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Restrictions on Private Foreign Investment in Various Nations--Including the Law on Expropriation

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INTERNATIONAL LAW

Introduction

> If states were in agreement as to the international law of foreign investments, it would have been possible to bring about a multilateral agreement on foreign investment stating the substantive principles which apply in the area. The fact that none exists is due to the existence of conflicting approaches to the problem of foreign investment protection and the existence of contending systems relating to the treatment of foreign investment.[1]

In the light of the above, there are two components to the treatment of restrictions of foreign property ownership and investment under international law. The first deals with the nature of national investment laws. The second relates to bilateral investment treaties, better known as BITs.

Nature of national investment codes

Investment legislation controls foreign private investment in any given country.[2] The main purpose of an investment code is to promote, facilitate and protect foreign investments. Invariably, they contain guarantees, tax relief and other incentives to investors. They also set forth processes and procedures to enter a particular market and instances of expropriation. By and large, investment codes are promotional in nature. As such, they are concentrated, to a large degree, in the developing countries.

Of the 51 countries included in INVESTMENT LAWS OF THE WORLD published by the International Center for the Settlement of Investment Disputes in Washington, D.C., 28 of these are African countries, 9 Asian, 6 European (primarily Eastern Europe), and 8 in Latin America and the Caribbean Region.[3]

Some industrial countries also have laws on foreign investments though markedly different in scope and substance to those existing in the 51 above-mentioned countries. These include Australia, Canada, Japan, New Zealand and Spain. Countries such as France, the United Kingdom and the United States do not have investment codes as those exhibited by the other countries examined above. Investment codes are categorized in terms of admission, treatment, expropriation of foreign investments and the settlement of investment disputes between investors and their host countries.

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[1] M. Sornarajah, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 187 (1994).

[2] *See generally,* A. R. Parra, *Principles Governing Foreign Investment in National Investment Codes, in* I. F. I. Shihata, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 311-335 (1993).

[3] The African countries include Angola, Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Djibouti, Gabon, Ghana, Guinea, Guinea-Bissau, Madagascar, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Somalia, Sudan,, Tanzania, Togo, Zaire, Zambia. The Asian countries include Bangladesh, Korea, Laos, Mongolia, Mynamar, Nepal, Philippines and Vietnam. The European countries include Bulgaria, Hungary, Poland, Portugal, Romania and Yugoslavia. Latin American and Caribbean countries constitute Argentina, Bolivia, Chile, Colombia, El Salvador, Haiti, Paraguay an d Venezuela.

Admission

Admission relates to the entry into the foreign investment markets by an investor. For example, BITs provisions on admission by and large include two areas. First, the host must or will create an amenable investment environment or climate for foreign investors to invest. The second deals with the obligation of the state to admit the foreign investor, creating a corresponding right of investors to gain admission. There are some codes with no articulated special restrictions on entry, beyond public order considerations. Others, however, impose greater control requiring foreign investors to secure special permits for entry into their markets.[4]

Treatment

Standards of treatment in general

About a third of the 51 countries have no express provisions on the treatment of foreign investors. This group traditionally has been less receptive to foreign investment. However, the overwhelming majority of those countries that encourage foreign investment also accord foreign investors the same treatment as nationals. A very small fraction of the 51 countries maintain a *fair and equitable* disposition set forth in the BITs and reflected in their investment laws.[5]

Repatriation of capital and profits

The other aspect of treatment of a foreign investor in the host country is the transfer of capital and profits. Of the 51 countries, only Mongolia and Yugoslavia appear to grant complete and unconditional rights of repatriation to foreign investors. The majority of the countries, even though they guarantee such transfers of both capital and profits, expressly subjugate them to either foreign exchange controls and/or taxation. A very limited number of the countries place a time restriction on repatriation, requiring that transfers be done after a certain length of time in installments.[6]

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[4] Countries that require special permits with a very broad discretion vested in the host country include Angola, Djibouti, Gabon, Guinea Bissau, Mozambique, Somalia and Tanzania in Africa; in Asia, Bangladesh, Laos, Mongolia, Myanmar, Nepal, Vietnam and Yemen in the Middle East; in Europe, Romania; and in Latin America and Caribbean countries, Colombia, El Salvador and Paraguay. Countries that also demand a special permit, but with a narrow discretion on the part of the host country include Egypt, Ghana, Sudan and Zambia in Africa and the Middle East; Korea, the Philippines in Asia; Bulgaria, Poland, Portugal and Yugoslavia in Europe; and in Latin America and the Caribbean countries, Argentina, Chile and Venezuela. Countries with no special restrictions on entry in Africa include, Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Guinea, Madagascar, Mauritania, Namibia, Niger, Rwanda, Senegal, Togo and Zaire. Only Hungary in Europe and Bolivia and Haiti in Latin America and the Caribbean countries have no special restrictions on entry of a foreign investor.

[5] Those Africa countries with a national treatment requirement include Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Egypt, Gabon, Guinea, Madagascar, Mauritania, Namibia, Niger, Rwanda, Senegal, Somalia, Sudan and Togo; in Asia, Korea, Philippines and Yemen; in Europe, Bulgaria, Hungary, Romania and Yugoslavia; in Latin America and the Caribbean, Argentina, Bolivia, Colombia, Haiti and Paraguay. Those African Countries with a *fair and equitable* approach include Angola and Bangladesh; and Vietnam in Asia. Countries with no provisions on treatment in Africa include Benin, Djibouti, Ghana, Guinea-Bissau, Mozambique, Tanzania, Zaire and Zambia; in Asia, Laos, Mongolia, Myanmar and Nepal; in Europe, Poland and Portugal; and in Latin America and the Caribbean, Chile, El Salvador and Venezuela.

[6] Countries with unconditional transfer provisions in Asia as noted are Mongolia and in Europe Yugoslavia. In Africa, the majority of the countries permit transfers subject to other regulations. These include Angola, Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Gabon, Ghana, Guinea, Mauritania, Mozambique, Niger, Rwanda, Senegal,

Expropriation

Conditions of expropriation in general

Most of the 51 countries contain provisions on expropriation. Only a relatively small number of the countries allow absolute guarantees against compulsory acquisition and taking. A majority of the countries stipulate that foreign investments may be expropriated only in the public interest against compensation in accordance with the laws of the land. A third of the 51 countries have no provision on expropriation. But these countries invariably rely on constitutional provisions on expropriation. Furthermore, a few codes that guarantee absolutely against expropriation may also exempt certain assets from this complete guarantee to compulsory acquisition and taking. For example, the code of Egypt does this precisely concerning real estate.

The rule that investments will not be expropriated except in the public interest according to law and with payment of compensation is also found in the constitutions of such countries as Australia, France, Japan, Spain and the United States. The United Kingdom, in the absence of an enacted single constitutional instrument, does not have this rule. But, custom, case law and statutes all combine to reveal similar rules.[7]

Compensation for expropriation

About half of the 51 countries have no express provision on measures or ways of paying compensation because of expropriation. This category manifests those countries that neither provide absolute guarantees against expropriation or have no expropriation provisions in their codes though these may be found in their constitutions. The remaining countries are mixed. Some require that the investor affected by expropriation will be compensated equal to the value or actual value of the investments. Five in this category allude to market value, while another five promise prior compensation. They also refer to the fact that such compensation will be just and fair. However, they do not stipulate the measure of such compensation.

The largest number of the countries, many from Sub-Saharan Africa, require that where expropriation occurs, the foreign investor will receive fair and equitable, or fair and adequate or just simply, "just, fair or equitable" compensation. There are very few countries that expressly specify repatriation with amounts or percentages to be received as compensation in case of expropriation. Again the constitutions of countries

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Sudan, Tanzania, Togo, Zaire and Zambia. Those Asia countries with transfer subject to other regulations include Korea, Laos, Myanmar and the Philippines; in Europe it is Bulgaria, Hungary, Poland and Portugal; in Latin America the list includes Bolivia, Chile, Colombia, Haiti and Venezuela. Countries that permit repatriation subject to other regulations and in installments on liquidation or only following a specified period in Africa include, Egypt, Guinea-Bissau, Madagascar, Namibia and Somalia; in Asia, Bangladesh, Nepal, Vietnam and Yemen; in Europe, Romania; and in Latin America and the Caribbean, Argentina and El Salvador. Countries with no provision on repatriation in Africa are Djibouti and in Latin America and the Caribbean, Paraguay.

[7] Countries with public interest expropriation and compensation in Africa are Angola, Benin, Cameroon, Central African Republic, Djibouti, Gabon, Guinea, Guinea-Bissau, Madagascar, Mauritania, Mozambique, Namibia, Niger, Rwanda, Somalia, Sudan, Tanzania, Zaire and Zambia; in Asia, Bangladesh, Nepal and Philippines; in Europe, Bulgaria, Hungary, Poland and Romania; and in Latin America Haiti. Countries which do not expropriate foreign investments in Africa are Egypt and Ghana; and in Asia, Laos, Mongolia, Myanmar, Vietnam and Yemen. Countries with no provision on expropriation in their laws in Africa are Burundi, Chad, Comoros, Congo, Cote d'Ivoire, Senegal and Togo; in Asia, Korea; in Europe, Portugal and Yugoslavia; and in Latin America and the Caribbean, Argentina, Bolivia, Chile, Colombia, El Salvador, Paraguay and Venezuela.

such as Australia, France, Japan, Spain and the United States broadly incorporate the concept of just compensation for expropriation.[8]

Dispute settlement

A relatively small number of the 51 countries require local courts, local arbitration or administrative boards to settle investment disputes between the foreign investor and the foreign country. A third of the countries have no provision on the settlement of investment disputes. By implication, such disputes are, therefore, a matter of jurisdiction for the local tribunals. A majority of the countries require one or more forms of international arbitration. A large proportion of them subject themselves to the International Center for the Settlement of Investment Disputes (ICSID). By and large, African countries subject themselves to variant modes of arbitration at both local and international levels to resolve investment disputes. About half of the countries in this group refer to international arbitration in addition to the authority to the state to consent or deny one or more other specified forms of arbitration. The remainder in this group desire that such arbitration be subjected to a special agreement between the investor and the host country. Others also require conciliation as another forum to arbitrate investment disputes.

In the industrial countries with investment codes, their laws stipulate criminal sanctions for violation of their codes. No other provisions are available on the disposition of disputes between the investor and the host country. By implication, therefore, as in the developing countries, such investment conflicts are subject to the jurisdiction of the local tribunals. For example, under their laws, Australia, Canada, Japan, New Zealand and the United Kingdom may legitimately consent to have their investment disputes resolved by international conciliation or arbitration. Other industrial nations such as the United States and Spain, for example, do not readily subject themselves to international arbitration at the center. In France, on the other hand, a major portion of investment disputes emanating under various classes of agreements between the foreign investor and the host state may not be submitted to arbitration.[9]

[8] Countries with actual value compensation in case of expropriation in Africa are Madagascar and in Europe, Hungary and Poland. Countries with market value compensation in case of compulsory acquisition and taking in Africa are Somalia, Sudan and Zambia; in Asia only Bangladesh has this provision in its code; and in Europe only Romania deals with compensation on the basis of market value. Countries with fair and equitable compensation provisions in Africa are Angola, Central African Republic, Djibouti, Gabon, Guinea, Guinea-Bissau, Mauritania, Mozambique, Namibia, Niger, Tanzania and Zaire; in Asia, the codes in Nepal and the Philippines contain the same provision. Prior compensation provisions in case of expropriation in Africa are found in Benin, Cameroon and Rwanda; in Europe, Bulgaria and in Latin America; and the Caribbean, Haiti. Countries with no provision on compensation in Africa are Burundi, Chad, Comoros, Congo, Cote d'Ivoire, Senegal and Togo; in Asia, Korea; in Europe, Portugal and Yugoslavia; and in Latin America and the Caribbean, Argentina, Bolivia, Chile, Colombia, El Salvador, Paraguay and Venezuela have no provision on compensation. Country codes that stipulate that investments shall not be subject to expropriation are Egypt and Ghana in Africa and Laos, Mongolia, Myanmar, Vietnam and Yemen in Asia.

[9] In Africa, countries that require investment disputes to be resolved by the local tribunals are Djibouti and Guinea-Bissau while in Asia it is Laos, Mongolia, Myanmar and the Philippines. Countries that require either local courts or international arbitration in Africa are Angola, Benin, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Egypt, Gabon, Ghana, Madagascar, Mauritania, Mozambique, Namibia, Niger, Niger, Rwanda, Senegal, Somalia, Tanzania, Togo, Zaire and Zambia; in Asia, it is Nepal, Vietnam and Yemen; in Europe, Hungary and Yugoslavia; and in Latin America and the Caribbean, Bolivia, Colombia and El Salvador. Countries with no provisions on settlement of investment disputes are Burundi, Comoros and Sudan in Africa; in Asia, Bangladesh and Korea; in Europe, Bulgaria, Poland, Portugal and Romania; and in Latin America and the Caribbean nations, Argentina, Chile, Haiti, Paraguay and Venezuela.

Bilateral investment treaties (BITs)

Brief history

Customary international law traditionally required that an alien's rights in the host country cannot be the same as citizens of the country whether corporate or individual. This is particularly true of foreign business enterprises.[10] Despite the fact that modern international law acknowledges and affords protection to minimum rights of aliens, the desire to create special rules to control the treatment of foreign investment has been constant.

The Friendship, Commerce and Navigation Treaties (FCNs) pioneered by the United States were the predecessors of Bilateral Investment Treaties (BITs). Even though the scope of FCNs covered foreign property, they were largely designed to cater to contingencies of trade rather than foreign investments. Their scope was truly broad. It included matters ranging from entry right to access to local courts, enforcement of arbitral awards, right to engage technical expertise, issues pertaining to leases of land and other real estate property, taxation, customs and excise, treatment of commercial travellers, treatment of products and consultation with respect to local restrictions on business.

As time elapsed, it became necessary to treat each subject area covered by FCNs in greater depth than they provided. This coincided with the emergence of newly independent states in the developing countries during the 1950s and early 1960s to the present. Their economies were truly not suited to most existing agreements including the FCNs. The new state was invariably of the view that the broad spectrum of close political, economic and cultural cooperation envisioned by the FCNs was more in tune or best suited to treaties between states of relatively comparable economic development. In addition, the predominant features of the FCN was its traditional demand for unrestricted right of entry and the unqualified right of national treatment. These elements were considered anathema to the political and economic aspirations of the new state.

One result of this new state dynamic was its influence on United Nations Resolutions which emphasized the desire of these new nations not to have their economies closely tied or integrated into those of the developed countries. The orientation of the new nations to macro-economic policies further eliminated the efficacy of rigid legal obligation permitting unrestricted access to their markets. This made it impossible for the FCN model to thrive in the newly emergent states.[11] Consequently, the FCN was no longer a viable mechanism to regulate bilateral economic arrangements. In its place, the BIT emerged as the preferred agreement to conduct bilateral cooperation on foreign private investments.

The Bilateral Investment Treaty (BIT)

In less than thirty years, BITs have emerged as the single most important instrument affecting private foreign investment. Effective, September 1994, there were in excess of 700 BITs.[12]

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[10] *See*, Sornarajah, *supra* note 1.

[11] For U.N. Resolution and influence by newly emergent nations, *see* UNGA RES.1803 (XVII) (1962); UNGA RES.2158 (XXI); UNGA RES.3201 (S-VI) both of 1962. *See also* Declaration on the Establishment of a New International Economic Order, 13 I.L.M. 238 (1974).

[12] *See* R. Dolzer & M. Stevens, BILATERAL INVESTMENT TREATIES 1-18 (1995); United Nations Center on Transnational Corporations, BILATERAL INVESTMENT TREATIES, 1959-1991 (1992); and its BILATERAL INVESTMENT TREATIES (1988); United Nations Transnational Corporation and Management Division, Dept of Economic and Social Development, WORLD INVESTMENT

The modern BIT is of European origin. The first such BIT was concluded between the Federal Republic of Germany and Pakistan on November 25, 1959.[13] Since then, Germany has signed about 90 such agreements. Other European countries such as France and Switzerland in particular concluded a number of BITs with developing countries in the late 1950s and early 1960s. These national efforts were reinforced by the work of the Organization for Economic Cooperation and Development (OECD) on the protection and promotion of investments. As a result, the OECD presented its Draft Convention on the Protection of Foreign Property in 1967.[14] However, the draft did not receive the necessary support to be opened for signature.

Even though the Draft Convention did not materialize into a final international treaty, it played a significant role in the development and eventual enunciation and formulation of subsequent OECD instruments.[15] This evolution partially explains the homogeneous nature in the form and substance of a large number of BITs. There appears to be a continuous review of OECD policies with respect to BITs, in particular by the OECD Committee on International Investment and Multinational Enterprises.[16]

Since the 1970s, Switzerland and the United Kingdom have each entered into 60 BITs. France has concluded 48, the Netherlands 44 and Belgium-Luxembourg 34. Among them, the Scandinavian countries have concluded more than 70 BITs,[17] Italy 30, and Austria 16. Due to its traditional emphasis on trade rather than foreign investment, Japan has entered into only four BITs. Other OECD countries such as Australia, Canada and New Zealand have concluded eleven, six, and one respectively.[18]

As discussed above, the United States, during the course of the 19th and 20th centuries, established its bilateral economic relations founded on Friendship, Commerce and Navigation Treaties (FCNs). A new series of such agreements was negotiated subsequent to World War II. The modern FCN was successful in regulating economic relations with developed countries. However, it was more difficult to enter into these types of treaties with developing countries.[19] The types of guarantees required by the United States were

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DIRECTORY 1992: FOREIGN DIRECT INVESTMENT (1993).

13 *Id*. Dolzer & Stevens at 1 & Bilateral Investment Treaties 1959-1991.

14 7 I.L.M. 117 (1968); *see also* Declaration on the Establishment of a New Economic Order, 13 I.L.M. 238 (1974); Dolzer, *Permanent Sovereignty Over Natural Resources and Economic Decolonization* 7 HUM.RTS L.J. 217 (1986).

15 *See for example*, Denza & Brooks, *Investment Protection Treaties; United Kingdom Experience* 36 INT'L & COMP. L.Q. 910 (1987); *see also*, Gudgeon, *United States Bilateral Investment Treaties...* 4 INT'L TAX & BUS.L. 111 (1986).

16 For example, in 1976 OECD member states adopted the Declaration on International Investment and Multinational Enterprises 15 I.L.M. 967 (1976). The Declaration in the annex contains *OECD Guidelines for Multinational Enterprises*. *See*, *World Bank Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment of Sept. 21, 1992*, also known as World Bank Guidelines on the Treatment of Foreign Direct Investment 31 I.L.M. 1363 (1992).

17 Denmark has entered into 22 such agreements, Finland 17, Norway 13, and Sweden 22. *See* Dolzer & Stevens, *supra* note 12, note 18 including a discussion on the Germany experience.

18 *Id*. at 10; *see also*, Peterson, *Canadian Investment Promotion and Protection Treaties*, CANADIAN Y.B. INT'L. L. 373 (1991).

19 Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties...* 24 INT'L. L. 655, 657 (1990); *see also*, Vandevelde, *The*

granted with significant reluctance by the host countries. Consequently, the United States entered into its last FCN with a developing country thirty years ago in 1966, one with Togo and another one with Thailand.[20]

Concern in the United States was evident with the lack of modern investment safeguards, more especially during the course of the 1970s. As a result, the United States developed its first BIT model text in 1980.[21] The BIT program in the United States evolved at a slower pace in its first ten years of existence from 1980 to 1990. As of 1995, the United states concluded 24 BITs. About half of these were not concluded until the beginning of the 1990s. Even though there are significant variations between U.S. and European BITs, there are also important similarities between them.[22]

In the developing countries, more than 90 capital-importing nations are parties to BITs. Among the Caribbean nations, 11 states have concluded at least one BIT each. In Africa 40 countries have entered into BITs. Prolific African countries in this regard include Cameroon, Cote d'Ivoire, Madagascar, Senegal, Sudan and Zaire.[23] In the Middle East, Egypt, Jordan and Kuwait have all concluded several BITs. As of 1995, seven other countries in this region had concluded one BIT each.[24]

In Asia, 19 countries have entered into BITs as of 1995. China with 55 has more BITs than any other country in this region. As was the situation with the United States, but for different reasons, China's BIT program did not really pick-up until the early 1980s. In similar manner as the United States, more than half of the Chinese BITs have been concluded only in the early 1990s.[25] Generally, the structure and substance of Chinese BITs have no major variations from BITs by other nations. The Chinese trend appears to signify a new emphasis on rules based on treaties to regulate foreign investment but also manifest Chinese approaches to international law and mechanisms applicable to resolution of international conflicts.[26]

Other Asian nations with BITs include Indonesia, Korea, Malaysia, Sri Lanka and recently Vietnam. Each of these countries have entered into more than 12 BITs. India is the only significant country in Asia

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Bilateral Investment Treaty Program of the United States, 21 CORNELL INT'L. L. J. 203-211 (1988).

[20] 20 I.L.M. 565 (1981) contains a listing of FCN treaties in force prepared by the U.S. Dept. of State. An unsuccessful attempt to conclude an FCN was made early in the 1970s with the Philippines. For details, *see generally*, Dolzer & Stevens, *supra* note 12.

[21] G. Arksen, THE CASE FOR BILATERAL TREATIES IN PRIVATE INVESTMENT ABROAD-PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS (1981).

[22] Dolzer & Stevens, *supra* note 12.

[23] *Id*.

[24] *Id*. at 4.

[25] For details on Chinese BIT practice, *see*, L. Shishi, BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENTS: PRACTICE OF THE PEOPLE'S REPUBLIC OF CHINA IN INTERNATIONAL LAW AND DEVELOPMENT 163-184 (1988); *see also*, Mo, *Some Aspects of the Australia-China Investment Protection Treaty* 25 J. WORLD TRADE L. 43 (1991).

