For Voluntary Inclusion in Individual Action Plans**

APEC leaders and ministers at Bogor, Osaka, Subic, and Vancouver have committed their economies to create free and open investment by 2010 and 2020. They endorse Individual Action Plans (IAPs) as a core instrument in this process. They have called for transparency in, and the annual improvement of IAPs. ABAC has also called on APEC economies to make progress in the investment area.

In response to both government and business, the Investment Experts Group, at St. Johns, Canada, undertook to compile a "menu of options" for helping economies to identify policy measures that member economies may include unilaterally in their IAPs for implementation of this objective. There was a consensus that the project should focus on concrete measures, rather than on continued philosophical debate. APEC ministers endorsed the "menu" initiative at Vancouver.

With these instructions in mind, the following document is a non-exhaustive "*master menu*" of investment-liberalizing and business-facilitating measures from which economies may voluntarily select any of a number of *options* to make progress toward creating a free and open investment regime. It is intended as a *reference tool* that economies may refer to when updating their IAPs.

The APEC approach to liberalization and facilitation of trade and investment, as reiterated by APEC Leaders at Vancouver, recognizes the diversity that exists among APEC economies.

This "menu of options" is consistent with this recognition of diversity, providing members with a broad range of choices suitable for different circumstances. The items are not prescriptive and, where chosen, may be modified to suit particular circumstances. The menu is not designed to set out the steps in the liberalization process and will evolve over time.

The IEG intends to update this menu on a regular basis, starting in 1999, so as to capture the benefit of APEC economies' increasing experience and changing views.

Item No.	Description
<b>GENERAL</b>	
1.01	<p>Broaden definitions of investment and foreign investment in existing legislation, regulations and administrative procedures to permit the widest variety of forms of investment and allow for newly emerging forms to be covered, without a need for future changes in domestic legislation/ regulations.</p> <p>-- The definition might include – illustratively - not just new ("green field") investments, but also acquisition of shares of domestic enterprises, management contracts, long-term leases, all forms of business organization (e.g. wholly owned, subsidiaries, partnerships, branches, joint ventures, smart partnerships, strategic alliances, venture capital), certain kinds of debt instruments, intellectual property, etc.</p>
1.02	Permit and promote all forms of investment through means other than, or additional to, broadening the definitions of investment and foreign investment in existing legislation, regulations and administrative procedures.
1.03	Commit to locking in current treatment for investors in specific sectors (i.e. standstill on restrictions).
<u>On prior authorization requirements:</u>	
1.04	Eliminate or phase out prior authorization requirements. If appropriate, replace them with post-establishment notification.
1.05	Make approval within any existing prior-authorization mechanism automatic except in limited specified situations.
1.06	Raise the threshold (value of an investment) above which prior authorization is required. If appropriate, announce progressive raising of the threshold, according to a schedule with a certain date to eliminate most or all prior authorization requirements.
1.07	Limit the requirement for prior authorization to selected sectors. If appropriate, replace it with post-establishment notification.
<u>Involving other economies:</u>	
1.08	Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional, and/or multilateral agreements or arrangements for the protection of investment that provide commitments to the current level of protection and openness for investors/ investment.
1.09	Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional and/or multilateral agreements or arrangements for the protection of investment with enhanced protection and openness for investors/ investments (e.g. fewer restricted sectors of an economy, fewer restrictions within sectors, stronger mechanisms for resolving disputes).