[26] As examined above, in 1964, India concluded a BIT with Germany. However, the treaty is in the form of an exchange of notes. Unlike today's BIT, the Indian agreement with Germany essentially contains obligations assumed by India to protect German investments. The agreement appears *in* 5 INDIAN J. INT'L. L. 91 (1965); *see also*, Krishna, *Exchange Controls Under West German Treaties for the Protection of Private Foreign Investments*, AUSTRALIAN Y.B. INT'L. L. 71 (1965).

whose modern BIT program has just begun.[27] In his budget speech of February 27, 1993, the Indian Minister of Finance indicated the country's willingness to conclude BITs with the United States, Germany and the United Kingdom.[28]

Regional and multilateral arrangements: The Importance attached to BITs by developing countries

Developing countries have attached particular importance to BITs. This acknowledgement of the significance of the operation of the BIT surfaced in 1984 under the auspices of the Asian-African Legal Consultative Committee (AALCC). The Committee published a detailed model BIT with two variations.[29] In 1985, the Committee prepared three draft models of BITs. Model A is identical to BITs between capital-importing countries with greater emphasis on promotion of foreign investments. Model B reflects a detailed admission process that may ordinarily be the case scenario in practice. This model also envisages a more restrictive attitude towards the protection of foreign investments by host countries. Model C is by and large patterned after Model A. However, the application of Model C is confined to specific categories of investments as determined by the host country.[30] This importance of BITs for the developing countries has recently also been manifested in the successful Lome Conventions Involving African, Caribbean and Pacific Countries (ACP). The Lome Conventions reveal that the Contracting Parties value BITs.[31] In addition to accepting the Lome Conventions, the Caribbean Community (CARICOM) also signed an agreement with Venezuela in 1992.[32] The agreement specifically requires the parties to promote and protect investments through BITs.[33]

Beyond the African, Caribbean and Pacific States, the importance of BITs is also reflected in other regions as well. The member states of the Organization of the Islamic Conference entered into an agreement for the promotion, protection and guarantee of investments in force in 1988, better known as the OIC Agreement.[34] The agreement contains many provisions identical to those found in BITs. Recall also that the Convention Establishing the Multilateral Guarantee Agency (MIGA Convention) which opened for signature in October of 1985 provides for the Agency's role to promote investments. Article 23 of this instrument requires members to promote and facilitate investments through BITs. As of early September 1994, MIGA had 127 members. Of these, 19 of them belong to the industrialized nations. The majority of

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[27] *Id. see also*, Dolzer & Stevens, *supra* note 12.

[28] As a result India entered into a BIT with the United Kingdom on Mar. 14, 1994, 34 I.L.M. 935 (1995).

[29] *See*, 23 I.L.M. 254 (1984).

[30] Dolzer & Stevens, *supra* note 12.

[31] Arts. 258 and 260 of the Convention are devoted to BITs. *See also*, Dolzer & Stevens, *supra* note 12.

[32] *Id*.

[33] CARICOM was created on July 4, 1973. Its members include Anguilla, Antigua-Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

[34] 1 ICSID REV.-F1LJ 1986. The Conference was held in Baghdad, Iraq, on June 1-5, 1981.

them, 108 to be precise constitute developing countries. In the interim, an additional 20 developing countries are working towards complete membership.[35]

The Latin American countries have a long standing tradition in their opposition to international rules governing foreign investments in their countries. Thus, as far back as 1896, the Argentine jurist Carlos Calvo espoused the view that rules that control foreign investments should be predicated on the precepts of national treatment. Consequently, the pertinent rules of domestic law should not be altered by norms of international law.[36]

Most Latin American countries have embraced the Calvo Doctrine well into the twentieth century. Evidence of this support was in particular reflected in the Andean Treaty Law on Foreign Investments in the 1969 Agreement at Cartagena. The Agreement created the Andean Common Market (ANCOM) that incorporates Bolivia, Chile, Colombia, Ecuador and Peru.[37] Article 27 of this Agreement requires contracting parties to adopt a unified system for the treatment of foreign capital. Consistent with this provision, the Andean Commission in 1970 issued Decision 24 being a code of common restrictions on foreign investments in the ANCOM countries.[38]

One of the basic principles of Decision 24 was that member states should not grant to foreign investors more favorable treatment than that granted to national investors. In addition, Decision 24 further instituted a tracking mechanism to ensure that the legislation of member states will not facilitate resolution of investment disputes beyond the jurisdiction of the host nation. However, Decision 24 has subsequently been amended numerous times, for example by Decision 220[39] and Decision 291[40] respectively. These allow for fewer restrictions on foreign investments. As a result, the last couple of years have seen a number of Latin American countries promulgate legislation that is focused on attracting foreign investments.[41] Lately, a greater number of countries in this hemisphere have begun to enter into BITs. For example, Argentina has concluded 26 BITs, Bolivia 10, Chile 15, and Uruguay 11.

The added impetus to BITs began when developing countries started to enter into these types of treaties between themselves, thereby providing a new dimension to South-South cooperation in this area. For example, a number of new industrialized South East Asian countries have concluded BITs with the oil-exporting Arab countries. These facilitate the investment in technology and/or capital in other developing

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35 Dolzer & Stevens, *supra* note 12, at 8.

36 D. Shea, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955).

37 8 I.L.M. 910 (1969).

38 Decision 24 of the Andean Investment Code was adopted on Dec. 31, 1971, by the Andean Commission, 10 I.L.M. 1065 (1971).

39 27 I.L.M. 978 (1988).

40 29 I.L.M. 1283 (1991).

41 *See for example*, Mexico Foreign Investment Law of Dec. 23, 1993; the Argentina Executive Order 1853 of Sept.8, 1993 codifying the Foreign Investment Act of Sept. 8, 1993; Peru Foreign Investment Promotion Law, Decree, No. 662 of 1991; and the Cuban Foreign Investment Act, No. 77 of Sept. 5, 1995, reprinted *in* 35 I.L.M. 331 (1996). *See also*, Peters & Schrijver, *Latin America and International Regulation of Foreign Investment: Changing Perceptions* 39 NETHERLANDS INT'L. L. REV. 355 (1992).

nations. In the immediate past, BITs have been sealed between capital importing countries, more especially in Central and Eastern Europe and also East Asia as a regional effort to ensure foreign investments. For instance, during the course of 1992 and 1993, China concluded BITs with all the five Central Asian Republics of Kazakhstan, Kyrghystan, Turkmenistan, Uzbekistan and Tadjikistan. Others include Albania-Croatia of 1993 and Czech Republic-Hungary in 1993. China signed a BIT with Laos in 1993; Korea and Vietnam signed a BIT in 1992; Turkey and Uzbekistan signed a BIT in 1992 and Argentina and Chile in 1991.[42] The substance of BITs concluded by these developing countries have retained the main features of those signed by capital exporting countries.

In Eastern Europe, the previous socialist policies traditionally did not encourage private foreign investment. Consequently, only Romania and Yugoslavia concluded BITs prior to transformation of the region to market economies in the late 1980s. Since then, however, all the nations in Central and Eastern Europe have concluded several BITs. By 1995, for example, Bulgaria had entered into 19 BITs, Hungary 29, and Poland 30. Similarly, with the impact of political changes in the former Soviet Union, its newly independent states have also put in place BIT programs as above noted.[43] At the close of 1995, the Baltic republics had concluded some 25 BITs, Ukraine 7, Armenia 6, Kazakhstan 5 and Kyrghystan 3.

Conclusion

There is no multilateral instrument on foreign investment. In the absence of such a convention stating the substantive precepts applicable, states and the foreign investor have established various mechanisms to deal with the issues in this area. To date, two approaches of national legislation or codes and bilateral investment treaties (BITs) have been utilized to regulate foreign investments. The proliferation of both country codes and BITs indicate a fertile ground for codification of these principles into an international instrument. Such a treaty would bring uniformity and certainty to the law, practice and procedure.

For now, however, it appears that the BIT program seems to contain and satisfy the needs of individual countries and the foreign investor. Exacerbated by conflicting approaches to foreign investment as well as the presence of variant systems of law on the matter, it may be that for the present institutions such as the OECD, appropriate agencies of the United Nations and the World Bank may not have a choice but sit back and let international law of foreign investment develop through bilateral cooperation between states and between the foreign investor and the host nation.

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[42] For details, *see*, Dolzer & Steven, *supra* note 12 & Sornarajah, *supra* note 1.

[43] Dolzer & Stevens, *supra* note 12.

96-2855

EUROPEAN UNION

Introduction

A primary goal of the Treaty of Rome (1957), establishing the European Economic Community (EC),[44] has been the formation of a common market where persons and capital can move freely and in which all goods and services are offered and sold under the same conditions without any restrictions. The provisions concerning the free movement of capital in the EC Treaty are stipulated in Chapter 4 of Title III on the Free Movement of Persons, services and capital.

The Law before 1994

Until the inception of the Maastricht Treaty, establishing the European Union,[45] the rules governing the free movement of capital were contained in articles 67 to 73 of the EC Treaty.[46] According to article 67, the Member States were obligated to progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in the Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital was invested.[47]

However, the rules stipulated in articles 67-73 did not cover investment by third countries in the EU Member States. Moreover, article 73 permitted certain derogations from the application of the general rule. Hence, according to article 73:1, in case the movement of capital had led to disturbance in the functioning of the capital market in any Member State, the Commission had, after consulting the Monetary Committee, to authorize that State to take protective measures in the field of capital movement, although the Council could revoke the authorization or amend the conditions or details thereof. Nevertheless, article 73:2 prescribed that a Member State which was in difficulties could on grounds of secrecy or urgency take the measures mentioned above, where that proved necessary, on its own initiative.[48]

The Maastricht Treaty amended, among other things, the provisions of the EC Treaty Concerning the Free Movement of Capital. Thus, by means of article 73a, as of January 1, 1994, articles 73b to 73g[49] have replaced articles 67 to 73 (*see below*).

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44 Note that the Maastricht Treaty changed the term *European Economic Community* to *European Community* (EC).

45 Treaty on European Union, signed in Maastricht on Feb. 7, 1992, 1 EUROPEAN UNION, SELECTED INSTRUMENTS TAKEN FROM THE TREATIES, 11 ff (Book 1, Luxembourg: Office for Official Publications of the European Communities, 1993).

46 *Id*. at 173-176.

47 In this connection, see Council Directive No. 88/361 of June 24, 1988 (OJ L 178, 08.07,88), on the Implementation of Article 67 of the Treaty. This Directive was amended by Directive No. 94/A0103 (63) (OJ L 001,03,01.94), p. 420; and by Directive No. 94/A0103 (73) (OJ L 001, 03,01.94), p. 572.

48 *Supra* note 2, at 176.

49 *Id*. at 177-181.

Present Law

Article 73b(1) of the EC Treaty, as amended by the Maastricht Treaty, prescribes total free movement of capital between the Member States and between Member States and third countries. This means that all restrictions are prohibited. According to article 73b(2), within the framework of the provisions set out in relevant articles, all restrictions on payments between Member States and between Member States and third countries are prohibited.

However, article 73c provides exceptions with regard to third countries. According to article 73c(1), the provisions of article 73b shall be without prejudice to the application to third countries of any restrictions which exist on December 31, 1993, under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment, including investment in real estate. Article 73c(2) stipulates that despite the objective of free movement of capital between Member States and third countries to the greatest extent possible, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment, including investment in real estate, establishment, the provision of financial services or the admission of securities to capital market. Unanimity will be required for measures which constitute a *step back in Community Law*.

Article 73d exempts from the application of the general rule of non-restriction the application of tax laws distinguishing between taxpayers' residence and place of invested capital, preventing fiscal infringements and ensuring prudential supervision of financial institutions, provided such measures do not constitute a disguised discrimination or restriction on freedom of capital movement.

According to article 73e:

> Member States which on 31 December 1993 enjoy a derogation on the basis of existing Community Law, shall be entitled to maintain, until 31 December 1995 at the latest, restrictions on movement of capital authorized by such derogations as exist on that date.

Articles 73f and 73g contain further exceptions with respect to third countries. Hence, article 73f prescribes that the Council, through a qualified majority, may take safeguard measures of a limited duration in exceptional circumstances where capital movement to or from third countries can cause serious difficulties for the European Monetary Union (EMU).

According to article 73g(1), in cases concerning the application of article 228a,[50] the Council may by a qualified majority restrict capital movements and payments as regards specific third countries. Article 73g(2) prescribes that the Member States may introduce, for serious political reasons and on grounds of urgency, unilateral actions against a third country with regard to capital movements and payments. The Commission and the Member States must be informed of such measures by the date of their entry into force at the latest. However, the Council may by a qualified majority require the Member States to amend or abolish such measures.

Article 73h contains the following guidelines for the free movement of capital in the first phase of EMU, which was until January 1, 1994.

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50 Art. 228a deals with politically motivated sanctions.

- the Member States must authorize any payments or transfers related to goods, services, capital, or earnings to the extent that these movements have been liberalized by the Treaty;
- the Member States may go beyond the extent of liberalization provided for if economic conditions allow;
- where the movement of goods, services and capital are only limited by payment restrictions, these restrictions shall be progressively abolished;
- the Member States undertake to not introduce any new restrictions on transfers of invisible transactions as listed in Annex III[51] to the Treaty; and
- the Member States shall consult each other on the measures to be taken to enable the payments and transfers to be effected.

Finally, it should be pointed out that during the preparation of the Maastricht Treaty, Denmark negotiated and obtained a principal exemption from the application of the general rule on non-restriction. Protocol 1 of the Maastricht Treaty namely provides: The High Contracting Parties, Desiring to settle certain particular problems relating to Denmark, have agreed upon the following provision, which shall be annexed to the Treaty establishing the European Economic Community:

> Notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes.[52]

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51 *Supra* note 2, at 455.

52 *Id*. at 511.

96-2855

AUSTRALIA

Introduction

The Foreign Acquisitions and Takeovers Act 1975 governs the investment in Australian enterprises by foreigners as administered by a section of the Australian Treasury called the Foreign Investment Review Board ("FIRB"). The general policy is to encourage foreign investment in Australia while ensuring that the investment is consistent with the needs of the community. The Government recognizes the substantial contribution that foreign investment makes to the development of Australia's industries and resources. The policy acknowledges that foreign capital supplements domestic savings and enhances the scope for increased economic activity and employment. Foreign investment is also accepted as providing access to new technology, management skills and overseas markets.

The 1975 Act provides a broad authority to prohibit the proposed acquisition of shares or control of an Australian corporation or business if the result would be to transfer control to a foreign person and which "would be contrary to the national interest."[53] Accordingly, the Government requires notification of the following proposals by foreign interests to invest in Australia:

- acquisitions of substantial interests in existing Australian businesses with total assets over A$5m (over A$3m for rural propertries);

- plans to establish new businesses involving a total investment of A$10 or more;

- investments in the media irrespective of size;

- takeovers of offshore companies whose Australian subsidiaries or assets are valued at $20m or more, or account for more than 50% of the target company's global assets;

- direct investments by foreign governments or their agencies irrespective of size;

- acquisitions of developed non-residential commercial real estate valued at $5m or more;

- acquisitions of accommodation facilities irrespective of value;

- acquisitions of residential real estate irrespective of value; and

- proposals where any doubt exists as to whether they are notifiable.[54]

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53 §§ 18(2)(c), 19(2)(c), 20(2)(c) & 21(2)(c).

54 *Summary Of Australia's Foreign Investment Policy* (March 1996) received from the Embassy of Australia, Washington, D.C. Information on the policy governing foreign investments has been obtained from the summary.

A foreign interest is defined as either a natural person not ordinarily resident in Australia or any corporation or business in which a single foreigner has 15% or more of the ownership or in which several foreigners have 40% or more in aggregate of the ownership.

Particular sectors[55]

Notification of proposals for investments by foreign interests above a certain threshold need to be made. The thresholds are:

- over A$3m for rural properties;
- over A$5m for acquisitions of substantial interests in other existing businesses;
- A$10m or more for the establishment of new businesses; and
- A$20m or more for offshore takeovers.

These proposals are registered, but the government generally raises no objection to those in which the relevant assets or total investments are below A$50m. No objections are raised concerning proposals to acquire existing businesses or establish new businesses (with assets of over A$50m) unless they are contrary to the national interest. In approving proposals, the parties may be required to meet certain conditions, which, in practice, relate to time periods for real estate development or environmental requirements.

Real estate

Proposed purchases of real estate by Australian citizens living abroad or holders of permanent visas for Australia are exempt from examination. Proposals for the *development of* real estate (within 12 months) are normally approved unless they are contrary to the national interest. Approval is also normally given for the purchase of vacant residential land (if construction is to start within 12 months) and residences, etc., which are under construction or newly constructed but never occupied. However, no more than half of the units in any one development can be sold to foreign interests. Acquisitions of residential property within a designated "tourism resort" are exempt from examination.

All other proposals for the acquisition of *developed residential real estate* are examinable and are not normally approved, except in limited cases. Acquisitions of *developed non-residential commercial real estate* are normally approved unless they are contrary to the national interest.

Banking

Foreign owned banks are permitted to operate in Australia where the Reserve Bank is satisfied that the bank and its home supervisor are of sufficient standing, provided the foreign bank agrees to comply with prudential supervision arrangements.

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55 Real property, agriculture, forestry, fishing, resource processing, oil and gas, mining (excluding uranium), manufacturing, non-bank financial institutions, insurance, tourism, and most other services.

Under the Banking Act 1959, §11E(2), before accepting a deposit from a person in Australia, a foreign bank must inform the person that the Act's provisions concerning protection of depositors do not apply to foreign banks. The Banks (Shareholdings) Act 1972 places a limitation of 10% on the shareholdings of individuals in a bank.

Civil aviation

Foreign airlines flying to Australia may acquire up to 25% of the equity of a domestic carrier individually or up to 40% in aggregate if the acquisition is not contrary to the national interest. Other foreign investors (including those not providing an airline service to Australia) may acquire up to 100% of a domestic carrier or establish a new aviation business unless it is contrary to the national interest.

Foreign airlines may acquire up to 25% in an Australian international carrier (except for Qantas) individually or up to 35% in the aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, a maximum foreign ownership of 49% in aggregate is permitted.

Media

All foreign investment proposals in Australian media are subject to prior approval.

Broadcasting

Broadcasting licenses and services are subject to several limitations placed on foreign ownership. Under the Broadcasting Act 1942, §90G, the following limitations apply to commercial radio licenses:

a) a foreigner shall not at any time be in a position to control the company holding the license; and

b) two or more foreigners shall not be in a position to control 20% of voting rights in a company holding the license.

Moreover, under §90FA, at least 80% of the directors of the company that holds the license must be Australian citizens. The Act makes detailed provisions for tracing foreign interests in voting shares through a series of companies.

Similar restrictions are also placed on the holding of television licenses. The Broadcasting Act 1992, §57(1), provides that a foreigner must not be in a position to control a commercial television broadcasting license. A foreigner must not have company interests in a license in excess of 15%; the interests of two or more foreigners must not exceed 20%.

For all subscription television braodcasting services licenses, a foreigner is restricted to 20% ownership; there is a combined limitation of 35% on ownership by two or more foreigners.

Newspapers

Foreign direct investment in national and metropolitan newspapers is restricted to 25% for a single shareholder. In the case of provincial and suburban newspapers, aggregate foreign investment is restricted to less than 50%.

Telecommunications

Telstra Corporation Ltd., the leading provider of telecommunications services, is a government monopoly. However, under the Telecommunications Act 1989, parts 3 and 4, investment is permitted in "value added services and Private Network Services." There are also some constraints on foreign investment in Optus Communications, the second general telecommunications company. A third carrier, Vodaphone, is currently 95% foreign owned. However, after July 1, 2003, the license requires that foreign interests hold less than 50% of Vodaphone's shares.

Expropriation and compensation

The Constitution of the Commonwealth of Australia constrains the Federal Government in the exercise of its power of compulsory acquisition (eminent domain). Section 51 (xxxi) provides that the Parliament shall have the power to make laws with respect to "the acquisition of property on just terms from any State or person." However, no such constraint is placed in the Constitutions of Australian States, although they normally provide for the payment of compensation for compulsory acquisitions made for public purposes.[56]

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56 D. Flint, FOREIGN INVESTMENT LAW IN AUSTRALIA 442 (1985).

96-2855

BRAZIL

Background

Even though the right of property is guaranteed to nationals and aliens alike under the National Constitution, the same source establishes some possible restrictions on foreign ownership based on the need to serve social functions. Thus expropriation may be an option for reasons of public use and the necessity or the interest of society.[57]

On the specific subject of land ownership, foreigners, residents of Brazil or corporations authorized to operate in Brazil are eligible to acquire ownership rights on rural lands only up to fifty *modules*.[58] These *modules* may be considered either as an aggregate or as individual tract as determined by the enforcing agency. Acquisition of landownership rights on areas smaller than three *modules* is permissible for all.[59] The acquisition of rural lands between three and fifty modules by foreigners is regulated and controlled.

Foreign companies may own land designated for agricultural activities, livestock rearing, industry or colonization projects according to the objectives set forth in their by-laws.[60]

Rural landholdings located in areas considered indispensable for national defense may only be acquired by foreigners under special authorization issued by the Secretary General of the National Security Council.[61]

Restrictions in foreign investment

Until the latest constitutional amendments of August 1995, the Brazilian Constitution provided for a differential treatment of national and foreign capital companies in certain areas considered of exclusive national interest. President Enrique Cardozo succeeded in passing five constitutional amendments in the first year of his administration. In addition to eliminating the distinction between domestic and foreign firms,[62] he obtained congressional approval to break up the state monopoly on petroleum, telecommunications, natural gas, and coastal shipping. Even though this means an important step forward, the challenge lies in the complementary laws that are still under congressional debate.

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[57] Assambleia Nacional Constituinte, CONSTITUCAO DA REPUBLICA FEDERATIVA DO BRASIL (Brasilia, Centro Grafico do Senado Federal, Brasilia, 1988), art. 5, XXII, XXIII and XXIV.

[58] Modules are units of measurements consisting of factors such as quality, content, economic functions and the like. They may vary from region to region depending on the corresponding values assigned. Law No. 5709 of Oct. 7, 1971, DIARIO OFICIAL (D.O.) Oct. 11, 1971, art. 3.

[59] *Id*. art. 3.1.

[60] *Id*. art. 5.

[61] *Id*. art. 7.

[62] Emenda Constitucional No. 6, arts. 1 & 3 *in* D.O. Aug. 16, 1995.

Mining

Restrictions on foreign investment in mining have been lifted[63] except in cases where the investment involves national borders or Indian lands. In these cases, the implementing law will establish the conditions under which foreigners may operate. Regarding the oil industry, the Brazilian Congress still has to approve the implementing law that will allow the formation of joint ventures with the Brazilian Petroleum Corporation (PETROBRAS) and for foreign companies to make independent investments based on a complex regulation that still has to be approved.[64] The bureaucratic nature of the bill that would regulate the breakup of the PETROBRAS monopoly is the main reason for its delayed passage. Unsolved issues include the length of office and nomination procedure for members of the National Petroleum Agency (ANP). Another aspect that is a source of concern, in light of the other privileges awarded to Petrobras, is that the bill retains the bureaucracy's original idea that Petrobras should be given preference in bidding for concessions, provided its bid is the same as the others. It is likely that the debate in Congress will not be as transparent as it should be on an issue of such importance.[65] In the meantime, more than 300 oil companies from around the world have visited Petrobras in Rio de Janeiro. So, in a spirit of self-preservation, Petrobras has to a certain extent upstaged three regulatory laws and is already in the advanced stages of *unofficial* negotiations with companies on a number of oil and gas projects.[66]

Shipping

The amendment[67] that ended the constitutional monopoly of domestic shipping provides that cargo transport between sea ports will be regulated by a specific law which has not been passed. Until these regulations are approved, foreign ships may only carry passengers.

Electricity

Restrictions on foreign ownership of hydroelectric facilities have been abolished in the Constitution.[68] Foreigners may now own, individually or collectively, a majority ownership in such facilities. In the largest privatization in Brazil's history, on May 21, 1996, the government sold 54.6% of the voting shares in the Rio de Janeiro Power Company Light. This company is responsible for 80% of the electricity consumed in metropolitan Rio. For the second time in 1996, foreign investors were the major players in a privatization

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63 *Id.* art. 1.