<b>TRANSPARENCY</b>	
2.01	Make available to investors timely updates of changes to investment regimes, including via the APEC Secretariat (who will use it for the APEC investment guidebook).
2.02	Publish and/or make widely available through other means, on a timely basis, information on an economy's investment code, investment laws and regulations, and procurement procedures, with an eye to ensuring transparency in the administration of investment laws, regulations and procedures at federal/central, provincial/state and local authority levels.
2.03	If screening is used, publish and/or make widely available through other means the guidelines for evaluating and scoring projects for their approval.
2.04	Conduct briefings (in appropriate fora) on the current investment policies and future directions to be undertaken by the government.
2.05	Give advance notice of proposed regulations and laws, and provide an opportunity for public comment.
2.06	<p>Clarify procedures and practices regarding application, registration, government licensing and procurement by:</p> <ul style="list-style-type: none"> <li>-- Publishing (and widely disseminating) clear and simple instructions, and an explanation of the process (the steps) involved in applying/bidding/registering;</li> <li>-- Publishing (and widely disseminating) definitions of criteria for assessment of investment proposals;</li> <li>-- Publishing (and widely disseminating) contact points for inquiries on standards, technical regulations, and conformity requirements;</li> <li>-- Conduct periodic reviews of prior authorization requirement procedures to ensure they are simplified and transparent;</li> <li>-- Make available to investors all rules and information relating to investment promotion schemes.</li> </ul>
<b>NON-DISCRIMINATION</b>	
<u>Related to MFN</u>	
3.01	Commit to MFN treatment economy-wide, except in a few limited cases as may be specified by individual member economies, immediately or over a publicly announced period of time.
3.02	For economies that have already committed to MFN treatment, review where MFN exceptions to it taken in the past can be eliminated or reduced (in other words, review whether the "few limited cases" of exceptions to MFN can be narrowed even further).

<u>Related to National Treatment or both MFN and National Treatment Sectors</u>	
3.03	Extend national treatment now (or starting on a particular date) in one or more sectors.
3.04	Extend national treatment economy-wide except in a few limited cases now, or starting on a certain date; or
3.05	Progressively extend national treatment to one more sectors.
3.06	Open additional sectors to participation by foreign investors, or permit foreign investment economy-wide with only limited exceptions. In other words, reduce the size of the list of sectors that are closed or partially restricted to foreign investment.
3.07	Eliminate or phase out sectoral restrictions on a foreign investment.
3.08	Review existing agreements, treaties, and laws to see if any exceptions to national treatment can be eliminated.
<i>Ownership</i>	
3.09	Allow all investors to choose their form of establishment within legislative and legal frameworks.
3.10	Update regulations to eliminate joint venture requirements for establishment.
3.11	Permit greater foreign equity ownership in sectors partially opened to foreign investment, or permit greater foreign equity ownership economy-wide.  -- Prepare a schedule now for future increases in foreign equity ownership.  -- Accelerate implementation of dates for liberalizing sectors where possible.
3.12	Eliminate or phase out conditions for foreign ownership in relation with export ratios or domestic sales.
3.13	Reduce areas with joint-venture criteria under investment promotion schemes to allow greater foreign participation.
3.14	Implement (and announce) a policy of not requiring the divestiture or dilution of the ownership of investments on the basis of nationality. Eliminate or phase out requirements to transfer ownership to local firms over a period of time.
3.15	Eliminate or phase out restrictions for foreign investors on the establishment of local branches.
3.16	Eliminate or phase out restrictions for foreign investors to diversity operations.
3.17	Eliminate or phase out restrictions on foreigners with respect to operational permits and licenses.
3.18	Where a time period for foreign investors to find local partners is specified, extend the period of time.

<i>Finance and Capitalization</i>	
3.19	Update regulations to reduce or eliminate restrictions on foreign borrowing by corporations.
3.20	Liberalize foreigners' access to domestic financial instruments (e.g. money market instruments, corporate bond markets).
3.21	With respect to the entry of foreign investment, eliminate or phase out requirements to deposit certain guarantees for foreign investors.
3.22	Reduce, reduce progressively, or eliminate minimum capitalization requirements in sectors where such capitalization requirements are not needed for prudential reasons.
3.23	Eliminate or phase out subsequent additional investment or reinvestment requirements for foreign investors.
3.24	Open existing investment incentive programs to participation by foreign investors, so they are equally available to domestic as well as foreign investors.
<i>Other Measures</i>	
3.25	Eliminate or ease discriminatory restrictions on imports needed to support foreign investment.
3.26	Change policies, guidance, regulations, or laws to eliminate pricing by state-designated monopolies that are discriminatory on the basis of nationality.
3.27	Change policies, guidance, regulations or laws to eliminate discriminatory access to local raw materials and inputs.
<b>EXPROPRIATION AND COMPENSATION</b>	
4.01	Consistent with international law standards/principles, limit permissible expropriation to cases involving a public purpose where expropriation is undertaken in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation.  -- Take steps to amend expropriation laws and regulations based on the above-mentioned standards/principles of international law with respect to expropriation.
4.02	Included in bilateral, regional or multilateral investment treaties, agreements, and/or arrangements a commitment on compensation in cases of expropriation.
4.03	To improve transparency, define, publish and disseminate to investors the relevant investment treaties and arrangements.