64 *Japan: Brazilian President Gives News Conference, Brasilia Voz do Brasil Network,* Mar. 15, 1996, FOREIGN BROADCAST INFORMATION SERVICE (FBIS) EAS-96-053.

65 Brazil: Draft Bill Regulating Oil Industry Analyzed *in Estado de Sao Paulo*, July 9, 1996, in FBIS-LAT-96-137.

66 Brazil: Brazil Oils Market Wheels *in* Reuter Textline LLoyds List, July 25, 1996.

67 Emenda Constitucional No. 7, of Aug. 15, 1995, D.O. Aug. 16, 1995, art. 1.

68 *Supra* note 6, art. 1.

auction.[69] The fact that the main buyers were foreign investors should also help the government in its efforts to attract more foreign participants for the coming auctions.[70]

Insurance and banking

Restrictions to foreign capital participation in the areas of insurance in general, private social security, and capital stock (*capitalizaçao*) have been abolished. This was stated in a report by the Counsel General Office.[71] Previously, if a foreign company wanted to invest in Brazil, it had to tread a long path starting at the Private Insurance Superintendency and ending in the National Council of Private Insurance or from the Ministry of Finance to the President of the Republic.

Now, after the Counsel General's new interpretation of the Law and temporary provisions in the National Constitution,[72] as published in the above mentioned report, in order to invest in Brazil, an insurance company must simply comply with all the requirements for other foreign investors. That is, one must comply with local rules and register the funds to be brought into the country with the Central Bank.[73]

Regarding banking institutions, the Central Bank requires foreign banks interested in entering the Brazilian market to assume the debt of failed Brazilian banks, in return for authorization from the Central Bank to establish or expand their activities in Brazil. The Central Bank's requirement is somewhat a toll gate. The objective of the Brazilian authorities is to reduce, in the shortest possible time, the debt of failed institutions by paying the creditors. The Central Bank has accordingly taken advantage of the interest expressed by these foreign banks to convince them to assume a part of this debt and expand their presence in the Brazilian market.[74]

Telecommunications

Until August 1995, when Constitutional Amendment No. 8[75] was passed, the Constitution guaranteed a government monopoly in public telecommunication services. Implementing this amendment, on May 14, 1996, the Lower House of Congress approved the government sponsored bill opening cellular

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69 *Brazil's Largest Privatization Sale; New Telecom Law Limits Foreign Participation*, 4 LATIN AMERICAN LAW AND BUSINESS REPORT (No. 6, June 30, 1996).

70 *Id*.

71 D.O., June 10, 1996, § 1, at 10144.

72 Temporary Provision No. 52. of the National Constitution establishes that a presidential decree is required in order to deposit investments in banks. As art. 52 refers to art. 192, the one that regulates the country's financial area, to which the insurance sector also relates, the two areas were considered governed by the same rule calling for a presidential decree. The new interpretation by the Attorney General's Office and the General Counsel's Office, however, corrected the previous interpretation. The result was that restrictions in the area were lifted.

73 *Brazil: Some Restrictions on Foreign Investment Lifted*, FBIS-LAT-96-120, June 13, 1996.

74 *Brazil: Foreign Investment in Failed Banks Viewed*, FBIS-LAT-96-186, Sept. 15, 1996.

75 Emenda Constitucional No. 8, D.O. Aug. 10, 1995, art. 1.

phone, satellite communication and data transmission services to the private sector, including foreign telecommunications firms.[76] In its final draft, the bill states that for the first three years after the law's approval, the government may, if such is deemed to be in the national interest, require that 51% of the voting shares in companies holding telecommunications concessions be controlled by Brazilians. This restriction will be applied on a case-by-case basis for a maximum of three years.[77] This amounts to a compromise on the government's original proposal which limited foreign capital to 49% of the voting shares in all private-sector telecommunication concessions.[78] The compromise was considered acceptable by executives of the multinational companies ready to invest in the fast expanding Brazilian cellular phone market, considered the prime attraction of the government reform. At present, sixteen consortiums of investors have been formed to invest in the cellular market. Most of these consortiums contain a multinational associated with Brazilian and international banks, plus Brazilian companies.[79] In the consortiums that have been announced, none of the foreign partners holds more than 40% of the voting capital, a fact that was cited by multinational executives in expressing their approval of the bill.[80] The legislation approved by the Lower House does not place restrictions on non-voting shares nor does it prevent foreign firms from being the leading shareholders in sector concessions or from forming partnerships with Brazilian firms to gain majority control.[81]

Although the bill is still subject to the Senate's vote, the Chamber's vote has historical significance despite of the obvious flaws in what was approved. The biggest flaw is the fact that for the first three years, the constitutional rule stating that there is no distinction between domestic and foreign firms will not be obeyed.[82]

Although attention is being focused on the cellular phone market, the bill also opens satellite services to the private sector. Under the proposed legislation, state telecommunications company EMBRATEL will retain its current monopoly over these services until the end of 1997 after which private capital companies will be able to launch their own satellites and compete with EMBRATEL.[83] As with cellular services, there will be an initial discretionary three-year restriction on foreign capital. At present two Brazilian consortiums have been formed to launch satellites, both have multinational partners.[84]

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[76] *Supra* note 13.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Brazil: Chamber's Passage of Telecom Bill Discussed*, FBIS-LAT-96-101, May 16, 1996.

[83] *Id*.

[84] *Id*.

In Brazil's proudly nationalistic climate, private, and particularly foreign competition against TELEBRAS is unlikely to win congressional approval until new regulations are drafted to protect the state-controlled company.[85]

Protection of foreign investment agreements

In August 1996, the first international agreement that promotes and protects foreign investment will be adopted with Great Britain. It was signed in 1995. The delay for its ratification was due to the initial opposition by some deputies and senators because of fear that the administration was proposing the creation of incentives for foreign capital to the detriment of domestic industry. But clarifications provided by the Executive cleared up all doubts, and the legislators decided that, just as Brazil guarantee foreign investments, the country signatories to the treaty will do the same with Brazilian capital invested there. It appears that the next agreement of this type will be signed with Switzerland.[86]

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85 *Brazil: Privatization of Telecoms Market Assessed*, FBIS-LAT-96-044, Mar. 5, 1996.

86 *Brazil: International Accord Protects Foreign Capital*, FBIS-LAT-96-167, Aug. 20, 1996.

96-2855

CANADA

Investment Canada Act review process

Throughout the 1960s, the Government of Canada became increasingly concerned with the question of whether the relatively high level of foreign investment in the country was retarding long-term economic growth, employment opportunities, and the development of strong Canadian industries. This concern intensified when a government task force recommended in 1967 that Canada weigh the benefits of specific foreign investments against their costs and led to the enactment of the Foreign Investment Review Act in 1973.[87] This Act established a Foreign Investment Review Agency (FIRA) and entrusted it with the responsibility of assessing every proposed foreign takeover and every new investment above a fairly low threshold in order to determine whether it would be of significant benefit to Canada. Under FIRA, agency recommendations were sent to the Federal Cabinet for final decisions as to whether a takeover or new investment should be allowed.[88]

The Foreign Investment Review Act remained controversial throughout the 1970s.[89] Although its operations were strongly supported by economic nationalists, many business leaders believed that even though it was not leading to final disapproval in a large percentage of cases, the review process was adversely affecting many Canadian industries by discouraging potential foreign investors who did not want to submit to it. Foreign governments, including the Government of the United States, contended that FIRA's alleged practice of indirectly seeking concessions and performance pledges violated the rules of international trade established by the General Agreements on Trade and Tariffs.

In 1985, the Progressive Conservative Government headed by former Prime Minister Mulroney replaced the Foreign Investment Review Act with an Investment Canada Act.[90] The new Act loosened many restrictions by exempting most new investments and greatly raising the thresholds for reviews of proposed takeovers. It also lowered the standard for approval from investments that would be of significant benefit to Canada to investments that would be of net benefit to Canada.[91]

The assurances contained in the 1985 reforms were generally extended to cultural industries but were qualified in one major respect. Under a special rule, investments in prescribed publishing, film production, recording and related businesses were made reviewable at the option of the Government.[92] This step was

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[87] 1973 S.C. ch. 46.

[88] *Id.* § 13.

[89] P. Hayden & J. Burns, FOREIGN INVESTMENT IN CANADA, ¶ 5015 (1989).

[90] R.S.C. ch. 28 (1st Supp. 1985).

[91] *Id.* § 27.

[92] *Id.* § 35.

taken to shield a segment of the economy that is generally considered to be of great national importance and particularly vulnerable to foreign competition. Since returning to power in 1993, the Liberal Party has been committed to guarding cultural industries vigorously.[93]

The Investment Canada Act generally applies to individuals who are not Canadian citizens or permanent residents and corporations that are not Canadian controlled. However, it does not generally apply to publicly traded companies. There are fairly detailed rules for determining who is a non-Canadian,[94] what transactions are reviewable, and what information must be supplied to the Investment Canada Agency.

The Investment Canada Act is still in force, but the Investment Canada Agency was recently transformed into the Investment Review Division within the Department of Industry.[95] This step was taken for cost-cutting reasons and reflects the fact that the Agency's jurisdiction shrank dramatically as a result of the conclusion of the North American Free Trade Agreement (NAFTA) and the Uruguay round of the GATT.

NAFTA and the WTO

The general threshold for reviews of foreign takeovers under the Investment Canada Act is Can$5 million for direct takeovers of Canadian businesses and Can$50 for indirect takeovers of Canadian businesses.[96] However, in implementing the provisions of NAFTA, Canada greatly raised these thresholds for NAFTA investors and provided that they should be indexed. At the present time, the NAFTA threshold for direct acquisitions is approximately Can$160 million. Indirect acquisitions, which normally occur when a Canadian subsidiary is included in the takeover of a foreign parent, are not reviewable under NAFTA.

Canada recently extended the NAFTA thresholds to investors from all World Trade Organization countries (WTO).[97] Thus, the general thresholds will now apply only in cases of takeovers by non-WTO investors and takeovers of businesses engaged in prescribed cultural activities.

In negotiating the Canada-United States Free Trade Agreement, NAFTA, and the WTO agreement, Canada secured exemptions to allow it to keep its lower thresholds for investments in the cultural activities that are subject to review under the Investment Canada Act.[98] Under the Investment Canada Act and NAFTA, cultural activities are defined to include the publication and sale of books, magazines, periodicals, and newspapers, films and videos, music recordings and printed music and radiocommunications.[99]

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[93] The Liberal Government has amended the Act twice (1994 ch. 47 and 1995 S.C. ch. 1). Previous amendments were contained in 1988 S.C. ch. 65; 1991 S.C. ch. 46; 1991 S.C. ch. 47; 1993 S.C. ch. 35; and 1993 S.C. ch. 44.

[94] *Id.* § 1.

[95] *Id.* § 6.

[96] *Id.* § 14.

[97] *Id.* § 14.1.

[98] Annex 2106. J. Holbein & D. Musch, NORTH AMERICAN FREE TRADE AGREEMENTS 379 (1996).

[99] *Id.* art. 2106, at 378.

Also exempted from the higher review thresholds prescribed by NAFTA are direct and indirect takeovers in the fields of financial services, transportation, and uranium. Thus, as in the case of takeovers of firms engaged in the prescribed cultural activities, takeovers of industries engaged in providing these services and supplies are subject to the Can$5 million and Can$50 million thresholds.

Reservations

Chapter 11 of NAFTA contains a number of provisions requiring investors from all of its parties to be afforded national treatment, prohibiting most performance requirements, and prescribing minimum standards of treatment.[100] However, it also allowed the parties to make reservations to exempt existing non-conforming measures set out in the Annexes to the Agreement. On the Federal level, Canada listed laws dealing with the following subjects that would otherwise violate the chapter on investment contained in NAFTA:

- restrictions on farm credit loans;
- sales of state enterprises;
- requirements respecting directors of corporations;
- acquisitions of real property;
- public participation in Air Canada;
- the issuance of export and import licenses;
- Autopact performance requirements;
- duty free shops;
- expert examiners of cultural property;
- patent agents;
- trademark agents;
- oil and gas production licenses;
- uranium production;
- coastal fishery licenses;
- purchases of Canadian savings bonds, commercial air services;
- specific aerial services;

100 *Id*. at 233-236.

- aircraft repair, maintenance, and overhaul;
- drivers of truck and bus services within Canada;
- international maritime services;
- ship's officers, masters, mates, and engineers;
- shipping conference exemptions;
- coasting trade;
- performance requirements for Hibernia; and
- oil and gas benefits plans.

Annex II to NAFTA contains sectoral exemptions relating to telecommunications, government securities, specialty air services, and water transportation.

Federal investment restrictions

At the present time, the major Federal restrictions on foreign investment in Canada are in the fields of uranium production, air transportation, telecommunications, and banking. Foreign ownership of uranium mining and processing projects is generally limited to 49%.[101] Foreign ownership in air transportation is limited to 25%.[102] Foreign banks may not own more than 10% of a Schedule I bank. Banks that are not Schedule I banks are restricted in offering accounts and making loans.

In telecommunications, direct foreign ownership was limited to 20% until the law was recently changed to allow up to 33 1/3% foreign ownership through the use of non-voting equity shares. As part of an effort designed to attract foreign capital for radio and television companies, this formula was extended to broadcasting in May of 1996.

Provincial investment restrictions

Canada's provinces also maintain some restrictions on foreign investment. Relevant provincial laws pre-dating NAFTA are also covered by a grandfather agreement; but, unlike in the case of otherwise offending Federal laws, they are not specifically mentioned.

Some of the most significant provincial restrictions on foreign investment are contained in farm ownership laws, agricultural loan laws, distributors of publications laws, trust and insurance company laws, liquor licensing laws, a mineral tenure law, pharmacy laws, and land transfer tax laws.[103] A pertinent

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[101] Canada. Department of Industry, CANADA'S INTERNATIONAL INVESTMENT POLICY 3 (1996).

[102] *Id*. and Air Regulations, C.R.C. ch. 2 (1978), as amended.

[103] H. Stikeman, DOING BUSINESS IN CANADA, ¶ 3.03 (1996).

example is Quebec's Land Transfer Duties Act.[104] This Act provides for a 33% duty on the transfer of certain agricultural and recreational lands to nonresidents.[105]

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104 R.S.Q. ch. D-17 (1977), as amended.

105 *Id*. § 4.

96-2855

CHINA

Background

Since the initiation in 1979 of China's policy of opening up to the outside world, foreign investment vehicles in the People's Republic of China (PRC) have chiefly been in the form of two types of joint ventures: equity and contractual, and wholly foreign-owned enterprises. Additional vehicles beyond these three forms of foreign investment were formally instituted in 1995, when regulations were promulgated on the establishment of foreign investment companies limited by shares (where the company shares jointly held by Sino-foreign shareholders and the shares purchased and held by foreign shareholders constitute more than 25% of the registered capital) and investment companies (i.e., holding companies, either wholly foreign-owned or Chinese-foreign jointly funded).[106] The extent of foreign investment in the PRC has steadily increased over the years. By the end of 1995, China had used foreign funds amounting to $135 billion and more than 120,000 foreign-funded enterprises had been established.[107] In 1994, actual invested capital amounted to US$27.7 billion;[108] in the first half of 1996 alone, even though the number of government-approved foreign investment projects dropped by about 10%, the value of the projects was $19.8 billion, 20% higher than the same period in 1995.[109]

Provisions guiding foreign investment

There are a set of general rules that govern the direction of foreign investment in China: the 1995 Provisional Regulations on Guiding Foreign Investment (the Regulations). The Regulations are accompanied by a list of 317 industries--the Catalog for Guiding Foreign Investment in Industries (the Catalog)--divided among the three categories of *encouraged*, *restricted*, and *prohibited*, as stipulated under the Regulations.[110] Items that do not fall under these three categories are to be considered as belonging to *permitted* areas of foreign investment, a fourth category distinguished in the Regulations (art. 4). According to one assessment:

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106 For a good overview of these types of enterprises and the principal laws and regulations pertaining to them from the point of view of the necessary approval procedures, *see* Xiangmin Xu *and* Celina Chew, *Foreign Investment Enterprises in China: A Comprehensive Guide to Approval Issues--Part I: Approval Hierarchy, Approval Procedures and Related Problems,* 17 EAST ASIAN EXECUTIVE REPORTS 9-13 (Nov. 15, 1995), and *Part II: Delegated Approval Authority--New Approval Procedures--Violations*, 17 EAST ASIAN EXECUTIVE REPORTS 9-12 (Dec. 15, 1995).

107 *Unswervingly Make Good Use of Foreign Funds,* RENMIN RIBAO (in Chinese), Aug. 12, 1996, at 1, as translated in Foreign Broadcast Information Service, DAILY REPORT: CHINA, Aug. 22, 1996, at http://fbis.fedworld.gov (FBIS).

108 The committed capital for the 41,000 foreign investment projects that were approved amounted to US$68.1 billion. J. Zhengdong Huang, *An Introduction to Foreign Investment Laws in the People's Republic of China*, 28 THE JOHN MARSHALL L. R. 471 (Spring 1995), citing RENMIN RIBAO (People's Daily), Jan. 9, 1995, at 1.

109 Yang Chunya, *Overseas Investments Rise,* CHINA DAILY (Aug. 22, 1996), at 4.

110 Promulgated on June 27 by the State Planning Commission and effective the same day. For a bilingual text of the Regulations and the associated Guideline Catalogue of Foreign Investment Industries, *see* CHINA LAWS FOR FOREIGN BUSINESS ¶13-420 (Hong Kong, CCH Australia Limited, 1985-) (CLFB).

> These policy guidelines were designed to encourage foreign investors to move away from labour-intensive projects in manufacturing and real estate towards joint ventures in infrastructure construction, involving advanced technology and high value-added goods.[111]

Encouraged foreign investment projects are in the areas of agriculture, energy, transport, raw materials, new or advanced technology, natural resource utilization and environmental pollution control, and market improvements for goods, with a special geographical emphasis on Central and Western China (art. 5). Foreign investment is to be restricted in sectors where domestic demand has been met by technology already developed in or introduced into China, where a State monopoly is still necessary, where exploitation of rare or valuable mineral deposits is involved, or where foreign investment is being sought on a trial basis only (art. 6, ¶ 1). Prohibited categories of foreign investment include projects that would endanger national security, pollute or damage the environment, harm natural resources, pose a threat to human health, utilize large tracts of farm land, be harmful to land resource protection and development, endanger the security of military installations, or utilize indigenous production techniques or technology (art. 6, ¶ 1).

A general statement about the scope of foreign investment in China is also found in the 1986 Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment (i.e., wholly foreign-owned enterprises):

> Enterprises established exclusively with foreign capital must benefit the development of the Chinese national economy and utilize advanced technology and equipment or export all, or the majority of their products.
>
> Lines of business in which the establishment of enterprises with sole foreign investment is prohibited or restricted are stipulated by the State Council.[112]

Furthermore, according to the Provisional Regulations Governing the Establishment of Investment-Type Companies by Foreign Business Investment,[113] approved investment companies "may engage in all or part of the following activities: (1) investment in areas such as industry, agriculture, infrastructure and energy in which foreign investment is permitted and encouraged by the State...." (art. 5). However, in regard to infrastructural investment (e.g., the power sector, telecommunications, railways, highways, agriculture),[114] at least as of late 1995 there were no published guidelines governing foreign equity investments, so that such

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[111] Yang Chunya, *supra* note 4.

[112] The Law was adopted on Apr. 12, 1986, at the 4th Session of the Sixth National People's Congress. For a bilingual text, *see* CLFB at ¶13-506. Solely foreign-invested enterprises are those enterprises established within China, in accordance with relevant Chinese laws, with capital provided totally by the foreign investor, and not including branches in China of foreign enterprises or other commercial organizations (art. 2).

[113] Promulgated Apr. 4, 1995, by the Ministry of Foreign Trade and Economic Cooperation and effective on the same date. For a bilingual text, *see* CLFB at ¶13-400.

[114] It was reported in June 1996 that the State Planning Commission and Ministry of Foreign Trade and Economic Cooperation had announced a list of 210 key communications and infrastructure projects open to foreign investors until the year 2000. The projects, 118 of which are for infrastructure, involve a total amount of 30 billion *yuan*. CHING CHI TAO PAO (June 3, 1996), at 16, as translated *in* DAILY REPORT: CHINA, FBIS, July 9, 1996, at 47.

matters as the percentage of allowable foreign ownership and the limits on the term of investment in infrastructure have not been specified.[115] Nor has an official pronouncement been made in regard to foreign takeovers of state-owned enterprises as to the percentage of foreign ownership allowed, even though the Government is considering making a stipulation that there be at least 51% Chinese ownership.[116]

Agriculture and real estate

Three types of ownership are recognized under the legal system of China: State, collective, and individual.[117] Under the 1982 Constitution of the PRC,[118] State property includes mineral resources, water, forests, mountains, grassland, unreclaimed land, beaches, and other natural resources as well as urban land.[119] Means of transportation and communication and banks are also State-owned. The State owns all urban land, while land in suburban and rural areas, as well as housing sites and privately farmed crop land and hilly land, are owned by collectives.[120] Collective property is property owned by organized groups of workers, urban or rural. Among other types of property, it includes land, forests, mountains, grasslands, unreclaimed land, beaches and other areas stipulated by law to be collectively owned.[121] Individual ownership of property--

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115 D. D. Deamer, *Financing and Investing in Infrastructure Projects in China*, 17 EAST ASIAN EXECUTIVE REPORTS 10 (June 15, 1995).

116 *Id*. Deamer also notes that "At this time, investments in infrastructure projects are largely regulated under *neibu* [internal] guidelines" that are "highly confidential" and "not yet developed enough to make them official published guidelines, which accounts for the apparent flip-flops and inconsistent practices."

117 According to arts. 73-75, General Principles of Civil Law of the PRC, adopted by the National People's Congress and promulgated by the President of the PRC on Apr. 12, 1986, and effective as of Jan. 1, 1987. Ownership is defined under this law as the owner's right by law to possess, make use of, profit from, and dispose of his or her property (art. 71). For the text in Chinese, *see* 2 ZHONGHUA RENMIN GONGHEGUO FALÜ FAGUI QUANSHU (Compendium of Laws and Regulations of the People's Republic of China) 1-9 (Beijing, China Democratic Legal System Press, Apr. 1994) (Compendium). For an English text of the law, *see* THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *comp*., 2 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1987-1989) 225-249 (Beijing, Foreign Languages Press, 1987).

118 Adopted and promulgated for implementation on Dec. 4, 1982, and amended on Apr. 12, 1988, and Mar. 29, 1993. For the text in Chinese, *see* 1 COMPENDIUM 20-30. For an English translation, *see* The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *comp*., 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1987-1989) 1-32 (Beijing, Foreign Languages Press, 1987).

119 *Id*. Constitution, arts. 9, ¶ 1, & 10, ¶ 1.

120 *Id*. Art. 10, ¶¶ 1&2. Art. 10 of the Constitution, as amended, states in full:

Land in the cities is owned by the state.
Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives.
The state may, in the public interest, requisition land for its use in accordance with the law.
No organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways. The right to the use of land may be transferred in accordance with the law.
All organizations and individuals using land must ensure its rational use.

121 General Principles of Civil Law, art. 74, ¶ 1.

the right to own lawful income, savings, houses, and the like,[122] as well as articles for daily use, art objects, books, reference materials, trees, livestock, and lawful means of production--does not include the right to own land. Before 1988, land and land-use rights in China were owned by the State or collectives and alienation of ownership or use rights was prohibited. In 1988, the Constitution and the Land Administration Law[123] were amended so as to permit the alienation of long-term land-use rights and to create a formal legal system whereby the right to use State or collectively-owned land could be transferred for value.[124]

According to the Interim Regulations of the PRC Concerning the Assignment and Transfer of the Right to the Use of the State-Owned Land in the Urban Areas,[125] rural land is to remain under collective ownership and control and is not to be used for commercial purposes unless transformed into urban land.[126] Urban land-use rights are divided into assigned (or granted) land-use rights (acquired through payment of a fee) and allocated land-use rights (acquired without compensation). Generally speaking, only assigned land-use rights may be transferred (reassigned by means of sale, exchange or donation), leased, or mortgaged (arts. 19 & 43).[127] The stated purpose of the Interim Measures for the Administration of Foreign-Invested Development and Management of Tracts of Land[128] is to attract foreign investment "for the development and management of tracts of land...so as to intensify the construction of public works, improve the environment for investment, introduce technically advanced enterprises and export-oriented enterprises and develop the

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[122] Constitution, art. 13, ¶ 1; General Principles of Civil Law, art. 75, ¶ 1.

[123] Adopted by the Standing Committee of the National People's Congress on June 25, 1986, and revised in accordance with the Decision on Revising the Land Administration Law of the People's Republic of China adopted by the NPC Standing Committee on Dec. 29, 1988. For a bilingual text, *see* CLFB at ¶ 14-715.

[124] N. C. Howson, *The Law of the Land*, THE CHINA BUSINESS REVIEW 40 (Nov.-Dec. 1995). Art. 2 of the Land Administration Law, as amended, stipulates in part:

> The People's Republic of China practises the socialist public ownership of land, which is ownership by the whole people and collective ownership by the working people.
> No unit or individual may appropriate, buy, sell, lease or use any other method to illegally transfer land.
> The State may, in accordance with the law, expropriate land which is under collective ownership, if this is in the public interest.
> The right to use State-owned or collectively owned land may be assigned, pursuant to the law....
> The State shall implement a compensatory land use system for State-owned land, pursuant to the law....

Supra note 18.

[125] Promulgated by the State Council and effective on May 19, 1990. For the Chinese text and an English translation, *see* Bureau of Legislative Affairs of the State Council of the People's Republic of China, *comp.*, ZHONGHUA RENMIN GONGHEGUO SHEWAI FAGUI HUIBIAN (1949-1990) (Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters) 1379-1383, 1681-1686 (Beijing, China Legal System Publishing House, July 1991).

[126] Howson, *supra* note 19, at 41.

[127] *Id.* As Howson points out, there are also Provisional Measures on Administration of Allocated Land Use Rights, promulgated by the State Land Administration Bureau in March 1992, that clarify "how allocated land use rights are to be held and transferred."

[128] Promulgated May 19, 1990. *Supra* note 20, at 1384-1386, 1687-1690.

export-oriented economy" (art. 1). The 1995 Urban Real Estate Administration Law[129] essentially confirms the land-use rights set forth in the prior regulations and measures.

While private ownership of land is prohibited, various forms of investment involving farmland are encouraged under the Catalog for Guiding Foreign Investment in Industries, including, among others, the following: cultivation and development of wasteland, barren mountains, coastal plains (except where there are military installations), transformation of middle and low-yield farm land and low-yield forests; development of high quality, high-yield and new variety crops; serialized production of vegetables and flowers using hydroponic methods; establishment of forests and the introduction of high quality varieties of trees. Foreign investment in the processing and export of timber of valuable tree species and in aquatic fishing in in-shore waters and inland waters is restricted (and prohibited to wholly foreign enterprises). It is prohibited in protected wildlife resources, rare and valuable Chinese plant and animal species, construction of wildlife reserves, and the processing of green teas and special variety teas.

Under the Law Concerning Enterprises with Sole Foreign Investment, investment in the real estate industry is restricted.[130] The Catalog specifies that foreign investment is to be restricted in the areas of luxury guesthouses, resorts, and high-quality office buildings and golf courses (enterprises with sole foreign investment are not permitted to invest in these areas).

Banking

The Catalog lists finance and related agencies such as banking and insurance companies as restricted industries for foreign investment. However, according to the Commercial Bank Law of the PRC,[131] foreign-funded commercial banks, commercial banks jointly funded by Chinese and foreign investors, and the branches of foreign commercial banks may operate as domestic commercial banks in China, unless other laws and administrative rules stipulate otherwise (art. 88). *Commercial banks* are defined under the Law as "business corporations that are established in accordance with this law and the 'Company Law of the People's Republic of China, that absorb public savings, grant loans, settle accounts, and engage in other business" (art. 2).[132] The Regulations of the People's Republic of China for Controls Relating to Foreign Banking Institutions[133] set forth the types of foreign financial organizations that may operate in China. They stipulate that the minimum registered capital of a foreign bank or joint bank will be equivalent in convertible currency to 300 million *renminbi* and that of a foreign finance company or joint finance company, 200 million *renminbi*;

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129 Adopted by the Standing Committee of the National People's Congress on July 5, 1994, and effective as of Jan. 1, 1995. For a bilingual text, *see* CLFB at ¶ 19-593.

130 For a discussion of real estate law in the PRC, *see* Yao Liang Huang *and* Xie Zhao Hua, *An Overview of China's Real Estate Law*, 28 THE JOHN MARSHALL L. R. 593-617 (Spring 1995).

131 Adopted by the Standing Committee of the NPC on May 10, 1995, and effective as of July 1, 1995. For the Chinese text, *see* 4 NPC GAZETTE 6-19 (May 30, 1995). For an English translation, *see* Xinhua, May 11, 1995, as translated in FBIS, May 16, 1995, at 27-35.

132 *Id.* at 27.

133 Approved by the State Council on Jan. 7, 1994, promulgated on Feb. 25, 1994, and entered into effect on Apr. 1, 1994. For an English translation, *see* Xinhua, Mar. 1, 1994, as translated in FBIS, Apr. 13, 1994, at 30-34. For a Chinese text, *see* FAZHI RIBAO (Legal System Daily), Mar. 2, 1994, at 2.

that the paid-up capital may not be less than 50% of the registered capital, and that a foreign bank branch must be provided with a non-reimbursable operation fund by its head office with a convertible currency amount equivalent to not less than 100 million *renminbi* (art. 5). It may be noted that foreign-funded banks operating in Special Economic Zones benefit from a preferential policy that exempts them from business tax for five years. Furthermore, foreign-funded banks that operate in areas designated by the State Council enjoy a 15% tax rate and certain preferential tax treatment if their working capital is US$10 million and the bank has a business term of over 10 years.[134] Reportedly, warehouse financing in which foreign banks become involved in stock financing is developing.[135] A People's Bank of China official has stated that "China will gradually give national treatment to foreign financial institutions...and actively create conditions for foreign banks to open *renminbi* business."[136]

Communications

According to the Catalog, foreign investment is prohibited in the management of postal and telecommunications businesses and air traffic control; radio stations and television stations (including cable television networks and transmission and relay stations and channels)[137] at all levels; production, publishing and distribution of radio and television programs; production, distribution and showing of films; showing of videos; and news media.[138] Restricted sectors of foreign investment in communications include printing, publishing and distribution businesses; the production, publication, and distribution of audio-visual products (in the case of the printing/publishing/distribution businesses, wholly foreign-owned operations are prohibited); and the manufacturing of equipment for telephone exchanges and digitally program-controlled bureaus and switchboards for customer use and of radio and broadcast and TV transmission systems. For a time the switching equipment market was restricted to only a few foreign suppliers, but seven foreign vendors are now permitted to manufacture digital switches locally and sell to the Ministry of Posts and Telecommunications.[139]

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134 ZHONGGUO XINWEN SHE, Jan. 23, 1996, as carried in FBIS, Jan. 29, 1996, at 36.

135 L. O'Donnell, *China Commodity Financing Faces Revolution,* Reuters, July 8, 1996.

136 Xinhua, June 3, 1996, as translated in FBIS, June 13, 1996, at 42. The article states that "According to statistics, as of the end of 1995, foreign financial institutions had opened 519 representative offices in China; and there were 142 operating foreign financial institutions: 120 foreign bank branches, five Chinese-foreign joint funded banks, five independently funded banks, five foreign financial corporations, six foreign insurance companies, and one Chinese-foreign joint funded financial company."

137 The Provisions Governing Cable Television, issued on Feb. 3, 1994, and effective the same day, prescribe that no unit is permitted to have a joint venture with any organization outside the country, nor is any cable television station permitted to lease channels to or rent broadcast time to individuals or organizations outside China (art. 10). It may be noted that when cable TV stations broadcast movies or taped productions made in foreign countries, special permission must be obtained (art. 24), and television programs from Hong Kong, Macao, and Taiwan as well as programs transmitted via satellite from outside China are prohibited (art. 25(6),(7)). For the Chinese text, *see* 7 STATE COUNCIL GAZETTE 281-286 (Apr. 13, 1994).

138 The Detailed Rules for Implementation of the Law of the People's Republic of China on Sole Foreign Investment Enterprises provide that establishing a sole foreign investment enterprise in "newspapers, publishing, broadcasting, television or films" or in "post and telecommunications" is prohibited (art. 4(1) & (3)). The Rules were approved on Oct. 28, 1990, by the State Council and issued on Dec. 12, 1990, by the (then) Ministry of Foreign Economic Relations and Trade (now the Ministry of Foreign Trade and Cooperation). For a bilingual text, *see* CLFB at ¶ 13-507.

139 A. Rehak & J. Wang, *On the Fast Track: Modest Liberalization in China's Telecommunications Sector Means More Sales*–

In the telecommunications field, at present foreigners are only permitted to invest in the production of telecommunications equipment by means of loans, joint ventures, or BOT (build-operate-transfer); telecommunications services (e.g., management of data networks) are not yet open to foreign investment.[140] However, according to Vice-Minister of Posts and Telecommunications Yang Xianchu, that market will be opened up "step by step...to foreigners in accordance with a planned schedule."[141] The ban on foreign investment enterprises, foreign companies, and foreigners from investing or taking part in the management of telecommunications businesses is also stipulated in the Provisional Regulations Concerning Approval and Administration of Commercial Telecommunications Business.[142] The Catalog lists wireless telephone equipment of 450 megahertz or less, broadcast and television transmission systems, analogue mobile communication systems (honeycomb, concentrate, pagers, mobile telephones), satellite TV receivers and key components, and micro-relay communications equipment of four sub-clusters or less as electronic industries in which foreign investment is to be restricted. Although telecommunications financing is hampered by China's restrictions on foreign equity ownership in telecom operating ventures, operators are devising ways of circumventing the ownership restriction through creative financing, and as they do so, in the eyes of one commentator, "it seems inevitable that authorities will relax the rules."[143]

Securities

According to the Catalog, foreign investment is restricted in the areas of securities companies, investment banks, merchant banks, and fund management companies. China has two national stock exchanges, the Shanghai Stock Exchange and the Shenzhen Stock Exchange, which offer three types of shares: A-shares for domestic investors, B-shares (of joint venture companies) for overseas investors, and H-shares (listed on the Hong Kong Stock Exchange) for mainland Chinese company listings overseas.

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and New Competition, 23 THE CHINA BUSINESS REVIEW 12 (Mar.-Apr. 1996).

[140] The Ministry of Posts and Telecommunications (MPT) monopolized all telecommunications services--originally having responsibility for both regulation and operation of networks--until 1994, and "remains the major player in China's telecommunications sector." Its responsibilities were divided in 1993 when it spun off a new division, the Directorate General of Telecommunications, to handle the operational and maintenance side. In 1994, a second telecom provider, the State-owned China United Telecommunications Corp. (Unicom), emerged as a competitor to the MPT, authorized by the Government to compete with the ministry in all aspects of telecommunications operation. Rehak & Wang, *id.* at 8, 9. For a detailed explanation of how the Provisional Rules for Guiding Foreign Investment and the Catalog affect telecommunications investment, *see* Chai Qinglian, *China: Introduction to Telecom Industry Open to Foreign Investment,* 8 CHINA TELECOMMUNICATIONS CONSTRUCTION 51-55 (June 1996), as carried in FBIS online, FBIS REPORT: SCIENCE & TECHNOLOGY, Sept. 5, 1996.

[141] ZHONGGUO XINWEN SHE, June 19, 1996, as carried in FBIS, July 3, 1996, at 49.

[142] Promulgated by the MPT on Sept. 11, 1993, and entered into force on Nov. 1, 1993. *Telecommunications*, 10 CHINA LAW QUARTERLY 10 (Dec. 1993).

[143] Rehak, *High Hopes, Shallow Pockets*, inserted piece in *supra* note 34, at 10. She gives by way of example the agreement worked out between Hong Kong Telecom (HKT) and the Beijing Telecommunications Authority (BTA). HKT is investing $259 million in the construction of a fiber-optic link between Beijing and Hong Kong and a cellular network in Beijing, and "it is widely assumed that HKT will provide informal operations assistance and share operating profits with BTA." However, she points out, there is a clear risk to the foreign partner, who will have no formal control over operations and management.

As of late 1995, B-share issues were limited to companies that operate in Shanghai and Shenzhen,[144] and both Shanghai and Shenzhen had issued regulations dealing with B-shares.[145] Recently, however, two sets of regulations governing B-shares were issued at the national level: the Provisions of the State Council Governing the Listing of Foreign-Invested Stocks by Limited-Liability Companies in China and their Detailed Rules of Implementation.[146] The new provisions replace the legislation on administering B-shares that had been adopted in Shanghai and Shenzhen and transfer the power to approve B-share listings and to monitor trading from the two regional securities commissions to the Securities Policy Committee (*Zhengquan weiyuanhui)* under the State Council and its regulatory vehicle, the China Securities Regulatory Commission.[147] The Provisions stipulate that with the approval of the Securities Policy Committee, a limited-liability company may issue foreign-invested stocks in the domestic market; however, if the par value amount of the stock is over US$30 million, the Committee must obtain State Council approval for the issue (art. 2). Investors in foreign-invested shares are limited to:

- natural and juridical persons and other organizations of foreign countries;
- Chinese natural persons, legal persons, and other organizations of Hong Kong, Macao, and Taiwan;
- Chinese citizens who have settled abroad; and
- other investors in such shares stipulated by the Securities Commission of the State Council (art. 4, ¶1).

Thus, B-share investors have been expanded to include overseas Chinese. Companies that apply to issue foreign-invested shares must meet the following conditions, among others: conform to State industrial policy, meet State requirements on fixed-asset investment, conform to provisions on the use of foreign capital, and have three years of consecutive earnings (art. 8(1)-(3), (8)). In addition, promoters must subscribe to at least 35% of the company's share capital and invest a minimum of 150 million *yuan* (art. 8(4)-(5)); and publicly issued shares must constitute more than 25% of the company's share capital, or more than 15% if the share capital exceeds 400 million *yuan* (art. 8(6)).[148] In terms of portfolio investment in infrastructure projects in China, the following options are open to foreigners: H-shares, B-shares, American Depositary Receipts listed on the U.S. stock exchanges, direct public offerings of common stock in foreign companies

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144 Deamer, *supra* note 10, at 10.

145 The Shenzhen Securities Exchange has also promulgated Provisional Rules of the Shenzhen Stock Exchange on B Share Offset Trading (issued on, and effective from, Aug. 5, 1993) and Operating Rules of the Shenzhen Securities Exchange for Trading and Clearing of B Shares (issued on, and effective from, Jan. 31, 1992). For bilingual texts, *see* CLFB at ¶ 73-564 and ¶ 73-565, respectively.

146 The Provisions were approved by the State Council on Nov. 2, 1995, and issued on Dec. 25, 1995, effective the same day. The Detailed Rules were issued by the Securities Commission under the State Council on May 3, 1996, and came into force on the same day as the Provisions. For the texts in Chinese, *see* STATE COUNCIL GAZETTE 1350-1355 (Jan. 16, 1996) [Note: this is Issue No. 33 of 1995] and JINGJI YÜ FALÜ (Economy and Law) 67-69 (June 1996), respectively.

147 Renee Lai, *Beijing Tightens Grip Over B-Shares,* SOUTH CHINA MORNING POST, Jan. 3, 1996, at 1 (Nexis, Curnws file).

148 *See also id.*

that specialize in infrastructure investment in China, private investment funds, and private placements by investment banks.[149]

The Catalog stipulates that foreign investment is prohibited in futures trading. Nevertheless, foreigners may be appointed to senior management in a futures company, provided that a certificate of appointment and certification are submitted in compliance with other conditions, according to the Provisional Measures on the Administration of the Registration of Companies Dealing in Futures.[150] It is also stipulated that "These Measures shall also apply to foreign investment enterprises established within the territory of China which engage in futures trading operations" (art. 14).

Transport

According to the Catalog, foreign investment is to be encouraged in space and aeronautical industries, such as the manufacture of civilian aircraft; in shipping industries; and in transport industries, such as construction and operation of local railways (wholly-owned foreign enterprises not permitted), of urban subway systems and civil airports (State-owned assets must hold dominant position);[151] and of public roads and ports facilities. It is restricted in such industries as waterway transport and vehicular transport to and from China (wholly foreign-owned operations not permitted) and also in general aviation, since State-owned assets must be the majority share in industrial aviation businesses.[152] Foreign investment is prohibited in the air traffic control industry and wholly-owned foreign firms are not allowed in agricultural and forestry aviation.[153]

The Detailed Rules for the Implementation of the Law of the PRC Concerning Enterprises with Sole Foreign Investment make the general stipulation that foreign investment in public utilities, transport facilities, trust investment, and leasing is to be restricted (art. 5). The Ministry of Foreign Trade and Economic Cooperation and the Ministry of Communications have issued a Notice on the Issues Involved in Foreign Shipping Companies Setting Up Wholly-Owned Shipping Firms in China.[154] Approval for wholly-owned foreign shipping companies must be based on the principle of reciprocity in bilateral shipping agreements

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[149] Deamer, *supra* note 10, at 10.

[150] Promulgated on Apr. 28, 1993, by the State Administration for Industry and Commerce and effective the same day. For a bilingual text, *see* CLFB at ¶ 13-578.

[151] According to a circular on foreign investment in China's civil aviation industry, issued in May 1994 by the Civil Aviation Administration of China and the Ministry of Foreign Trade and Economic Cooperation. Reported in Xinhua, July 6, 1995, as carried in FBIS, July 6, 1995, at 53. Up until the time when the article was written, there had been no direct foreign commercial investment in airport construction.

[152] A MOFTEC official stated in an interview that 61 Sino-foreign enterprises in China have been authorized to deal with domestic water transport and 64 with international shipping service; 557 have been permitted in overland transport and the first Sino-foreign share-issuing airline has been launched in Hainan Province. Sun Hong, *Service Industries Open Wider to Outside,* CHINA DAILY (BUSINESS WEEKLY) (in English), Aug. 31, 1996, at 2, as carried in FBIS online, Aug. 31, 1996.

[153] *Supra* note 46.

[154] For an English text, *see* GUOJI SHANGBAO (International Trade News), Mar. 12, 1996, at 2, as translated in FBIS, Apr. 4, 1996, at 46-47.

(item I). Among other requirements, applicants must have over 15 years of shipping experience and have had a representative office established in the city where the firm is to be set up for three full years, and the firm may have no less than $1 million in registered capital (items II:1, IV). As part of the requirements that must be met to set up branches, the foreign shipping firm must provide additional registered capital of over $120,000 (item VII:3). There are separate regulations for the establishment of wholly-owned shipping firms by companies from Hong Kong, Macao, and Taiwan.

According to the Aviation Law of the People's Republic of China, [155] civil aircraft owned by enterprise legal persons must go through nationality registration procedures; those with foreign investment in their registered capital must comply with the provisions of administrative laws and regulations in regard to organizational setup, personnel composition, and the investment proportion of the Chinese investor (art. 7, ¶ 1, item 2). The Civil Aviation Administration of China has stated that Chinese airlines that meet the relevant requirements will be open to foreign investment, and that at present foreign investors are being encouraged to buy into China Northwestern Airlines. Up to 35% of an aviation company may be held by foreign investors, who may gain 25% of the voting rights.[156]

Utilities

Between 1979 and 1995, China's power industry absorbed almost US$11.5 billion in foreign investment (about 10% of the total investment in the power sector). This was in the form of loans, joint ventures, co-operative projects, wholly-owned foreign enterprises, BOT (build-operate-transfer) projects, and overseas stock listings.[157] According to the Catalog, foreign investment is to be encouraged in areas of the power industry such as construction and operation of thermal power and nuclear power stations. It is restricted in industries having to do with thermal power, hydro-electric power, and electricity transmission equipment. Foreign investment in the construction and operation of electricity networks is prohibited.

On December 28, 1995, the Standing Committee of the NPC passed China's first Electric Power Law.[158] It stipulates as a general principle that direct foreign investment is permitted in power projects under the BOT concept as well as through wholly foreign-owned build-own-operate plants, and it codifies government support of foreign capital utilization in the power sector.[159] There will be limited guarantees to BOT projects under special circumstances, but no sovereign guarantees; foreign investment in the power sector is to be in conformity with China's industrial policy, accepted as part of the Ninth Five-Year Plan (1996-2000), and included in the 15-year development plan; it is permitted only in power projects using coal, clean coal, natural gas and liquefied petroleum gas, hydro and nuclear energy, but should be focussed on

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155 Approved by the Standing Committee of the NPC on Oct. 30, 1995; entered into effect on Mar. 1, 1996. For an English translation, *see* Xinhua, Oct. 31, 1995, as translated in FBIS, Dec. 6, 1995, at 24-47.

156 *Civil Aviation Market Set To Open Further,* Zongguo Xinwen she (in English), Sept. 24, 1996, as carried in FBIS online, Sept. 26, 1996.

157 Zhongguo xinwen she, Mar. 16, 1996, as carried in FBIS, Mar. 18, 1996, at 59.

158 The Law was also promulgated on Dec. 28, 1995, and went into effect on Apr. 1, 1996. For the Chinese text, *see* the NPC GAZETTE 3-13 (Dec. 31, 1995).

159 *China's New Power Law Takes Effect; Specifies Role of Foreign Investment*, INDEPENDENT POWER REPORT, Apr. 19, 1996, at 6 (Nexis, Curnws file).

hydroelectric and nuclear projects and new non-polluting technologies; risks and rewards of power projects are to be shared by all involved, on the basis of "mutual benefit and convenience."[160] In July 1996, several regulations regarding foreign investment were reportedly issued. Among these are rules that deal with direct foreign investment in construction related to the power industry.