<b>PROTECTION FROM STRIFE AND SIMILAR EVENTS</b>	
5.01	Decide - and, as possible, commit in investment agreements/arrangements between governments and private investors and in bilateral/multilateral government-to-government treaties, agreements, and/or arrangements - that the government will accord treatment that is non-discriminatory on the basis of nationality to investments with respect to losses that investments may suffer in the government's territory that are due to war, other armed conflict, revolution, national emergency, insurrection, civil disturbance, or other similar events.
<b>TRANSFERS OF CAPITAL RELATED TO INVESTMENTS</b>	
6.01	Remove or reduce restrictions on the transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidations – all in a freely convertible or a freely usable currency.  -- Eliminate or phase out restrictions that impede recovery of profit, such as ceilings on royalties, technical assistance fees or special taxes, restrictions on access to foreign exchange, and control over the allocation of foreign currencies.
6.02	Make a binding commitment, in treaties, agreements or arrangements, to eliminate or progressively reduce restrictions on the transfers of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidation - all in freely convertible or freely usable currencies.
6.03	Guarantee the right to transfer capital related to an investment in and out of an economy, without delay and at market rates of exchange, with only limited exceptions.
<b>PERFORMANCE REQUIREMENTS</b>	
7.01	Publish and implement a phase-out plan for WTO TRIMs-inconsistent programs identified on TRIMs illustrative list.
7.02	Reach consistency with WTO TRIMs' illustrative list by 2000. Take steps to accelerate implementation of phase-out plans where possible.

7.03	<p>Eliminate, phase out, or relax unilaterally and/or through government-to-government agreements and treaties, on an economy-wide or sectoral basis, requirements such as:</p> <ul style="list-style-type: none"> <li>-- local hiring requirements,</li> <li>-- local training requirements,</li> <li>-- requirements to manufacture locally,</li> <li>-- local sales requirements,</li> <li>-- required technology transfer,</li> <li>-- required local R&amp;D,</li> <li>-- export requirements (e.g. those expressed as requirements to generate foreign exchange or achieve a particular export target).</li> </ul>
<b>ENTRY AND STAY OF PERSONNEL</b>	
8.01	Consistent with an economy's visa laws regarding the entry and stay of personnel, allow the temporary entry and stay of personnel needed to establish, develop, administer or advise on the operation of an investment of theirs (i.e. investor and key managerial or technical personnel and advisers).
8.02	Offer visas for investors that facilitate entry and re-entry (or identify other ways, consistent with domestic laws and policy, to facilitate investors' ability to enter and reenter for investment purposes).
8.03	Take steps to permit investors/project sponsors to hire the top managerial advisory talent of their choice, regardless of nationality.
8.04	Take steps to permit investors/project sponsors to hire the top technical. and/or advisory talent of their choice, regardless of nationality.
<b>SETTLEMENT OF DISPUTES</b>	
9.01	Develop effective mechanisms for resolving disputes and mechanisms for enforcing the solutions found to those disputes.
9.02	Take steps to become a member of the International Convention on the Settlement of Investment Disputes (ICSID) and/or other widely recognized international arbitration bodies.
<p><i>Note: We defer to the APEC Dispute Mediation Experts Group for specific menu options for IAPs related to improvements in dispute mediation.</i></p>	