Mining

The newly amended Mineral Resources Law,[161] which becomes effective on January 1, 1997, "grants legal status to foreign businesses to invest in prospecting and developing mineral resources" and

> ...changes the provisions [of the existing law] prohibiting the sale, lease, and mortgage of mining rights and affirms the character of mineral prospecting and developing rights as property right, thereby affirming prospecting rights as incorporating the right of obtaining developing rights on a priority basis. Thus, the law establishes the ground for obtaining mineral prospecting and developing rights with compensation and the transfer of these rights in accordance with the law and establishes a legal basis for bringing mineral prospecting and developing rights into the marketplace for sale or transfer.[162]

After the amended law's promulgation, Measures for Managing Foreign Investment in Prospecting and Developing Mineral Resources are also to be formulated.[163]

The Ministry of Coal Industry and local governments have new rights to examine and approve foreign-funded coal projects where the total investment is less than 10 million dollars or up to 30 million *yuan* [sic] in special economic zones and other open cities. The foreign investors may hold a majority stake in all coal projects in which they are allowed or encouraged to invest.[164]

Manufacturing

Foreign investment in China is encouraged in a broad range of industries, both light and heavy. According to the Provisions of the State Council for the Encouragement of Foreign Investment,[165] the State

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160 *Id.*

161 The Law was originally adopted by the Standing Committee of the National People's Congress on Mar. 19, 1986; it was amended and promulgated on Aug. 29, 1996, in accordance with the Decision on Amending the PRC Mineral Resources Law, also issued on Aug. 29. For the Chinese texts of the Decision and the Law, *see* FAZHI RIBAO (Legal System Daily), Aug. 31, 1996, at 2, 3. For an English translation of the Law, *see PRC: Text of Amended Mineral Resources Law,* Xinhua (in Chinese), Aug. 30, 1996, as translated in FBIS online, Sept. 6, 1996.

162 *Amended Mineral Law Encourages Foreign Investment*, Zhongguo tongxun she (Hong Kong, in Chinese), Sept. 13, 1996, as translated in FBIS online, Sept. 17, 1996.

163 *Id.*

164 *PRC: Minilstry Sets Policies To Boost Foreign Investment in Coal,* Xinhua (in English), Sept. 26, 1996, as carried in FBIS online, Sept. 27, 1996.

165 Promulgated on Oct. 11, 1986, and effective the same day. For a bilingual text, *see* CLFB at ¶ 13-509.

gives special benefits to two types of foreign investment enterprises: exporting enterprises and technologically advanced enterprises (in which a foreign investor provides advanced technology to develop new products or upgrade products) (art. 2, ¶ 2).

Among the many types of *encouraged* industries listed in the Catalog are light industries such as the commercial paper pulp industry; textile industries such as printing and processing of fabrics; portions of the coal industry (e.g, exploitation equipment); ferrous and non-ferrous metal industries and petrochemical industries; mechanical industries such as large-scale scientific instruments and key motor vehicle parts; electronic industries such as large-scale integrated circuit production and large and medium-scale computer manufacture; construction material and equipment; medical and pharmaceutical industries and medical apparatus and equipment; newly emerged industries; and service industries.

Among the *restricted* industries are light industries such as watch assembly, household electrical goods production, tobacco processing, and foreign brand non-alcoholic beverages; textile industries such as wool, cotton, and silk; ferrous metal industries such as ordinary electric arc furnaces; non-ferrous metal industries involving aluminum materials and certain others like copper processing where wholly foreign-owned operations are not permitted; mechanical industries such as those involving the manufacture of passenger and cargo ships, diesel engines, and electric drills, of fully assembled cars, motorcycles, and light vehicles (State-owned assets must hold a dominant position); electronic industries such as the production of tape recorders, video cameras, and facsimile machines; construction material such as cement production lines; medicine and pharmaceutical industries such as manufacture of Chinese medicinal products, vitamin C, and blood products; petrochemical industries such as black and white and color film; and various domestic and foreign trade, tourism, real estate and service industries (wholly foreign-owned investment operations are not permitted in these) such as golf courses and travel agencies and education and translation services.

Prohibited industries for foreign investment include, among others, light industries such as hand-made rugs; the manufacture of Chinese medicine materials listed as national protected resources; and military weapons production.

Buy-back provisions / investment guarantees

Various Chinese laws relating to foreign investment contain investment guarantees. Under the Law Concerning Enterprises with Sole Foreign Investment, it is stipulated that "The investments, profits and other legitimate rights and interests of foreign investors in China are protected by Chinese law" (art. 4, ¶ 1). The Law further states:

> The State will not nationalise or expropriate enterprises with sole foreign investment but in special circumstances, where it is necessary to the public interest, an enterprise with sole foreign investment may be expropriated in accordance with legal procedures, and appropriate compensation paid (art. 5).

Similar provisions are found in the Law of the People's Republic of China on Sino-Foreign Joint Equity Enterprises.[166]

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[166] Art. 2, ¶¶ 1,3. Adopted on July 1, 1979, and amended on Apr. 4, 1990. For a bilingual text, *see* CLFB at ¶ 6-500.

The 1990 State Council Provisions for Encouraging Investment by Overseas Chinese and Hong Kong and Macao Compatriots[167] provide:

> Investments, purchased assets, industrial property rights, dividends received on investments and other legal rights and interests within Chinese territory of overseas Chinese, Hong Kong and Macao investors shall receive the protection of State laws and may be legally assigned or inherited (art. 7).

The Regulations also declare that "The State shall not nationalise the investments and other assets of overseas Chinese, Hong Kong and Macao investors" (art. 8). Investors from Taiwan are protected under separate legislation, the 1994 Law of the People's Republic of China on the Protection of Investment by Taiwanese Compatriots, which contains similar protections.[168]

China also has agreements on protection of investments with foreign countries. For example, China and the United States exchanged notes on an agreement relating to investment guarantees on October 30, 1980, and the agreement entered into force on the same day.[169] Under the Investment Incentive Agreement, OPIC (Overseas Private Investment Corporation) is the issuer of any investment insurance against loss from political risk or any investment guaranty issued in accordance with the Agreement.

Some trends for the future of foreign investment in China

According to the Minister of Foreign Trade and Economic Cooperation, China is considering the introduction of foreign investment via BOT in line with industrial policies and will soon give foreign-funded enterprises the same treatment as their Chinese counterparts. The Minister's remarks, in the view of one commentator, "[buttress] the government's shift from 'simply giving great favourable conditions' to 'mutual benefit and long-term co-operation.'"[170] Furthermore, Tan Aising, director of the international cooperation department of the Ministry of Power Industry, is quoted as saying that "direct investment without Chinese governmental guarantee, in line with international conventions, will become the major form of foreign co-operation."[171]

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[167] Promulgated on Aug. 19, 1990, by the State Council and effective the same day. For a bilingual text, *see* CLFB at ¶ 13-550.

[168] The Law was adopted on Mar. 5, 1994, by the Standing Committee of the NPC and was promulgated on and effective the same day. For a bilingual Chinese-English text, *see* CLFB at ¶ 19-582. Article 3 says that "The State shall, in accordance with this Law, protect the investments of Taiwanese investors, the returns from their investments and other legal rights and interests." According to article 4, "The State shall not nationalise or expropriate the investments of Taiwanese investors; under special circumstances the State may, according to the requirements of the social and public interest, expropriate the investment of Taiwanese investors pursuant to legal procedures and with appropriate compensation."

[169] 32 UST 4010; TIAS 9924.

[170] Yang Chunya, *supra* note 4. A regulation is being drafted concerning foreign investment in projects with BOT schemes; the drafting reportedly began after the State Planning Commission studied BOT rules, practice, and legal status in other countries. The new provisions "will define the scope of BOT schemes,...lay down rules to govern companies involved in these projects...[,] set appraisal and approval procedures for projects with BOT schemes, list the responsibilities and risks of the parties involved, and clarify the laws applicable when dealing with disputes between parties involved." *New Regulations Drafted To Govern BOT Practice*, Zhongguo xinwen she (in English), Sept. 26, 1996, as carried by FBIS online, Sept. 30, 1996.

[171] CHINA DAILY (BUSINESS WEEKLY), June 2-8, 1996, at 8, as carried in FBIS, June 6, 1996, at 68.

In regard to opening up overseas investment in service industries, it will be on a step-by-step, trial basis but is viewed as a necessity as China nears attainment of membership in the World Trade Organization.[172] Negotiations for the first Sino-foreign life insurance company are underway; since 1992, six overseas-funded insurance companies have been approved in other areas of insurance. There is discussion of approving overseas-funded banks to engage in Chinese currency (*renminbi*) business on an experimental basis. More retail enterprises with overseas funding may be allowed and wholesale business with overseas investment may be initiated as an experiment. One official is quoted as calling the image of a closed service market *misleading*, since China not only promised significant process at the Uruguay Round of GATT but also, despite existing nominal restrictions, has quietly been opening many sectors:

> Though overseas investment in law services and securities are nominally not allowed, branch offices of foreign law agencies in China have been handling legal consulting services according to provisional Chinese regulations, and offices of foreign secrities companies and investment banks in China can underwrite and trade B shares as special members of local exchanges.[173]

In 1997, Shenzhen Special Economic Zone plans to introduce *national treatment* for foreign businesses. As one important result of the new scheme, foreign investors will be able to set the ratio of their products to be sold in mainland markets and overseas, as long as the products are not ones subject to Government quotas or restrictions. Thus, foreign businesses will be able to freely sell high technology and agricultural products in China in any ratio; that is, they can gear production exclusively for the mainland market.[174]

Yet another trend is to direct foreign investment to China's inland areas. The State Council has expanded the examination and approval rights of inland areas and of several major Chinese companies or units (e.g., the China National Nuclear Corporation, the Chinese Academy of Sciences) for Sino-foreign funded production projects having an investment of from 10 million dollars to 30 million dollars each.[175]

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[172] Sun Hong, *supra* note 47.

[173] *Id.*

[174] Zhongguo xinwen she, Aug. 23, 1996, as carried in FBIS online, Aug. 23, 1996.

[175] *Approval Rights for Foreign Investment Projects Expanded*, Xinhua (in English), Sept. 14, 1996, as carried by FBIS online, Sept. 17, 1996.

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CZECH REPUBLIC

There are only a few restrictions on foreign ownership and investment in the Czech Republic. Both the COMMERCIAL CODE[176] and the Law on Trades[177] place foreigners at an equal footing with citizens. They state that foreign persons, both physical and legal, may pursue business activity on the territory of the Republic under the same conditions and to the same extent as Czech persons. A foreign person may found a Czech legal person, may participate in an already existing Czech legal person or become the sole owner of a Czech firm or legal person so long sole ownership is permitted by law. A full 100% foreign ownership of a Czech company is thus possible. Furthermore, Czech legal persons may be founded in accordance with foreign law.

Czech currency is fully convertible, and profits may be freely repatriated. Also, any investment may be withdrawn abroad without restriction.

The few restrictions refer chiefly to investment in establishments of national defense and security. Further, a foreign physical or legal person cannot own land.[178] Also, mineral resources of the country are in exclusive state ownership but prospecting and mining can be done by foreign persons.[179] This is the present form of royal prerogative to the ownership of minerals originating in the Middle Ages.

All property and investment of a foreign person relating to business activity enjoys special protection by provision of the COMMERCIAL CODE. Such assets may be expropriated, or title thereto may be limited only by a statute. The taking must be in the public interest which cannot be attained in any other way. Prompt compensation of the full value at the time of taking will be made and is freely transferable abroad.[180]

The Czech Republic has concluded treaties for the encouragement and protection of investment with many countries, including the United States.[181] These treaties provide for most favored nation

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176 COMMERCIAL CODE, Law of Nov. 5, 1991, No. 513, COLLECTION OF LAWS.

177 Law of Nov. 15, 1991, on Trades, No. 455, COLLECTION OF LAWS.

178 Law of Sept. 26, 1995, on Foreign Exchange, No. 219, COLLECTION OF LAWS, art. 17.

179 Law of Apr. 19, 1988, on Mining, No. 44, COLLECTION OF LAWS, Consolidated Text of Sept. 14, 1992, No. 439, COLLECTION OF LAWS.

180 *Supra* note 1, art. 25.

181 Treaty concerning the reciprocal encouragement and protection of investment, with annex, protocol and exchange of letters. Signed at Washington, Oct. 22, 1991; entered into force, Dec. 19, 1992; Announcement of the Ministry of External Affairs of July 1, 1993, No. 187, COLLECTION OF LAWS.

treatment of investments and carry provisions for full compensation in the event of expropriation comparable with those in the COMMERCIAL CODE.

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EGYPT

Egypt did not open up its economy to foreign investment until 1974. In that year, the Law for Arab and Foreign Capital Investment and Free Zones[182] was enacted. The Law offered incentives to investors in various sectors, including industry, land reclamation and housing, banking, contracting, insurance, trade and tourism. Among the concessions the Law offers investors are guarantees against expropriation or nationalization, import of equipment and foreign exchange needed for development projects, repatriation of profits and disposition of assets, tax benefits, and use of patents and trade marks. The Law has since been updated and issued as Investment Law No. 230 of 1989 which maintains the privileges and advantages previously granted and adds new benefits.

The 1974 Law was intended to put an end to socialist policies and nationalizations which dominated the Egyptian economy since the 1950s under the Nasser regime. But the Nasser regime had left a legacy of inefficient public sector enterprises which the Egyptian Government has been attempting since the 1980s to deal with in its transition from central planning to a market-based economy, not a formidable task. Outside utilities, communications, the Suez Canal, banks and oil, the enterprises which are up for privatization account for two-thirds of the country's industrial output.[183] Furthermore, opposition from ideological parties, labor unions, and the hordes of small businesses benefiting from public sector contracts[184] was hard to overcome.

It was only in 1991 that legislation was enacted to deal with the problem. The Public Business Sector Law[185] created holding companies to control a number of affiliated companies for various types of products or activities which between them constitute the public business sector. As a result of this arrangement, private investment can own up to 49% of the affiliated companies leaving the publicly owned holding companies with the remaining 51% governed by the 1991 Law. If this first step in the privatization of the public sector holdings is succeeded by further divestitures in the share of the holding companies below 51%, a trend foreseen by the Executive Regulations of the 1991 Law,[186] then the affiliated companies would cease to be public sector companies subject to the 1991 Law and instead become private sector companies governed by the Companies Law.[187]

The Public Business Sector Law facilitates this trend by stipulating that holding companies may establish joint stock companies, buy and sell shares, and form and administer the financial portfolio of

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[182] Law No. 43 of 1974.

[183] *See* J. Whittington, *in* THE FINANCIAL TIMES (May 20, 1996), p. vi, special section on Egypt.

[184] *See* E. Hill, *Laws of Investment, Privatization and Labor in Egypt*, *in* H. Lewis Ruttley & C. Mallat, *eds.* COMMERCIAL LAW IN THE MIDDLE EAST 115-151 (London, 1995).

[185] Law No. 203 of 1991.

[186] Ministerial Decree Bo. 1590 of Oct. 31, 1991.

[187] Law No. 159 of 1981.

companies. And the enactment of a new Capital Market Law[188] has been justified as a means to tap private capital in improving the financial structure of the public sector companies and encourage their privatization.[189] In addition to regulating the capital market, the Law provides corporate tax breaks for companies which raise more than half of their capital by public subscription, allows the issuance of bearer shares and the operation of investment funds, and requires listed companies to issue quarterly financial reports.

Areas open to foreign investment

The 1989 Investment Law which absorbed the projects established under its predecessor the Foreign capital investment law of 1974 continues to promote investment in those sectors considered priority sectors to modernize, increase exports, and expand employment opportunities. These are identified in the 1989 Law and its Implementation Regulations (Prime Minister's Order No. 1531 of 1989) to include the following sectors as the sectors which the authorities encourage development with the help of international expertise and capital:

- All types of industrial activity, including agro-industries, and mining except petroleum exploration and extraction;
- reclamation of barren and desert land for cultivation purposes;
- housing construction whether for ownership or rental purposes;
- new urban development, towns and industrial areas;
- all types of activities related to tourism; and
- free zones.

The 1989 Law does not specify a minimum Egyptian participation in the enterprises which would qualify as investment companies. Invested capital is defined to include Egyptian pounds; and the 1989 Law tends to treat foreign and Egyptian capital similarly, whereas the 1974 Law required that foreign capital invested pursuant to that law be "in participation with public or private Egyptian capital," unless the Board of Directors of the Investment Authority decides otherwise by two-thirds majority of its members.[190]

Neither the 1989 Law nor the 1974 Law specified the percentage of local to foreign participation except, in the case of banks dealing in Egyptian pounds, the 1974 Law required 51% local participation. However the 1992 revision of the Banking Law[191] permits branches of foreign banks operating in Egypt to deal in local currency no different than their Egyptian counterparts. This was a logical step to the removal of exchange restrictions that allow a free transfer of currency in Egypt. As amended, the Banking Law gave

188 Law No. 95 of 1992.

189 Hill, *supra* note 3, at 144-145.

190 Law No. 43 of 1974, art. 4.

191 Law No. 37 of 1992 which amended Law No. 163 of 1957.

the Egyptian Central Bank, instead of the Minister of Economy and Foreign Trade, the responsibility of supervising both local and foreign banks in Egypt.

The Investment Authority

To qualify as a foreign investment project under the 1989 Investment Law or its 1974 predecessor and benefit from the privileges granted by these laws, the investment must be approved by the General Authority for Investment and Free Zones. Decisions are made by a Board of Directors composed of a number of cabinet ministers chaired by the Minister of Economy and Economic Cooperation, who may be delegated by the Board the power to approve projects by himself within certain limitations. The Authority is also the body responsible for laying down the overall policy and guidelines for implementing the Law; it is assisted by an executive staff made up of administrative and technical personnel.

Restrictions on foreign ownership

The 1989 Investment Law has removed many of the restrictions found in the 1974 Law, particularly the need for participation. The new Law now provides that "Egyptian, Arab or foreign capital may separately or jointly invest in any aspect of investment referred to in article 1 of this law."[192] And whatever the nationality of their owners or place of residence, investment projects will receive the same guarantees, privileges and benefits provided in the Law.[193] There are, however, extensive administrative requirements for investors of whatever corporate composition in applying to, and obtaining permission from, the Investment Authority to undertake their projects, according to the Implementation Regulations for the 1989 Law.

Nevertheless, even under the promotion of investment, certain restrictions on foreign ownership remain:

Agriculture

The Law allows only the reclamation of barren and desert land for cultivation purposes on a long term lease basis of up to fifty years, renewable for an additional 50 years, unless the Council of Ministers agrees to outright ownership in the case of joint stock companies.

Banks

Only Egyptian joint stock companies may own banks, which may include joint ventures with foreign investors. Foreign owned banks, however, may establish branch offices and deal in local currency now that foreign exchange restrictions have been removed.

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[192] Law No. 230 of 1989, art. 5.

[193] *Id*. art. 6.

Communications

Being state-owned, communications are not at this stage open to foreign ownership.

Securities

The Companies Law requires the shares and stocks of joint stock companies in Egypt to be presented in the course of one year from the date of closure of subscriptions to the Cairo and Alexandria Stock Exchanges. The Capital Market Authority, a government body, is entrusted with the supervision and control of the Stock Exchanges, including approval of public subscription issues.

Transportation

Vital means of transportation, railroads, airlines, inland waterways including the Suez Canal, ports and airfields, are all state-owned.

Utilities

Egypt obtains all its energy requirements locally from government-generated electricity whether from oil-powered stations or the hydro-powered turbines on the Aswan High Dam. Since the economic opening in the mid-1970s, oil production has increased considerably, mostly through joint ventures between the state-owned Egyptian General Petroleum Company and foreign oil companies.

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GERMANY

Liberal foreign trade policy

Since the enactment of the Foreign Trade Act in 1961,[194] Germany has adhered to a liberal foreign trade policy that is expressed in § 1, ¶ 1, of the Act:

> In principle trade and commerce in goods, services and capital payments as well as other business transactions with Foreign Economic Areas are free and so are business transactions in Foreign Assets and Gold (Foreign Business Transactions) between Residents. Applicable are the limitations contained in this Act or by ordinance in compliance with this Act.[195]

This general principle of free trade has almost constitutional importance in Germany, and the practice has lived up to the policy intent that was stated by the executive branch of the West German government when the bill was proposed to Parliament in 1959:

> The underlining of the principle of freedom shall serve to assure in the field of foreign economic transactions the guiding rule of uninhibited economic activities within the frame of constitutional law as embodied in articles 2, paragraph 1, 12, paragraph 1, and 14, of the Constitution.[196]

The German trade policy consistently welcomes foreign investment without granting special privileges. Although no barriers are set in the way of foreign investment, no fiscal incentives are provided; and foreign investors are subject to the same rigorous regulatory requirements of environmental law, urban planning, labor law, etc. This policy enjoys the approval of much of the German business community and there is virtually no protectionist sentiment. However, as a capital exporting country, Germany is interested in having the same free access to investments in other countries as is provided for foreigners in Germany, and the German Government is often called upon by industry to use its influence to ensure reciprocal treatment for German investors.[197]

Technically, the Foreign Trade Act allows for restrictions (such as notifications and permits) as well as prohibitions to accomplish a variety of trade policy goals such as the domestic economy, the domestic monetary situation, German security interests and international relations. These restrictions have been and continue to be of importance with regard to exports of sensitive technologies. However, with regard to

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194 Aussenwirtschaftsgesetz (AWG), Apr. 28, 1961, BUNDESGESETZBLATT (BGBl., official law gazette of the Federal Republic of Germany) I, p. 481, as amended.

195 Translation from U. Siebel, FOREIGN TRADE LAW OF THE FEDERAL REPUBLIC OF GERMANY 75 (Frankfurt am Main, 1989).

196 *Id.* at 12.

197 DOING BUSINESS IN GERMANY 31 (Price Waterhouse, 1994).

foreign investment and the concomitant inflow of capital, no restrictions have been in effect since the 1970s, aside from reporting requirements of the banks that receive foreign funds (*see below*).

Agriculture

There are no restrictions specifically directed against foreign investments in agricultural land. However, land currently used for agriculture or forestry can only be sold or leased following a permit proceeding in accordance with the Act on the Transfer of Real Estate[198] or the Act on Agricultural Tenancies.[199] These laws purport to preserve farms and forests, and a permit can be denied if the transaction would result in undesirable land uses, farm land would be subdivided into uneconomic parcels, or if the purchase price is not proportional to the value of the property. Permits also can be given subject to restrictive conditions, such as requiring that the property be leased to a farmer. According to a 1987 decision of the Federal Supreme Court,[200] the permit proceedings for agricultural land transfers are justified in preferring German farmers over Swiss farmers for a lease of German agricultural land.

Other restrictions on German land use that may seem burdensome to foreign investors but that are applied equally to German nationals are those emanating from Federal and state zoning laws and regulations. Of particular interest is § 35 of the Federal Zoning Law[201] that virtually makes it impossible to erect a dwelling for housing or commercial purposes outside of built-up areas, and § 17 of the Federal Regulation on the Use of Buildings[202] that specifies, in quite restrictive terms, the size of commercial buildings in zoned areas.

Banking

There are no restrictions on the foreign ownership of banks in Germany. However, foreign banks, their subsidiaries, branches and representations have to live up to the regulatory requirements of the German Banking Act.[203] Foreign subsidiaries must apply for a banking license in the same manner as domestic companies. Branches of foreign banks will be given a license to operate in Germany if certain regulatory requirements are met, among them, reciprocity on the basis of international agreements and two managers who reside in Germany.[204]

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198 Grundstückverkehrsgesetz, July 28, 1961, BGBl. I, p. 1091, as amended.

199 Landpachtverkehrsgesetz, Nov. 8, 1985, BGBl. I, p. 2075.

200 Decision of Bundesgerichtshof, May 14, 1987, 101 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN 95 (1987).

201 Baugesetzbuch, Dec. 8, 1986, BGBl. I, p. 2253, as amended.

202 Baunutzungsverordnung, Jan. 23, 1990, BGBl. I, p. 132, as amended.

203 Kreditwesengesetz (KWG), repromulgated June 30, 1993, BGBl. I, p. 1082, as amended.

204 KWG, § 53.

Communications

With the enactment of a new Telecommunications Act in 1996,[205] the German Postal Office began to phase out its monopoly positions over telecommunications by January 1, 1998. The new Act contains no restrictions on foreign applicants for licenses. It appears therefore, that these would be evaluated according to the generally prevailing qualification criteria of the Act. As of this time, the postal monopoly only applies to personal letters and the issuance of postal stamps.[206] Foreign entities are not restricted from the parcel shipping business.

Opportunities for private investment have also increased in the last decade in the field of radio and television. Whereas all radio and television was public until 1980, all the German states now permit private stations to compete with the public broadcasters. The state broadcasting acts generally require that the manager of a licensed broadcaster reside in Germany.[207] The purpose of this rule appears to be regulatory, to ensure proper supervision by the broadcasting agency of the state.

Securities

Even though the Foreign Trade Act gives the Government the power to restrict the purchase of German securities by foreigners and the issuance of foreign bond issues in Germany,[208] no restrictions on these matters have been in effect for the past two decades aside from the disclosure requirements described below and on liquidity requirements imposed on banks.[209]

Transportation

The German Railroad was privatized and transformed into a stock corporation in 1993,[210] after the national railroads were combined following the unification of Germany in 1990. Under the new regime, the rights of other railroads to use the roadbed of the German Railroad have been increased; however, aside from international transit, preference is still given to enterprises that have their principal business office in Germany, under consideration of the interests of public transportation of persons and goods.[211]

The privatization of the German airline Lufthansa commenced in 1994, when the Federal government sold 51% of the stock of the enterprise and refrained from participating in a new stock issue. Currently, a bill is pending that would privatize the remaining government participation of 39%. In order to live up to

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205 Telekommunikationsgesetz, July 15, 1996, BGBl. I, p. 1120.

206 Postgesetz, repromulgated July 3, 1989, BGBl. I, p. 1449, as amended, §§ 2 & 3.

207 e.g., for Baden-Württemberg, Landes-Mediengesetz, repromulgated Mar. 17, 1992, GESETZBLATT 189, as amended, § 25.

208 AWG, §§ 22 & 23.

209 Siebel, *supra* note 2, at 57.

210 Deutsche Bahn Gründungsgesetz, Dec. 27, 1993, BGBl. I, p. 2378.

211 *Id*. §§ 13 & 14.

bilateral aviation agreements,[212] this bill requires that Lufthansa and other German airlines be owned to at least 50% by German nationals.[213]

Utilities

Most of the energy industry in Germany is privately owned. The Government's role is focused on providing the regulatory framework including rules for crisis prevention and the stockpiling of emergency supplies.[214]

Disclosure

German banks must report to the German Central Bank the amounts of capital transferred to Germany for the purchase of securities for payments in excess of DM 5,000 (U.S. $3,250). German resident individuals or entities also must report to the Central Bank payments from abroad in excess of DM 5,000 (U.S. $3,250) that result from transactions other than exports and banking. In addition, German companies must provide certain financial data relating to their assets if a foreign individual or entity own more than 20% of the German enterprise. The branches or permanent establishments of foreign entities must also disclose their assets to the German Central Bank.[215]

On the whole, the reporting requirements are imposed on the German resident who participates in the transaction. The purposes of these disclosures have been defined in § 26 of the Foreign Trade Act as the furnishing of information for the shaping of German foreign trade policy and monetary policy.[216] The information is confidential[217] and can only be used for statistical purposes and the policy decisions resulting therefrom.

Expropriation and compensation

Article 14 of the German Constitution guarantees the right of property and provides the following protection against expropriations that have been interpreted stringently by the courts:[218]

> The taking of property shall only be permissible in the public weal. It may be effected only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public

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212 e.g. Air Transport Agreement Between the Federal Republic of Germany and the United Arab Republic, signed Feb. 16, 1960, BGBl. 1961 II, p. 511, art. 3, ¶ 4.

213 *Weg zur vollständigen Privatisierung*, SÜDDEUTSCHE ZEITUNG, Section Wirtschaft (Jan. 15, 1997/LEXIS/NEWS).

214 FACTS ABOUT GERMANY 296 (Frankfurt, 1995).

215 Aussenwirtschaftsverordnung, repromulgated Nov. 22, 1993, BGBl. I, p. 1934, as amended, §§ 58-69.

216 AWG, § 26.

217 *Id.* in conjunction with Bundesstatistikgesetz, Mar. 14, 1980, BGBl. I, p. 289.

218 B. Schmidt-Bleibtreu & F. Klein, KOMMENTAR ZUM GRUNDGESETZ 330 (Neuwied, 1990).

> interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the courts of ordinary jurisdiction.[219]

When East Germany was united with West Germany in 1990, it was agreed that restitution or compensation would be granted for property expropriated by the German Democratic Republic from 1949 on and also for property expropriated by the Nazi government in the area that formerly was East Germany.[220] However, it was also agreed that confiscations made in Eastern Germany between 1945 and 1949 under the Soviet occupation regime would not be undone. The numerous owners of land and industrial and commercial facilities who lost their property in the immediate post-war years have since complained twice to the Federal Constitutional Court. However, in both decisions the Court upheld the Unification Treaty and its implementing legislation on the property issue.[221] This seemingly callous attitude toward the victims of uncompensated takings appears to be the only blemish in an otherwise perfect record on the respect for property by the Federal Republic of Germany.

Conclusion

Germany, in fact, lives up to its proclaimed policy of free trade. Foreign investments and capital transfers have been almost totally unrestricted for the past thirty years. Moreover, in recent years more opportunities for foreign investment have opened up in industries that were formerly government monopolies. This is particularly true in the areas of communication and transportation, with the privatization of the German Postal Office, the German Railroad, and the airline company Lufthansa. The notable exception from the unrestricted climate is a nationality requirement for 50% of the stock of airline companies.

Despite this almost complete absence of restrictions, foreign investment in Germany requires careful economic decisions and a willingness to come to terms with the high cost of labor in Germany and with the German regulatory environment. To many a foreign investor, the regulatory density in Germany may seem like a barrier against foreigners. However, the various regulatory schemes appear to serve legitimate regulatory purposes.

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[219] Translation from BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (Bonn, 1989).

[220] Unification Treaty, i.e., Einigungsvertrag, Aug. 31, 1990, BGBl. II, p. 885, art. 41.

[221] Decision of Bundesverfassungsgericht (BVerfG), Apr. 23, 1991, 44 NEUE JURISTISCHE WOCHENSCHRIFT 1597 (1991); Decision of BVerfG, May 9, 1996, Docket No. 1 BvR1452/90.

96-2855

GREECE

Under the CIVIL CODE OF 1946, foreigners enjoy the same civil rights as nationals.[222] In spite of the general clause of equality, foreigners in Greece were, and still are to a lesser degree, subject to a number of restrictions for a variety of reasons, mainly due to national security considerations. Since early 1990s, land ownership restrictions have been lessened. Foreign and domestic investors are equally permitted to participate in the Government privatization program of the Hellenic Telecommunications Organization (OTE), the Public Power Corporation (PPC), the Public Petroleum Corporation (DEP) and two state refineries.

Since the early 1950s, the Greek Government has encouraged private foreign investment as a matter of policy and has treated domestic and foreign investors alike. One hundred percent foreign ownership is allowed in areas open to private investments,[223] except where foreign ownership is restricted such as in the mineral sector, shipping, exploitation of carbohydrates and a few other areas.

Greece has signed a number of bilateral investment agreements with several countries such as the United States, Albania, Armenia, Bulgaria, Egypt, Hungary, Morocco, Poland, Romania, Russia, and Tunisia. Investments made by European Union Members are protected under Community law.

Land ownership

Before 1990, foreigners were prohibited from acquiring or leasing property in areas designated as border areas. Since almost half of the Greek territory was designated as border area, the acquisition rights of property by foreigners were severely limited.

Law No. 1892/1990 reduced the number of areas designated as border areas.[224] Border areas are currently those located along Greece's northern and eastern borders with Albania, former Yugoslavia, Bulgaria and Turkey. Certain areas of the Island of Crete are also designated as such. Law No. 1892 prohibits any acquisition of rights through an act *in vivos* by individuals or legal entities on land situated in border areas as well as the transfer of shares of a corporation which owns real estate in those areas. Exceptions are allowed in some instances such as in case of parental donations or leases up to a six-year duration.[225]

Individuals or legal entities of Greek citizenship or ethnic Greeks of foreign citizenship, including Cypriots as well as natural or legal entities citizens of one of the Member States of European Union may,

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[222] C. Taliadoros, art. 4, General Principles, GREEK CIVIL CODE 1 (1992).

[223] In 1990, the inflow of foreign capital was approximately $3 billion. Of the 3,000 major Greek industrial firms having $4 billion in fixed assets, about 50 are wholly foreign-owned and 80 are partially foreign-owned. *See*, American Hellenic Institute Foundation, *Investing in Greece,* II DOING BUSINESS IN GREECE A4 (1996).

[224] EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS, pt. A, No. 135 (1990).

[225] *Id*. art. 25.

request that such a prohibition be lifted by a committee composed of Ministers of National Defense, Public Order and Agriculture.[226] In the application, the purpose of the land use must be specifically stated.

Individual or legal entity citizens of third countries may acquire property or personal rights in the above border areas upon application for permission from the Minister of National Defense.[227]

Law No. 1892/1990 subjects the acquisition by a foreign legal entity or individuals of real or personal rights in private islands or islets to a special permit. Such a permit may be issued by the Ministry of Agriculture after approval by the appropriate service of the Ministry of National Defense.[228]

The above Law retained Decree of June 22/24, 1927, in force.[229] This Decree prohibits the lease or in any other manner use of agricultural land of any type including grazing land, forests, lakes or fish farming. Lifting of this prohibition is permitted only by a joint decision of the Ministry of Agriculture, Interior and National Defense based on an opinion by a committee.

Investments

The first investment law was enacted in 1953. Legislative Decree No. 2687/1953 on Investment and Protection of Foreign Capital[230] encourages any foreign productive investment which promotes national production or in general contributes to the economic advancement of the country. Subsequent laws, such as Development Law No. 1892/1990, seek to further encourage investment, foreign or national, in those regions that are less developed.

In general, foreigners who are not citizens of a EU country and want to establish a corporation in Greece need to obtain an approval from the Ministry of Labor in accordance to the procedure established by Ministerial Decision No. 4803/1992 in implementation of Law No. 1975/1991.[231]

Shipping

A vessel is considered of Greek nationality if more than 50% is represented by Greek interests, that is more than 50% of the vessel is owned by Greek nationals or by a company of which 50% of the shares are owned by Greeks.[232]

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226 *Id*. art. 26, ¶ 1.

227 *Id*. art. 26, ¶ 2.

228 *Id*. art. 28.

229 P. Raptarchis, 172 DIARKES KODIX NOMOTHESIAS 299(d) (Athens, loose-leaf).

230 *Id*. 26, at 69(b).

231 *Supra* note 3, pt. A, No. 184.

232 CODE OF PUBLIC MARITIME LAW, art. 5.

In Greek maritime companies established pursuant to Law No. 9559/1979, foreigners or foreign legal entities are prohibited from owning shares (except through inheritance).[233] Nevertheless it can be agreed in the articles of incorporation that foreigners may own less than 50% of the shares.

Pursuant to article 25 of Law No. 89/1967, a foreign shipping company may establish an office in Greece if it meets the legal requirements and after a joint Ministerial decision of National Economy and Mercantile Marine grants a permit.

Aircraft

According to the Airspace Code,[234] an aircraft is Greek if more than 50% of the stock is owned by Greek citizens or citizens of the EU.

The construction of airports is granted through a permit issued by the appropriate Ministry. Such a permit is granted only to Greek citizens or legal entities controlled by either Greek or EU citizens.

Banking

Branches and subsidiaries of EU credit institutions

There are no entry restrictions on the Greek branches of EU credit institutions. If a subsidiary of a EU credit institution is to be established in Greece, a banking license is granted by the Bank of Greece, which is the regulatory agency in Greece, if the subsidiary meets the requirements of the First and Second Banking Directive.[235]

As to the acquisitions of Greek credit institutions, any legal entity that proposes to acquire directly or indirectly a qualifying holding is required to inform the Bank of Greece and notify the amount of its holding.

Branches and subsidiaries of non-EU credit institutions

The branch of a credit institution incorporated under the laws of a non-EU country can be granted an operating license under the principle of national treatment. Thus, such a branch cannot be treated more favorably than branches of EU credit institutions.

With regard to subsidiaries, the Bank of Greece has the authority to either deny or grant operating licenses upon fulfillment of the requirements pertinent to authorization of such institutions. The Bank of Greece needs to notify the European Commission of such authorization. This serves to ensure that credit institutions incorporated in a EU country are granted reciprocity and non-discriminatory treatment in a third country.

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[233] Art. 10, Law No. 959/1979 on Shipping Companies, as amended; *supra* note 3, pt. A, No. 192 (1979).

[234] Law No. 1815/1988 as amended by Law No. 2065/1992.

[235] Law No. 2076/1992; *supra* note 3, pt. A, No. 60.

If a credit institution incorporated in a non-EU country obtains authorization to acquire a majority participation in a Greek credit institution, the Bank of Greece will notify the European Commission regarding its decision.

Non-EU acquisition of a Greek state-owned Bank is limited to 40% of its shares.[236]

Securities

Securities operations are confined to the Athens Stock Exchange. Members of the Stock Exchange can be independent brokers and securities firms.[237] Securities firms can be wholly owned subsidiaries of one or more credit institution. A foreign security firm may be established in Greece with permission granted by the Capital Market Committee after the firm meets certain requirements. Such a permit is granted upon the clause of reciprocity.[238]

Securities firms and brokers from EU countries, once Greece implements the Investment Services Directive (93/22/EEC),[239] will be allowed to provide their services in the Greek market freely, either directly or indirectly through branches.

Expropriation

The right to own property is protected by the Greek Constitution under the condition that exercise of this right cannot be contrary to the public benefit.[240] The State has to prove public interest in case of expropriation and must always provide full compensation corresponding to the value of the expropriated property at the time of the court hearing. Compensation is decided by civil courts.

In addition, Decree No. 2687/1953 on Investment and Protection of Foreign Capital exempts the assets of enterprises that have been established or substantially financially assisted by the importation of foreign capital from compulsory expropriation.[241] Requisition may be permitted only for the requirements of the Armed Forces during war. In this case, enterprises must receive just compensation for the use of the assets by the State during the period of requisition.[242]

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236 *Country Commercial Guide: Greece 1996*, DOING BUSINESS IN GREECE, A1-17 (1996).

237 Law No. 1806/1988 on Amendment of the Stock Exchange Legislation, as amended; *supra* note 3, pt. A, No. 207.

238 *Id.* art. 3.

239 A bill pending in Parliament was submitted by the Minister of Finance. Under the Directive, however, Greece has the right to defer direct access of credit institutions to organized markets until 1999 and such a provision may not be passed.

240 Art. 17, ¶ 1.

241 Art. 11, ¶ 1.

242 Art. 11, ¶ 2.

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INDIA

Real estate

Foreigners, who are not citizens of India, or a company not incorporated in India or in which the non-resident interest exceeds 40%, enjoy only a qualified right to deal in real estate. They cannot acquire, hold, transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise real estate situate in India, except with the previous general or special permission of the Reserve Bank of India.

Telecommunications

India has opened foreign investment in telecommunication production as well as in basic and value-added services. Foreign equity up to 51% in manufacturing projects is approved on an automatic basis. Certain non-core industries would be allowed to raise the limit up to 74%. It is not clear whether telecommunication is one of them.

In respect of value added services, foreign investment approvals for telecommunication services require specific approval of the government. Only companies registered in India are permitted to participate in providing basic voice telephone services. In the event of a joint venture between an Indian and a foreign company not more than 49% foreign equity would be permitted.

Manufacturing

A large number of manufacturing industries have been opened for joint ventures by foreign companies. The list of such industries includes industrial machinery, metallurgical industries, boilers and steam generation and agricultural machinery, etc. Thus, foreign investors may invest in all areas except industries such as defense, atomic energy and railway transport which are reserved for the public sector. In other areas of foreign direct investment, the ceiling on foreign equity participation has now been raised to 74%.

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INDONESIA

Introduction

Restrictions on foreign investment in Indonesia have been progressively liberalized over the last twenty years. Before the passage of Indonesia's first law on foreign investment in 1967,[243] no foreigner or foreign interest was allowed to own property or businesses in that country, nor own shares in Indonesian companies, nor act as directors or other management officials in Indonesian companies. Article 6 of the Foreign Investment Law of 1967 provided that foreign investment would be prohibited from certain fields of activity, for national strategic reasons, including the production of arms, ammunition, explosives and other war equipment. It stated as follows:

> (1) Fields of activity which are closed to foreign capital investment exercising full control are those of importance to the country and in which the lives of a great deal of people are involved, are the following:
>
> a. harbors,
> b. production, transmission and distribution of electric power to the public,
> c. telecommunication,
> d. shipping,
> e. aviation,
> f. drinking water,
> g. public railways,
> h. development of atomic energy,
> i. mass media.
>
> (2) Industries performing a vital function in national defence, such as: the production of arms, ammunition, explosives, and war equipment, are entirely closed to foreign capital investment.[244]

Article 7 of the Law provides that the Government, in addition to those mentioned in article 6, paragraph 1, may further determine other specified spheres of activity that would be closed to foreign capital investment.[245]

After 1970, however, it became possible for foreign investors to put money into Indonesian industries and other institutions. Each year, from 1986 through 1989, and then again in 1991, the Indonesian Government has issued so-called *deregulation packages* concerning foreign investment. The intent was to encourage such investment and to boost exports other than oil and gas.[246] Those business areas that are

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243 Law No. 1 of 1967, as amended by Law No. 11 of 1970, INVEST IN INDONESIA 6 (Jakarta, 1972), Appendices.

244 *Id.*

245 *Id.*

246 DOING BUSINESS IN INDONESIA 48 (Jakarta, 1993).

closed to foreign investment are listed in the Negative Investment List (DNI) as are those that are open but with restrictions.[247] The DNI is so called because "it specifies the relatively few areas in which foreign investment is prohibited entirely or is permitted subject to certain specified requirements."[248] It was introduced in 1989 and replaced a much longer and more complex list of areas restricting foreign investment.

In 1992, the Capital Investment Coordinating Board (Badan Koordinasi Penanaman Modal or BKPM) announced a directive allowing foreign investors to hold 100% ownership of new companies in priority zones in Indonesia. It applied to investments with a minimum paid-up capital of $50 million in the more developed regions of Java and Sumatra. Also, to promote foreign investment in the more remote regions of the country, this capital minimum was waived for projects in Irian Jaya, Maluku, East Timor, Nusa Tenggara Barat, Sulawesi, Kalimantan, and Bengkulu and Jambi in central Sumatra.[249] However, the policy required foreign investors to gradually transfer a proportion of ownership to domestic interests. Thus, foreign investors had to sell at least 5% equity within five years after the project went into commercial production and at least 20% within 20 years, up from 15 years.

Also in 1992, the July deregulation package opened up nine business areas--from a total of 60--that had been previously closed to foreign investment. Of the 51 remaining areas, only six are completely closed. Whereas previous rules had allowed only the domestic partner in plantation joint ventures to obtain a license allowing unrestricted lease and use of the land, fully foreign-owned enterprises in the plantation sector that already owned such *rights of land use* were allowed to have these rights extended or renewed, provided they converted to a joint venture with Indonesian partners.[250]

The last set of regulations in Indonesia's ongoing deregulation of foreign investment was announced in 1994, and was the most liberal up till then. It opened "the country's doors to a far broader spectrum of foreign investment than before and making it one of the most attractive jurisdictions for foreign investment in the region, particularly for labor intensive industries."[251]

Article 2 of Government Regulation No. 20 of 1994 permits foreign investment to be made in the form of a joint venture or as direct investments where the entire capital is owned by the foreign investor. Joint ventures are restricted only by the requirement to have 5% of the equity owned by Indonesian nationals in order to undertake business activities in fields considered vital to the State and the general population. An example is the generation and distribution of electricity to the public, telecommunications, shipping, airlines, supply of drinking water, public railways, atomic energy generation, and mass media. Where 100% foreign-owned direct investment is permitted, there is a requirement that within fifteen years after the enterprise begins commercial production, a part of the foreign-owned shares must be sold to Indonesian citizens or companies. Foreign corporate bodies may now also buy shares of PMA (*penanaman modal asing*, or foreign investment joint venture company formed under the terms of the 1967 Foreign Investment Law) companies or PMDN

247 *Id*. at 50.

248 INDONESIAN DEVELOPMENT NEWS (May/June 1991) (Jakarta, National Development Information Office), at 6.

249 INDONESIA DEVELOPMENT NEWS (Spring 1992), at 1.

250 INDONESIA DEVELOPMENT NEWS (Summer 1992), at 4.

251 K. Mills, *Indonesia's Ongoing Deregulation of Direct Foreign Investment*, EAST ASIAN EXECUTIVE REPORTS (Jan. 15, 1996), at 9.

(*penanaman modal dalam negeri*, or domestic capital investment company) companies, if these companies are in the respective fields or businesses that are open to foreign capital investment.[252]

Agriculture

Land ownership is regulated by the Basic Agrarian Law passed in 1960,[253] under which only Indonesian citizens have the right to own land (*hak milik*). However, there are other types of rights in land, other than outright ownership, which are available to aliens. A PMA company, however, may hold certain rights over land other than the right of ownership.