<b>INTELLECTUAL PROPERTY</b>	
10.01	Develop adequate protection for intellectual property.
10.02	Provide protection for intellectual property that at least meets the standards established in the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS).
10.03	<p>Provide adequate and effective enforcement measures, including as appropriate, administrative, civil, and criminal, against infringement of IPR.</p> <ul style="list-style-type: none"> <li>-- Increase cooperation among agencies responsible for the administration and enforcement of intellectual property matters and between IPR agencies and those responsible for regulatory issues.</li> <li>-- Provide and streamline, as appropriate, judicial and administrative procedures to ensure timely processing of enforcement actions.</li> <li>-- Increase public education about the importance of intellectual property and its role in the economy as well as the need for effective and efficient enforcement of IPR.</li> <li>-- Enhance cooperative relationship between different law enforcement agencies.</li> <li>-- Ensure close and efficient cooperation between enforcement agencies and the right holders.</li> </ul>
10.04	<p>Develop and implement programs that require official agencies in member economies to respect intellectual rights in their operations, such as by using only legitimate software in an authorized manner.</p> <ul style="list-style-type: none"> <li>-- To the extent possible, provide an adequate budget for purchase of legitimate software.</li> </ul>
10.05	<p>Develop/further improve intellectual property regimes:</p> <ul style="list-style-type: none"> <li>-- Where possible, give effect to international norms for intellectual property protections.</li> <li>-- To the extent possible, cooperate with other nations in international fora.</li> </ul>
<i>Note: We defer to the APEC IPR Group for specific menu options for IAPs related to IPR improvements.</i>	
<b>AVOIDANCE OF DOUBLE TAXATION</b>	
11.01	Sign, where appropriate, bilateral avoidance of double taxation agreements that are in conformity with international norms. Expand coverage of such agreements as appropriate.

<b>COMPETITION POLICY AND REGULATORY REFORM</b>	
12.01	Ensure consistency between investment policies and competition and regulatory reform policy.
<i>Note: We defer to the APEC Competition Policy Group for specific menu options for IAPs related to improving competition.</i>	
<b>BUSINESS FACILITATING MEASURES TO IMPROVE THE DOMESTIC BUSINESS ENVIRONMENT</b>	
13.01	Reduce discriminatory use of bureaucratic discretion, by means such as: <ul style="list-style-type: none"> <li>-- preparing and distributing written in-house guidelines for administrative practices related to the handling of applications, registrations, licensing, etc.</li> <li>-- establishing in-house decision appeal mechanisms, as well as appeal mechanisms available to the public.</li> </ul>
13.02	Streamline application, registration, government licensing and government procurement procedures by: <ul style="list-style-type: none"> <li>-- simplifying forms;</li> <li>-- simplifying the submission (e.g. permitting electronic submission, or centralizing approval offices in a “one-stop shop”);</li> <li>-- shortening processing time of such applications/registrations, and</li> <li>-- reducing unnecessary steps.</li> </ul>
13.03	Take positive steps to assist investors by measures such as: <ul style="list-style-type: none"> <li>-- establishing an office to serve as a clearinghouse (one-stop agency/unit) for interested investors to learn market opportunities and potential investment partners;</li> <li>-- providing a network of all the government agencies that the investors or businesspersons have contact with in doing investments;</li> <li>-- establishing/designating one government agency to handle investors’ complaints (e.g. investment ombudsman).</li> </ul>
13.04	Examine the role and effects of investment incentives at all levels of government: federal/central, state/provincial and local.