There are three levels of land rights that may be held by non-citizens:

- the right to build on land (*hak guna bangunan*) which is generally valid for thirty years and renewable for another twenty years, if the land is being properly used;

- the right to use land (*hak pakai*) which is generally valid for ten years and is renewable for ten years at a time; and

- the right to do business on land (*hak guna usaha*), generally valid for 35 years and now can be renewed twice, each time for 25 years, to a maximum of 85 years.[254]

As noted above, since 1992, fully foreign-owned enterprises investing in the plantation sector that already owned *land use* rights could have these rights extended or renewed.

Banking

In 1988, the establishment of foreign joint venture banks was permitted for the first time since the former banking law of 1967 had been promulgated. New regulations on banking were issued in 1991, and new banking laws and regulations in 1992.

Foreign banks may now be issued operating licenses, whether they be branches or foreign banks or joint venture companies. Foreign banks are authorized to transact all forms of foreign exchange and general banking business.[255]

Communications and utilities

Television broadcasting and private radio broadcasting were previously completely closed to foreign investment. As of 1994, a maximum of 95% foreign shareholding is permitted in companies established in special sectors classified as important to the state and affecting the living needs of the people, including:

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252 Sudargo Gautama, INDONESIAN BUSINESS LAW 363-365 (Bandung, 1995).

253 Law No. 5 of 1960, INVEST IN INDONESIA, *supra* note 1, Appendices, at 121.

254 Pursuant to a 1992 Presidential Decree of 1992, *see* Mills, *supra* note 9, at 18.

255 Price Waterhouse, DOING BUSINESS IN INDONESIA 76 (Jakarta, 1993).

harbors; shipping; aviation; railways; telecommunications; electric power generation, transmission and distribution; atomic power generation; water; and mass media.[256]

Securities

The Indonesian capital market was deregulated in 1987, and stock markets have been established in Jakarta (JKE) and Surabaya (SSE) and include both the stock exchanges and the over-the-counter (OTC) market. A foreign investment company (PMA) may raise funds by selling its shares through the JKE, the SSE, or the OTC market, and may sell to either local or foreign investors. Companies may also issue bonds and other securities through any of the three markets.[257] Thus foreign companies are not restricted from the sale and purchase of securities in Indonesia; nor are they restricted in participating in the various securities markets of Indonesia.

Transportation

The 1991 Negative Investment List closed off to foreign investment many sectors such as intercity passenger transport or taxi service, local shipping, and scheduled or chartered flights.[258] However, although it was announced in 1992 that Indonesia's national airline, *Garuda*, would go public in 1995 with shares to be offered to the public,[259] it could not be ascertained whether or not this plan was implemented. Since 1994, even these fields may receive foreign investment provided it is in the form of a PMA joint venture in which at least 5% of the paid-up capital has come from Indonesian partners.[260]

Other aspects

Those areas of industry in which foreign investment is completely prohibited, for national strategic reasons, include the production of arms, ammunition, explosives and other war equipment. In addition, there are certain fields which, although specified in the Negative Investment List, are nonetheless unavailable for foreign investment because of the specific policy of the Ministry in charge of a particular area. These include professional services such as legal, medical, and tax and financial consulting. However, it has been pointed out that:

> ...in most ministries, the situation is in a very dynamic state, and it would be wise for any party considering investment or other activities in Indonesia to check with the Capital Investment Coordinating Board [Badan Koordinasi Penanaman Modal or BKPM] or local counsel regarding the current situation.[261]

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[256] D. Gingerich, *New Foreign Investment Rules Scrap Some Key Policies, Allow 100% Foreign Firms*, EAST ASIAN EXECUTIVE REPORTS (Sept. 15, 1994), at 11.

[257] *Supra* note 4, at 79.

[258] *Id.* at 56.

[259] INDONESIA DEVELOPMENT NEWS (Summer 1992), at 10.

[260] Gautama, *supra* note 10, at 364.

[261] Mills, *supra* note 9, at 15.

Right of expropriation and compensation

Chapter VIII of the Foreign Investment Law, in its article 21, states that the Government shall not undertake a total nationalization/revocation of ownership rights of foreign capital enterprises, nor take steps to restrict the rights of control and/or management of the enterprises concerned, except when declared by act of Parliament that the interest of the State requires such a step.[262]

In 1957, Dutch economic interests in Indonesia, its former colony, were seized by the Indonesian Government. In 1958, they were formally nationalized with the passage of Law No. 86 of 1958. In 1966, a treaty was concluded between Indonesia and the Netherlands settling claims for compensation arising from the nationalization measures.

Since then, however, Indonesia has entered into agreements with certain countries, including Belgium, Canada, Denmark, France, Germany, the Netherlands, Norway, South Korea, Switzerland, the United Kingdom, and the United States, providing investment guarantees to nationals of those countries who make investments in Indonesia.[263] In most cases, these guarantees cover compensation in case of nationalization or expropriation, or in case of damage or loss caused by actions of war, revolution or insurrection, and payment for any approved remittances pursuant to the investment in case of inconvertibility of the currency of the host country. The agreement with the United States is stated as also containing a guarantee against the so-called *extended risk*, which includes 75% of the commercial losses, subject to certain requirements administered by the U.S. Overseas Private Investment Corporation.[264] The U.S.-Indonesia Investment Guarantee Agreement was signed at Jakarta in January, 1967. Also, Law No. 5 of 1986 ratified Indonesia's adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[265]

Conclusion

The role, in Indonesia's foreign investment policies and procedures, of the Capital Investment Coordinating Board (BKPM), which was established in 1973, should not be underrated. It provides a one-stop service for foreign enterprises or individuals looking to invest in Indonesia. Thus the potential investor does not have to approach each government agency or department separately, since BKPM has the authority to issue the permits needed for a new investment project. Exceptions to this rule are rights in land; building permits, and the like, which are in charge of the Minister of Internal Affairs or the governor of the respective province; and procedures involved in ratifying incorporation deeds and stay permits for foreign personnel, which are within the sphere of the Ministry of Justice and the Directorate General of Immigration. [266]

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262 *Supra* note 1, at 8.

263 Gautama, *supra* note 10, at 363.

264 *Supra* note 1, at 4.

265 S. Pompe, *ed.*, INDONESIAN LAW 1949-1989 342 (Dordrecht, 1992).

266 Gautama, *supra* note 10, at 367-368.

Indonesia has been described as being "one of the most attractive jurisdictions for foreign investment in the region, particularly for labor intensive industries."[267] It is estimated that over $100 billion in foreign funds has been invested in Indonesia from the enactment of the 1967 Foreign Investment Law until mid-1995. This figure does not include enormous investments made in oil and gas exploration, and banking and financial services. The major areas of foreign investment, outside of oil and gas and financial services, are reported to include chemicals, the paper industry, metal goods, hotels and restaurants, electricity, water, basic metal industry, textiles, mining, food industry, nonmetallic minerals, real and industrial estate, and transportation.[268]

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[267] Mills, *supra* note 9, at 9.

[268] Mills, *supra* note 9, at 15.

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IRAN

Background

Foreign investment in Iran has a long history. It started in 1859 when concessions were granted to a Briton for the laying of railways and extracting oil and other minerals. The drilling of the first oil well in the south of Iran invited other investors to the country. King Nasser-eddin Shah granted a concession for railroad construction and other economic projects to another Briton, Baron Julius de Reuter. The Shah's purpose was to spend the resulting money from such concessions to introduce reforms and establish new industries. This concession, was cancelled under pressure from clerical leaders who feared foreign influence. Some twenty years later, the Shah, fearing Russian encroachment and advised by Russia's rival, the British Empire, opened the country to foreign trade and enterprise as a means of strengthening the country's economy. He opened the Karun River in Khuzestan to foreign shipping and gave Reuter permission to open the country's first bank. In 1890 the Shah gave another British company a monopoly over the country's tobacco trade. The tobacco concession which had been obtained through bribes to leading officials and aroused considerable opposition once again by the leading clerics, was cancelled.

The most important concession was granted to yet another Briton, William Knox d'Arcy, in 1901 for oil and gas exploration and production for a period of sixty years. In 1933, after long negotiations, the same concession was transferred to the Anglo-Iranian Oil Company.

Nationalization of the oil industry

The nationalization movement began in Iran by enacting the first law for nationalization of the oil industry in 1951. This episode was a turning point in the history of foreign investment as it brought an end to the era of concessions. Yet, as a non-industrialized country, Iran was in need of foreign investment and technical know-how.[269]

Foreign investment in the form of partnerships

The Law on Encouragement and Protection of Foreign Investment was passed in November 1955. It provided for the establishment of a special committee under the chairmanship of the governor of the National Bank of Iran to receive and study offers from foreign individuals and companies for investment in various development projects in mining, industry, agriculture, transportation and other fields. It contains the following incentives:

- both the capital imported and the income thereof accrued in Iran shall receive legal protection and enjoy the same privileges and benefits given to Iranian enterprises;

- in case of expropriation by special legislation, the government guarantees fair compensation for the loss and transfer of the capital abroad;

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269 KITABI SAFI, TA'RIKH-CHEH VA MATNI GHARARDA'DHAI MARBUT BE NAFTI IRAN 311 (The White Book, History and Texts of the Oil Agreements of Iran) (National Iranian Oil Company, 1966).

- the owner of the foreign capital is authorized to transfer abroad any amount of its net annual profit at the same rate it is imported into Iran; and

- transfer of the original capital and the interests accrued from Iran is authorized by giving an advance notice.

Restrictive clauses

A foreign investor may not transfer his shares, interests, and rights to his respective government or other governments. A foreign investor who is transferring his capital from Iran must deposit with an Iranian bank a sum equal to 10% of the original capital for a period of six months to cover possible liabilities.[270]

Implementing regulations

The implementing regulations of the Law, which was approved in March 1956, contains the following provisions:

- the privileges and benefits stated in the Law of 1955 apply to any juristic or natural person or any foreign enterprise investing in a development project or business operation or providing loans to Iranian enterprises;

- the foreign capital has to be invested in the fields authorized for domestic enterprises;

- the capital for investment may be in the form of foreign exchange, machinery, equipment, spare parts, transportation facilities, patent, and the foreign exchange paid as salaries to the professionals before the start of operations;

- it must not involve a monopolistic concession;

- it must be of a private source unrelated to a foreign government;

- if a foreign government acquires shares in the investment in the course of its operation, the capital must be transferred from Iran within a period to be set by the special committee;

- the foreign investor may insure his capital which is to be invested in Iran;

- the foreign investor may transfer his capital or shares of the partnership to another foreign investor;

- the foreign investor may transfer his capital in the form of products from Iran;

- a fair and fast compensation is due to the foreign investor whose property is nationalized or expropriated by law; and

- provisions of the law and its implementing regulations shall apply to the citizens and corporate entities of the countries where reciprocal privileges and facilities are provided for Iranian citizens and enterprises.[271]

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[270] MAJMUAH'I QAVANIN SALI 1334, 361-364 (Collection of the Laws of 1955) RUZNAMEHI RASMI (Official gazette), 1995.

[271] MAJMUAHI QAVANINI SALI 1335 (Compilations of the Laws of the year 1956) 21-27 (RUZNAMEHI RASMI, 1956).

Further privileges for foreign investment

The most recent regulations which were approved in September 1996 provides further facilities and privileges for foreign investment:

- importing machinery, equipment, and raw materials held by the foreign investor as part of his capital shall be exempt from the recent import restrictions and banking regulations; importing of such machinery, however, shall be subject to the Law on Encouragement and Protection of Foreign Investment of 1955 and its implementing regulations of 1956. The Ministry of Commerce and Investment and Economic Assistance Organization of Iran shall take measures to register and issue directives for the fast release of the machinery and equipment by customs;

- exporting the products of the foreign investment project shall be exempt from the restrictive export regulations; and regarding the requirement to return part of the foreign exchange accrued from such exports, either currently in force or laws and regulations which may be enacted in future in this respect, the Ministry of Commerce shall issue an export authorization with the approval of the Investment and Economic Assistance Organization;

- importing machinery, equipment, and raw materials and exporting products by the foreign investor, without share partnership but through financial support, shall be subject to the privileges of the Law on Encouragement and Protection of Foreign Investment. Payment of principal and interest for such financial sources shall be made from the foreign exchange accrued by exporting the products of the project;

- the foreign exchange accrued from tourism and services provided by the foreign investor may be used to meet the expenses of the enterprise as described in section two of the regulations;

- exporting in excess of the prescribed limits and using foreign exchange in excess of the items stated in the regulations is authorized as provided by other relevant laws and regulations;

- all the corporate units subject to the regulations may, as authorized by the Investment and Economic Assistance Organization of Iran, deposit the foreign exchange earned from their operations with a domestic or foreign bank and make withdrawals directly;

- with regard to the companies with share participation of the state-owned companies, the opening of accounts with foreign banks shall be made with the approval of the Central Bank of the Islamic Republic of Iran; and

- industrial and mining operations with the participation of foreign investors shall be exempt from taxation for a period of six years. The taxation exemption period may be extended when the investment is made in disadvantaged parts of the country.[272]

Foreign banks

Foreign banks and financial institutions are allowed to open branch offices in the free trade zones under the following conditions:

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[272] RUZNA'MAEHI RASMI JUMHURI ISLAMI'I IRAN, Official Gazette No. 12985, Aug. 15, 1996, at 17.

- the Central Bank has already opened a branch office in the free trade zone; and

- it must be approved by the Central Bank and the Council of Ministers.[273]

Property ownership by resident foreigners

Ownership of property by foreign citizens is regulated by the following rules and restrictions:[274]

- the foreigner must be a permanent resident of Iran;

- the property must be either for a residence or business activity;

- if the foreigner changes his residence to abroad, he must sell the property to an Iranian citizen within six months of his departure from Iran;

- the ownership of property by a foreigner must not be inconsistent with the treaties to which Iran is a party, nor should it be in violation of Iranian laws and public order;

- Iranian citizens must be allowed to own property in the country of the foreign citizen;

- the property should not be in certain restricted areas; and

- application for ownership of the property must be approved by the Deeds and Land Registration Office and the Ministry of Foreign Affairs.

Property ownership by non-resident foreigners

In order to encourage foreign visitors who make frequent visits to Iran, the Council of Ministers approved the following rules in May 1995:[275]

- a foreign visitor who wishes to buy property in Iran as his private residence in Iran must submit an application to the Iranian consulate abroad and to the governor of the province where the property is located;

- the property must not be located in a restricted area or an area prohibited to foreigners. A list of such areas shall be prepared by the Ministry of Interior;

- the buyer must pay the purchase price in Iranian currency by transferring foreign exchange through an authorized bank;

- the Land and Deed Registration Office shall register the property in fee simple in the name of the buyer in a special register; and

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273 *Foreign Banks,* IRAN TIMES (May 31, 1996), at 4.

274 RUZ NAMEH'E RASMI, Official Gazette No. 8167, May 9, 1927 - Nov. 1948.

275 RUZNA'MAH'E RASMI JUMHURI'I ISLAMI'I IRAN, Official Gazette of the Islamic Republic of Iran No. 14834, Jan. 31, 1996.

- registration of the property in the name of the heirs shall take place according to the observance of the regulations. The heirs of the deceased owner of the property have two years to claim their right. If no claim is made, the property shall be sold and the proceeds shall be deposited with the General Treasury for payment to the heirs.

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ISRAEL

Foreign ownership and investment is generally permitted and in most cases encouraged under Israeli law. The Encouragement of Capital Investments Law, 5719-1959,[276] is designed to promote the development of the productive capacity of the national economy; the improvement of the balance of payments of the State; and the absorption of immigration, creation of jobs and regional development.[277] The Law offers numerous benefit programs to enterprises approved by the Government Investment Center. Such enterprises may be owned by residents or foreign nationals or companies. Among the benefits available to approved enterprises are government investment grants, taxation benefits, and government loan guarantees.

In addition to some restrictions found under the Currency Control Law, 5738-1978,[278] there are certain restrictions in the following areas:

Broadcasting

Broadcasting and operating a broadcasting station requires a license by a committee appointed by the government.[279] The license is granted in a public tender. The Law requires that companies applying in the tender are registered in Israel and that 51% of their control is in Israeli hands.

Communications

Broadcasting via cables requires a license by the Minister of Telecommunications.[280] The license is provided by public tender. To be able to participate in the public tender, the participant must be an Israeli citizen and a resident or a corporation registered in Israel. A total of 51% of its control[281] must be in the hands of Israeli citizens and residents.[282] Telephone services in Israel are supplied by Bezek, the Israeli Company for Telecommunications. This company has a monopoly over telecommunications (initial installation only) in Israel.

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[276] 13 LAWS OF THE STATE OF ISRAEL (LSI) 258 (5719-1958/59); 25 DINIM (Laws) 15137 (1992-).

[277] *Id.* § 1.

[278] 32 LSI 134 (5738-1977/78).

[279] Second Broadcasting Authority for Radio and Television Law, 5750-1990, 5750-1990, §§ 32 & 7, 4 HACHAKIKA BEMEDINAT ISRAEL (Legislation in the State of Israel) 4229 (1990-).

[280] Bezek (Telecommunications) Law, 5742-1982, § 6(7), 2 DINIM 673 (1990-).

[281] Including the right to vote in the general meeting of the corporation, the right to appoint a director, to share the profits, and to get a share in the remaining assets of the corporation after repayment of debts following liquidation [*see id.* § 6(1)].

[282] *Id.* § 6(13).

Shipping

To be eligible for registration, the vessel should be more than half owned by the State, an Israeli national or an Israeli corporation.[283]

Defense

The Ministry of Defense often limits the participation of foreign investors in military industrial enterprises to 49% of the invested capital and voting rights.[284]

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283 Shipping (Vessels) Law, 5720-1960, 14 LAWS OF THE STATE OF ISRAEL 60 (5720-1960).

284 A. Rafel, *Tax Management, Foreign Income Portfolios*, BUSINESS OPERATIONS IN ISRAEL, A-9 (1994).

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ITALY

Background

The freedom of private enterprise in the economic field as well as the recognition and guarantee of private property have their foundation in the Italian Constitution. Expropriation of private property, subject to compensation, may be authorized by law for reasons of general public interest.[285] The Constitution, however, allows government agencies to own enterprises connected with essential public services or sources of energy and government monopolies.[286]

Foreign investments are viewed favorably in Italy, and all the usual methods of conducting business are open to foreign investors who are generally seen as important contributors to the Italian economy. The Italian Government supports free trade, and Italy's membership in the European Union has expanded its market to that of the entire Union.

The growth of Italy's industrialization has resulted in Italy attaining the status as the West's fifth largest economy and has prompted the complete liberalization of its exchange control legislation with a consequent elimination of most of the regulatory structure which governed foreign investment activities in the past.

Some limitations apply to foreign investments in sectors considered of national interest. These include shipping, air transport, banking, and to some extent radio and television broadcasting. The Italian State operates a monopoly on tobacco products and runs the railroads. It is worth noting, however, that a wide ranging privatization program is under way in Italy. In this framework, even the Government's monopoly over telecommunications entered a new phase which will lead to a regime of free competition. The privatization of cellular telephone services, implemented in 1994, is a case in point. These services were formerly controlled by the national telecommunication provider. It may be considered an important step in the direction of a free market approach for telecommunications.

In 1950, legislation was enacted to encourage the industrialization of certain Italian regions known as the *Mezzogiorno*. This legislation, as amended, provides incentives in the form of tax benefits as well as grants and low-interest loans which are available to qualifying Italian and foreign investors.

Property ownership

There are no specific obstacles for foreigners who wish to acquire property in Italy, including agricultural enterprises and buildings.

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[285] Constitution, arts. 41 & 42.

[286] *Id*. art. 43.

According to article 16 of the provisions of the law found in the general proceeding of the CIVIL CODE, aliens in Italy enjoy the civil rights of Italian citizens on condition of reciprocity and subject to the provisions contained in special statutes. These provisions also apply to alien legal persons.[287]

Article 147 of the Unified Text of Laws on Public Security, however, imposes on anyone who sells or cedes real estate to foreigners the duty to inform the police authorities within ten days by giving them information concerning the buyer and the property involved in the transaction.[288] A 1978 law requires that the seller provide the police authorities with detailed information regarding any property transfer, rental or other property transaction within 48 hours. This law is part of the anti-terrorist legislation enacted in the 1970s.[289]

Property rights in certain areas of the country may be subject to limitations required by the protection of military installations and for the purpose of national defence, under legislation dating back to the 1930s and amended in 1976 and 1990.[290] According to this legislation, any transfer of property in a protected area must be approved by the government authority in the province (*Prefetto della Provincia*) having heard the competent military authority, whenever such property transfer would involve non-Italian nationals. Any act performed in violation of the law is null and void, and penalties may be imposed.

Investment

With the exception of certain sectors of national interest, there are no restrictions on foreign investment, and investors in Italy and investment registration or government approval are not required. In general there are no restrictions under foreign exchange regulations. The main legislation in this field (Presidential Decree No. 148 of 1988 and implementing Ministerial Decrees) guarantees freedom of transactions with nonresidents, including acquisition of Italian companies, and the transfer of resulting profits abroad.

Airline and shipping services, as well as ownership of Italian registered aircraft and ships, are regulated by the CODE OF NAVIGATION.

According to the provisions of the CODE, airline services may be operated only by persons, agencies, and companies qualified to own Italian aircraft, upon the issuing of a special license. International airline services, however, may be granted to foreigners if so established in international agreements. In principle airline services within the national territory are reserved to Italian nationals unless otherwise established by international agreements or for reasons of public interest.[291] According to special legislation, foreign

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287 CODICE CIVILE E LEGGI COLLEGATE (Bologna, Zanichelli, 1993).

288 CODICE DI PUBBLICA SICUREZZA (Rimini, Maggioli, 1989).

289 Law No. 191 of 1978, GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA (official law gazette of Italy, G.U.) No. 137 of May 19, 1978.

290 Law No. 898 of 1976, G.U. No. 8 of Jan. 11, 1977; and Law No. 104 of 1990, G.U. No. 105 of May 8, 1990.

291 CODICE DELLA NAVIGAZIONE E RELATIVI REGOLAMENTI (Milano, Giuffré, 1986), arts. 776-780.

nationals may buy shares not exceeding 40% of the total share capital of Italian companies operating such services.[292]

Italian aircraft must be registered in the National Aircraft Register. Said registration is limited to aircraft owned by the State, other public entities, by Italian citizens, and companies two thirds of whose capital is controlled by Italian citizens. The top managers of these companies must be Italian.[293]

According to article 143 of the CODE OF NAVIGATION, Italian ships satisfy the requirements for registration when they are owned by Italian citizens, public or private Italian legal persons, or companies established in Italy or abroad for which it is ascertained by the competent Italian authorities that Italian citizens are in a majority position both as shareholders and in administration and management.[294] The CODE expressly refers to the anti-discriminatory provisions of articles 7 and 221 of the Treaty of Rome establishing the European Economic Community.

Banking in Italy is regulated mainly by the Consolidation Act of 1993.[295] The acquisition of any title to shares of banks, regardless of the purchaser, requires previous authorization of the Bank of Italy, when the acquisition creates a holding greater than 5% of the bank's capital as represented by shares with voting rights, and, independently from such limit, when the holding brings about control of the bank. Variations of said holdings need authorization as well; and holdings in banks, acquired or held through controlled companies, fiduciary companies, or third parties must also be taken into consideration. Authorization may be denied when the parties belong to a state which is a non-member of the European Community which does not guarantee conditions of reciprocity.