13.05	<p>Offer incentives which are voluntary, non-discriminatory, and limited in duration, such as:</p> <ul style="list-style-type: none"> <li>-- tax breaks,</li> <li>-- loans guarantees,</li> <li>-- grants, subsidies and industrial development bonds,</li> <li>-- employment training programs,</li> <li>-- programs aimed at helping companies achieve greater efficiency,</li> <li>-- WTO-consistent export promotion programs,</li> <li>-- small business development,</li> <li>-- high technology development programs,</li> <li>-- measures to support development of new industries,</li> <li>-- industrial linkage programs,</li> <li>-- mobilization of domestic resources.</li> </ul>
13.06	<p>Introduce measures to assist companies seeking to achieve greater efficiency such as:</p> <ul style="list-style-type: none"> <li>-- zero inventory</li> <li>-- just in time program</li> <li>-- other related programs</li> </ul>
13.07	<p>Establish legal and taxation systems in areas such as stock exchanges, corporate division and M&amp;As to enable flexible corporate reorganization.</p>
13.08	<p>Introduce accounting and financial reporting systems that follow internationally accepted accounting standards.</p>
13.09	<p>Develop and streamline bankruptcy law systems that facilitate corporate reorganization.</p>
13.10	<p>Establish a financial system that enables a variety of financing and capital raising methods.</p>
13.11	<p>Strengthen and promote improved standards of corporate governance.</p>
13.12	<p>Develop a labor market that facilitates domestic labor mobility, taking into account national labor market conditions and policies.</p>
13.13	<p>Improve standards of professional services, such as legal and accounting services.</p>

<b>TECHNOLOGY TRANSFER</b>	
14.01	Improve the transparency of related laws and regulations.
14.02	Reduce the restrictions on the transfer of technology consistent with the protection of essential security interests (for example by modifying as appropriate existing laws and regulations) to facilitate the flow of technology for the economic development of member economies.
14.03	Develop legislation, regulations and measures for the adequate and effective protection of technology and related interests arising from technology transfer.
<b>VENTURE CAPITAL AND START-UP COMPANIES</b>	
15.01	<p>Introduce measures to assist businesses in different stages including start-up companies seeking equity funding, such as:</p> <ul style="list-style-type: none"> <li>-- establishment of a legal and taxation system to assist the development of the venture capital industry and investment banking; and</li> <li>-- establishment of sound and transparent initial public offering (IPO) markets for SMEs.</li> </ul>



## **ANNEX 5 — EXCERPT FROM LEADERS' STATEMENT TO IMPLEMENT APEC TRANSPARENCY STANDARDS**

We, the Economic Leaders of APEC, reaffirm the commitment made in the Shanghai Accord to pursue implementation of APEC's transparency principles. In so doing, we observe that transparency:

- is an important element in promoting economic growth and financial stability at the domestic and international levels;
- is conducive to fairer and more effective governance and improves public confidence in government;
- is a General Principle in the Osaka Action Agenda which requires its application to the entire APEC liberalization and facilitation process;
- is a basic principle underlying trade liberalization and facilitation, where the removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative rulings affect their interests, can participate in their development, can participate in administrative proceedings applying them and can request review of their application under domestic law;
- in monetary, financial and fiscal policies, and in the dissemination of macroeconomic policy data ensures the accountability and integrity of central banks and financial agencies, and provides the public with needed economic, financial and capital markets data; and
- will be enhanced through well-targeted, demand-driven capacity building to assist developing economies make progress toward greater openness.

Accordingly, we are committed to implementing the following transparency standards, taking into account the General Principles in the Osaka Action Agenda. We recognize that implementation of these standards will be an important APEC-led contribution to achieving a successful outcome for the WTO Doha Development Agenda.

### **Transparency in Trade and Investment Liberalization and Facilitation**

#### General Principles

1. (a) Each Economy will ensure that its laws, regulations, and progressively, procedures and administrative rulings of general application respecting matters in Section C of Part One of the Osaka Action Agenda are promptly published or otherwise made available, for example via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them.

- (b) Each Economy will have or designate an official journal or journals and publish any measures referred to in paragraph 1 in such journals. Each Economy will publish such journals on a regular basis and make copies of them readily available to the public.
  - (c) An Economy may comply with subparagraph (b) by publication on the Internet.
  - (d) Each Economy will promote observance of the provisions of this paragraph by the regional and local governments and authorities within its customs territory.
2. When possible, each Economy will:
- (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and
  - (b) provide where applicable interested persons a reasonable opportunity to comment on such proposed measures.
3. Upon request from an interested person or another Economy, an Economy will endeavor to promptly provide information and respond to questions pertaining to any actual or proposed measure referred to in paragraph 1.
4. Each Economy will ensure in its administrative proceedings applying any measure referred to in paragraph 1 that:
- (a) wherever possible, persons of another Economy that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
  - (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and
  - (c) its procedures are in accordance with domestic law.
5. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding matters covered by these Standards, that:
- (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter;
  - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
  - (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and
  - (d) ensure, subject to appeal or further review under domestic law, that such decisions

are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

6. For purposes of these Standards, administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include: (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of another Economy in a specific case; or (b) a ruling that adjudicates with respect to a particular act or practice.

### Specific Principles

7. Consistent with the above Standards, Economies will follow the transparency provisions contained in the following documents:
  - (a) APEC Group on Services Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment;
  - (b) APEC Investment Experts Group Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies-For Voluntary Inclusion in Individual Action Plans;
  - (c) APEC Principles to Enhance Competition and Regulatory Reform;
  - (d) APEC Sub-Committee on Standard and Conformance objective to ensure transparency according to the WTO Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, and the SCSC 1994 Declaration of an APEC Standards and Conformance Framework and 1998 Terms of Reference; and
  - (e) APEC Principles on Trade Facilitation.
8.
  - (a) APEC sub-fora that have elaborated the above transparency provisions should review these regularly and, where appropriate, improve, revise or expand them further.
  - (b) APEC sub-fora that have not developed specific transparency provisions should do so.
  - (c) APEC sub-fora that develop such new or revised transparency provisions should present them to Leaders upon completion for incorporation into this Statement.

*(deleted)*

11. The provisions of this Statement will not require any Economy to disclose confidential information where such disclosure would impede law enforcement, the enactment of laws, or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular persons or enterprises.

12. (a) Economies are committed to implementing the area-Specific Transparency Standards contained in Sections A-H below in a manner consistent with the Standards in paragraphs 1-6 and 11 above.<sup>70</sup>
- (b) Economies agree to review periodically the Area-Specific Transparency Standards contained in Sections A-H below and, where appropriate, improve, revise or expand them further.

*(deleted)*

### **Transparency Standards on Investment**

1. Each Economy will, in the manner provided for in paragraph 1 of the Leaders' Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ("investment measures") are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them.
2. In accordance with paragraph 2 of the Leaders' Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment.
3. In accordance with paragraph 3 of the Leaders' Statement, upon request from an interested person or another Economy, each Economy will:
  - (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and
  - (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy.
4. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that:
  - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;
  - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
  - (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and

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<sup>70</sup> Economies in accession to the WTO accept the area-Specific Transparency Standards on the understanding that this will neither influence the outcome of their on-going WTO accession negotiations nor prejudge the results of the relevant WTO negotiations.

- (d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.
5. If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the Leaders' Statement each Economy will publish and/or make publicly available through other means those guidelines.
  6. Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:
    - (a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and
    - (b) publishing and/or making available definitions of criteria for assessment of investment proposals.
  7. Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.
  8. Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.
  9. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.
  10. Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.

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## GENERAL ACRONYMS

ASEAN	Association for South East Asian Nations
FDI	Foreign Direct Investment
FIAS	Foreign Investment Advisory Service (World Bank)
FTA	Free Trade Agreement
GATS	General Agreement On Tariffs and Services (Wto)
GATT	General Agreements On Tariff and Trade
ICSID	International Center for Settlement of Investment Disputes
IMF	International Monetary Fund
IP	Intellectual Property
IPA	Investment Promotion Agency
IPR	Intellectual Property Rights
IPPAS	Investment Promotion and Protection Agreements
M&AS	Mergers and Acquisitions
MFN	Most Favored Nation (Treatment / Status)
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
PPP	Public-Private Partnership
R&D	Research And Development
S&P	Standard and Poor's Credit Rating Agency
SME	Small and Medium-Size Enterprises
UNCITRAL	United Nations Commission on International Trade Law
TRIMS	Trade-Related Investment Measures Agreement (WTO, 1995)
TRIPS	Trade-Related Aspects of IPR Agreement (WTO, 1995)
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax
WIPO	World Intellectual Property Organization (WTO)
WTO	World Trade Organisation