The principle of separation between banks and industry is incorporated in the Banking Law which specifically prevents persons directly or indirectly engaged in significant business activity in sectors other than banking and finance from being authorized to buy or hold shares of banks exceeding 15% of the bank's capital as represented by shares with voting rights or in any case to gain control of the same bank.

Regarding the activity of foreign banks in Italy, the Law requires for European Community banks a simple notice from the competent authority of their home country to the Bank of Italy to proceed with the first establishment. For extra-community banks, an authorization of the Bank of Italy is necessary before the first or successive establishments.[296]

Law No. 1 of 1991 (the SIM Law) regulates securities brokerage activities and the organization of the securities market. The securities brokerage companies regulated by this Law are, accordingly, SIMs. Article 160 of the Banking Law refers to this Law, confirming that it remains in force and its provisions apply to Italian banks offering investment services, and, to the extent provided for by article 158 of the Italian

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[292] *Id*. at 774.

[293] *Id*. art. 751.

[294] *Id*. at 169.

[295] Legislative Decree No. 385 of Sept. 1, 1993, G.U. No. 230 of Sept. 30, 1993, O.S.

[296] *See also*, Decree of the Minister of Treasury of Aug. 9, 1993, G.U. No. 212 of Sept. 9, 1993.

Banking Law, to EC banks and affiliated institutions operating in Italy under the regime of the EC Second Banking Directive.

Originally, under the SIM Law, only SIMs and Italian banks and credit institutions authorized by the Bank of Italy could carry out security intermediation activities in Italy with consequent exclusion of any foreign institution. These restrictions were eliminated by the implementation of the Second Banking Directive through Law No. 481 of 1992 so that banks established in the EC were allowed to offer "mutual recognized services" listed in the Annex to said Directive.

In July 1996, the Italian Government approved a Law-Decree to implement the EC Investment Services Directive of 1993.[297] This Decree is going to have considerable impact on the current regulation and will certainly introduce substantial amendments to the SIM Law. The text of the new Decree is not yet available in the Library of Congress, but it should be pointed out that, as an act of the executive, it needs Parliament's approval within sixty days of its publication, and Parliament may introduce amendments to its text.

Nevertheless, it appears that, as a consequence of this Decree, interstate barriers to brokerage business will fall; the Stock Exchange will acquire a different structure; and the SIM Law will be subject to substantial amendments. The Decree also delegates to various authorities the responsibility to issue regulations on many important subjects, prominent among them are those pertaining to the procedures for the opening of the frontier to EC investment companies, and those on non-Community businesses, as well as provisions regulating the holding of stakes in SIMs capital.[298]

Before the issuing of the above-mentioned Decree-Law, Italian law did not allow banks to execute deals directly on the Stock Exchange and on the Secondary Market, and the same rule applied to foreign banks until December 31, 1996. The EC Investment Services Directive of 1993 specified that Member States which have laws not allowing credit institutions to become members of or have access to regulated markets unless they have specialized subsidiaries may continue to apply the same obligation in a non-discriminatory way to credit institutions from other Member States for purposes of access to those regulated markets until December 31, 1996.

Until recent years, radio, television and telephone services were traditionally an Italian Government monopoly. Challenges to this monopoly started in the early 1970s in the field of cable radio-television at the regional level. Subsequently, the private sector also gained access to radio-television broadcasting at the national level. Today, in addition to local stations, several private networks operate in the country. All are licensed by the government.

Legislation introduced in 1990 regulates public and private radio-television operations.[299] The law provides that individuals and companies of foreign nationality are not allowed to acquire a controlling interest in a concern licensed for radio-television activities and extends this prohibition to any entity exercising control over the licensee. Nationals of the countries of the European Union, and those of other countries that apply the principle of reciprocity are excluded from this prohibition.

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[297] MILANO FINANZA (July 13, 1996), at 9.

[298] *Id.*

[299] Law No. 223 of 1990, G.U. No. 185 of Aug. 9, 1990.

Law No. 73 of 1991, regulating cable radio and television,[300] does not contain specific provisions regarding foreign investment restrictions. This Law states, however, that the compatible provisions of Law No. 223/1990 apply to the authorization process for cable radio-television activities. As a consequence, the prohibition against the acquisition of a controlling interest in a concern licensed for radio-television broadcasting by foreign nationals, described above, may also apply to cable radio-television activities.

A 1992 law, which established the basic principles for the reform of the telecommunications sector,[301] concentrated the exclusive exercise of telecommunication services as well as the setting up and operation of the technical installations in one newly established share company. The totality of the shares of this company were reserved by the law to the Italian Institute for Industrial Reconstruction (IRI). Upon completion of the reform of the telecommunications sector, the ownership clause would be lifted and privatization could be implemented by making those shares available to private investors. The ownership clause was lifted in 1993.[302] The law does not contain specific provisions on foreign investment restrictions.

Most recently a new government bill on the rearrangement of the communications sector[303] and the decision on the flotation of IRI's telephone finance company, and other companies in this sector, have been received with strong resistance and opposition among political groups.[304] The Government's determination to press ahead with its privatization program is probably reinforced by the deadline set in the European Union for the total liberalization of the telecommunications market by January 1, 1998.

In the contest of the very ambitious Italian privatization program, the projected dismantling of the Government monopoly over electricity production and distribution, to be implemented in 1997, through the privatization of Italy's National Electric Power Agency ENEL, should be noted.[305]

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[300] G.U. No. 58 of Mar. 9, 1991.

[301] Law No. 58 of 1992, G.U. No. 29 of Feb. 5, 1992.

[302] Law No. 531 of 1993, G.U. No. 300 of Dec. 23, 1993.

[303] IL SOLE-24 ORE (July 18, 1996), at 3.

[304] LA NAZIONE (Aug. 5, 1996), at 5.

[305] LA STAMPA (June 27, 1996), at 25.

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JAPAN

Land and other property

Under the Alien Land Law of 1925,[306] foreign nationals or Japanese corporations in which 50% or more of the employees, shareholders, or officers are foreign nationals or 50% or more of the capital or voting rights are held by foreign nationals or foreign corporations are, in principle, entitled to land ownership. However, articles 4 and 5 of the Law reserve the Government's right to attach conditions to or impose restrictions on an alien's right to land ownership in specific areas designated important for purposes of national defense.

Further restrictions were set forth in the Cabinet Order Relating to Alien Acquisition of Property.[307] According to the Order, a national of a foreign country, including the United States, that maintained normal diplomatic relations with Japan might acquire land, buildings, or accessories to property in Japan for his own personal use. However, if an alien wished to acquire such property for purposes other than personal ones, it was required that he obtain a permit.[308]

This Cabinet Order was abolished when the Foreign Exchange and Foreign Trade Control Law was revised on December 18, 1979, with the following exceptions:[309]

- an alien who had already acquired property under article 3 at the time when the 1979 Law came to be enforced is not affected thereby; or

- an alien who had acquired property before the enforcement of the 1979 Law is required to submit reports as before to the competent minister.[310]

Under the revised Foreign Exchange and Foreign Trade Control Law of 1984, any alien who intends to invest in land and property (except in land and property for personal use, factories and stores for non-profit use, when the purpose of the investment is unclear, etc.) must give prior notice to the Minister of Finance.[311] However, when the Minister deems that the proposed investment in land is likely to cause a rise in the price of land, he may restrict such investment through validation.[312]

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306 Law No. 42, Apr. 1, 1925.

307 Cabinet Order No. 51, Mar. 15, 1949. By virtue of Law No. 88, 1952, it came into force as law after Apr. 28, 1952.

308 *Id.* art. 3.

309 Law No. 65, Dec. 18, 1979; came into force on Dec. 1, 1980.

310 *Id.* art. 7.

311 Art. 20, ¶1, item 10 and art. 22, ¶ 1, item 8, Law No. 44, May 25, 1984.

312 M. Shirasu, *Gaikoku kawase oyobi gaikoku boeki kanriho no ichibu kaisei ni tsuite* (Partial Amendment to the Foreign Exchange and Foreign Trade Law), 1064 KIN'YU HOMU JIJO 51 (Aug. 1984).

Furthermore, under the Agricultural Land Law,[313] any person intending to own farmland is subject to approval of the Agricultural Land Commission established in each city, town, or village.[314]

Securities and investments

A major change in the Japanese regulations on foreign investment became effective December 1, 1980, when the Law Partially Amending the Foreign Exchange and Foreign Trade Control Law (the 1979 Law), enacted December 18, 1979, came into force.[315] Under the 1979 Law, foreign investment is allowed unless specifically prohibited; previously, such investment was prohibited unless specifically allowed.

Formerly, all foreign investments had to have prior approval, in accordance with the provisions of the Foreign Investment Law of 1950. Under the revised 1979 Law, foreigners were required only to file prior notice through the Bank of Japan with the Ministry of Finance. However, a 1991 revision[316] replaced the prior notice requirement, in many instances, with the requirement of the filing of a subsequent report. The prior notice requirement still applies to a number of domestic direct investments as exceptions to the general rule of requiring a subsequent report.[317]

Two types of investments are covered by the 1979 Law, portfolio investment and inward direct investment (cases where the investment is likely to involve participation in management decisions). Direct investments defined in the 1979 Law include:

- any acquisition of stock in an unlisted company, irrespective of quantity or ratio of acquisition; and
- acquisition of shares in a listed company, including companies listed in the over-the-counter market, if shares acquired amount to 10% or more of the issued and outstanding shares of the corporation.[318]

Under present policy, the acquisition of shares in unlisted companies is generally permitted in all business categories with the exceptions of:

- agriculture, forestry, and fisheries;
- petroleum industries;
- mining; and

313 Law No. 229, July 15, 1952, as last amended by Law No. 44, May 17, 1988.

314 *Id.* art. 3.

315 Law No. 228, Dec. 1, 1949, as last amended by Law No. 65, Dec. 18, 1979. By this amendment the old Foreign Investment Law of 1950 was abolished.

316 Law No. 40, Apr. 26, 1991; came into force on April 1, 1992. *See also* 1419 TOKI NO HOREI 6 (Feb. 15, 1992).

317 A. D. Smith, *Exchange Control, Exchange Investment, in* JAPANESE BUSINESS GUIDE 70-255 (CCH International, 1995).

318 Art. 26, ¶1, of the 1979 Law.

- leather and leather products manufacturing.[319]

Proposed investments in these restricted business categories are subject to government validation after a case-by-case review. The provisions on these restricted industries are based upon the Japanese reservations to the OECD Code of Liberalization of Capital Movements. Because of the reservation, Japan has no obligation to allow domestic direct investments in the restricted industries.[320]

In addition, there are other industries in which foreign investments are subject to the requirement of a license under special, separate laws. These industries, such as banking, insurance, civil aviation, broadcasting, and utilities, are tied to the public interest and to national security. They are commonly excluded from international investment relations. Japan also retains the following business categories as non-liberalized industries in accordance with article 3(i)-(ii) of the OECD Code of Liberalization of Capital Movements:

- arms, gun powder, atomic energy, aircraft, and space development to protect national security; and

- narcotics manufacturing, vaccine manufacturing, and security guard services to protect public order and safety.[321]

Communications

Under the provisions of the Wire Television Broadcast Law,[322] any person desiring to install wire television broadcast facilities (including cable) or engage in a television broadcast business by using such facilities is required to obtain permission from the Minister of Posts and Telecommunications. However, the Minister may not give permission to the following:

- persons who do not have Japanese nationality;

- a foreign government or its representatives;

- a foreign corporation or group; or

- persons mentioned in the above three categories who occupy managerial positions or who exercise more than 20% of the voting rights in any domestic corporation or group.

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319 Cabinet Decision, Dec. 26, 1980.

320 Smith, *supra* note 13, at 75-620.

321 See Z. Tatsumura, *Gaikokujin ni yoru kabushiki shutoku to hokisei* (Legal Control of the Acquisition of Stocks by Aliens), 118 SHOJI HOMU 35 (May 25, 1989).

322 Law No. 114, July 1, 1972, as last amended by Law No. 54, June 27, 1990, art. 5, item 4.

Similar restrictions are also set forth in the Radio Wave Law,[323] which regulates the establishment of broadcast facilities. The above percentage is changed to 33% in the Telecommunications Business Law,[324] which regulates the telephone business among others.

Banking, insurance, and securities firms

The Bank Law[325] and the Foreign Insurance Business Law[326] require a license from the Minister of Finance for each branch or agency of a foreign bank or insurance company, respectively, that is set up in Japan. The establishment of a representative office of a foreign bank requires only the notification of the Minister, but the activities of such offices are limited to collecting and giving information about the bank and engaging in other similar functions designated by the Ministry of Finance.[327]

Under the Foreign Securities Firms (or Dealers) Law,[328] certain activities may be conducted abroad without the establishment of a licensed branch in Japan. However, if a foreign securities company intends to conduct securities business in Japan on a wider scale, it must do so through a licensed branch.[329]

Transportation and utilities

Under the Aviation Law,[330] aliens and Japanese corporations controlled by aliens may not own Japanese aircraft. The Aviation Law further states that an aircraft having the nationality of any foreign state must obtain a license to conduct:

- air navigation between points inside and outside in Japan;
- operate a business to transport passengers or freight on any flight specified in this law for remuneration; and
- transport passengers or freight for remuneration between points within Japan (cabotage).[331]

Other laws relating to transportation and utilities are not applicable to foreign nationals.

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323 Law No. 131, May 2, 1950, as last amended by Law No. 71, June 16, 1983, art. 5, ¶ 4, item 2.

324 Law No. 86, Dec. 25, 1984, as last amended by Law No. 61, May 27, 1992, art. 11, item 7.

325 Law No. 59, June 1, 1961, as last amended by Law No. 63, 1993, art. 47.

326 Law No. 105, June 7, 1995.

327 *Id*., art. 52.

328 Law No. 5, Mar. 3, 1971, as last amended by Law No. 89, 1993.

329 *Id*. art. 3, ¶¶ 2 & 3.

330 Art. 4, Law No. 231, July 15, 1952, as last amended by Law No. 85, 1995.

331 *Id*. arts. 127, 129 & 130.

Expropriation and compensation

Article 29 of the Constitution provides that "the right to own or to hold property is inviolable.... Private property may be taken for public use upon just compensation therefor."[332] The Land Expropriation Law of 1951[333] further elaborates on land expropriation and compensation. It is construed that private property mentioned in the Constitution includes that owned by foreign nationals.

Article VI(3) of the 1953 Treaty of Friendship, Commerce and Navigation with the United States[334] reads:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

The language used in the treaty is broader than that of article 29 of the Japanese Constitution.[335]

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332 Promulgated on Nov. 3, 1946; came into force on May 3, 1947.

333 Law No. 219, June 19, 1951, as last amended by Law No. 87, 1995.

334 4 UST 2063; TIAS 2863.

335 A. A. Ehrenzwig, *et al.*, AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW 87
87 (Dobbs Ferry, Oceana Publications, 1964).

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KENYA

Introduction

Kenya enjoys a stable outlook on foreign private investment. In general, the Kenyan Government does not interfere in foreign private investment. However, utilities and large-scale infrastructure are deemed reserved for the public sector.[336] Even though article 75 of the Constitution of Kenya of 1969, as amended,[337] guarantees the right to own property, this same article also constitutes authority for the Government to compulsorily take possession of and acquire property.

Restrictions

A foreigner is defined under various statutes. In regard to foreign corporations, these include, articles 87-98 of the Constitution of Kenya; the Kenyan Citizenship Act of 1963, as amended;[338] the Immigration Act of 1967, as amended;[339] the Aliens Restriction Act of 1973, as amended;[340] and the Companies Act of 1962, as amended.[341] Any person or corporation that is not a citizen is a foreigner.

Concerning foreign investments, sections 8 and 8A of the Foreign Investment Protection Act of 1964, as amended,[342] has incorporated article 75 of the Constitution of Kenya as part of this Law. These two sections deal with expropriation of a foreign enterprise and compensation. However, the mode and manner in which such expropriation can take place is only as provided for by article 75 of the Constitution which guarantees the right to own property of any kind. As alluded to above, however, this same article also vests authority in the Government to compulsorily take and acquire property based on public policy considerations such as defence, public safety, public order and others. Where the Government expropriates property, it must pay full and prompt compensation.

Foreign investment in large-scale agricultural projects is by and large discouraged, especially if huge tracts of land are involved. Specific legislation dealing with particular crops may also contain additional restrictions for business in these areas. Restrictions on banks and banking as regards a foreign investor are

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336 **For details** on restrictions on foreign property ownership and investment in Kenya, **see** the Law Library study on the same topic prepared by the author. It is in process of publication. All references examined in this overview are fully discussed in this study.

337 1 LAWS OF KENYA (rev. 1992).

338 5 LAWS OF KENYA, Ch. 170 (rev. 1988).

339 *Id*. Ch. 172 (rev. 1984).

340 *Id*. Ch. 173 (rev. 1985).

341 14 LAWS OF KENYA, Ch. 486 (rev. 1978).

342 15 LAWS OF KENYA, Ch. 518 (rev. 1990).

primarily contained in the relevant sections of the Exchange Control Act of 1950, as amended.[343] The investor must be aware of restrictions relating to transactions in gold, currency, payments, securities, debts, imports and exports, transfers and settlement of property. All such transactions require the permission of the Central Bank of Kenya. They can only be carried through authorized dealers, invariably banks.

On the other hand, the Exchange Control Act; the Companies Act; the Registration of Business Names Act of 1951, as amended;[344] the Trade Licensing Act of 1968, as amended;[345] and the Alien Restriction Act all contain some form of restriction on a foreign company operating in Kenya. In the communication sector, the monopoly exercised by public corporations and boards such the Kenya Posts and Telecommunications Corporation, the Kenya Broadcasting Corporation and the Board of Censors limits foreign investment opportunities.

Restrictions in the transportation industry only pertain to strict control concerning merchant shipping under the Merchant Shipping Act of 1967, as amended.[346] As above noted, utilities and infrastructure are the exclusive domain of the public sector.[347] Other restrictions on property ownership may be found in individual land and other real estate property legislation. The area of taxation also indicates a disparity in the manner in which foreigners are taxed compared to Kenyan citizens.

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[343] 4 LAWS OF KENYA, Ch. 113 (rev. 1988).

[344] 14 LAWS OF KENYA, Ch. 499 (rev. 1990).

[345] *Id*. Ch. 497 (rev. 1990).

[346] 11 LAWS OF KENYA, Ch. 389 (rev. 1989).

[347] **See** AFRICAN TAX SYSTEMS: KENYA §§ A & B (Supp. 1995).

96-2855

THE REPUBLIC OF KOREA

Real estate acquisition

The 1994 Law for Alien Land Acquisition and Management,[348] which replaced the 1961 Land Acquisition Law, is intended to ease the acquisition of land for alien nationals or companies as well as to control the management of the acquired land so as not to allow it to be used for the purpose of land speculation.

In order to acquire land rights, a foreign national or company must obtain permission from the Minister of Construction. However, the acquisition of land for residential purposes by a foreign national (one residence per household only) or acquisition of land by a foreign manufacturing company for industrial sites may be accomplished simply by reporting to the Minister. Land for offices and additional housing requires approval.

When it is deemed necessary for national defense or for industrial or other public necessity, the Minister may deny or attach conditions to or otherwise impose on an alien's or an alien juristic person's right to land ownership. Under the 1994 Law, the range of businesses allowed to own land has been expanded to include all industrial sectors in which foreign investments are allowed under the Foreign Capital Inducement Law (999 sectors, as of January 1994). Under the old law, foreign companies could have land holdings in only about 500 industrial fields.

An alien resident may be allowed to acquire land plots of less than 200 *pyong* (660 square meters) for residential purposes and of less than 165 square meters (50 *pyong*) for building retail stores. The size of industrial lots allowed for a foreign manufacturing company is determined by the standards set forth in the Law Concerning Industrial Location and Factory Establishment.[349] Even under the 1994 Law, a foreign national or company's right to acquire land may be subject to restrictions if a Korean national or company's right to land ownership is discriminated against in that alien's country.

Securities and foreign investments

Since the enactment of the Foreign Capital Inducement Law[350] in 1966, the government has gradually liberalized its rules on foreign direct investment. Under the 1992 revision, foreign investors are required to make a simple reporting of their investments, rather than obtain approval from the Minister of Finance. The reporting system that applies to all investments, regardless of the share, in liberalized areas of business is the principal method of validating foreign investments, with certain exceptions.

The aggregate ceiling on foreign stock ownership for general companies listed on the Korea Stock Exchange is 18% (20% from Oct. 1, 1996) and that for public utilities (e.g. Korea Electric Power Co.) is 12%

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[348] Law No. 4726, Jan. 7, 1994, art. 1.

[349] Law No. 4312, Jan. 13, 1990, as last amended by Law No. 5109, Dec. 29, 1995.

[350] As last amended by Law No. 5091, Dec. 29, 1995.

(15% from Oct. 1, 1996). Foreign ownership by a single foreign investor is limited to 4% (5% from Oct. 1, 1996) of general companies and 1% of utilities.[351]

On May 13, 1996, the Ministry of Finance and Economy announced that 47 more business sectors, including law firms, newspaper publishing, city bus services, petroleum service stations, and all types of vocational training schools will be open to foreign investment from 1997 through 2000. The number of sectors to be opened, in part or in full, will be 28 in 1997, eleven in 1998, six in 1999, and two in 2000. This is a revision of the Five-Year Foreign Direct Investment Liberalization Plan of 1993.[352]

The move is part of the Government's effort to join the Organization for Economic Cooperation (OECD) and also part of its long-range market opening program designed to promote foreign direct investment and help globalize the Korean economy. Under the new measure, foreign direct investment will be liberalized up to 97.5% in the year 2000, which will leave only 44 industrial sectors not open to foreign investment out of the 1,148 business categories currently listed in the Korean Standard Industrial Classification. As of May 1996, 120 of these categories remained open to foreign investment.[353]

Communications

The Broadcast Law[354] prohibits aliens, foreign governments and their representatives, and foreign corporations from investing in radio and television stations in Korea. Under the Comprehensive Wire Broadcast Law,[355] which regulates cable companies, foreign investment is allowed in the field of supplying cable programs, but at present only up to 15% of the programs may be supplied by foreign investors.

Under the Telecommunications Business Law,[356] no permission to invest will be granted to any foreign national or corporation or to any corporation or organization whose representative is an alien, one-third or more of whose officers are aliens, or one-third or more of whose voting rights are exercised by aliens.

Under the present law, foreign investment in the wire telecommunications field is completely prohibited, but up to a 33% share of ownership in cellular and other wireless telecommunications services is allowed. However, beginning in January 1998, foreign nationals will be allowed to invest up to a 33% share both in wire and wireless telecommunications service companies. Foreigners who set up a wire or wireless telecommunications company in Korea with Korean partners will also be allowed to invest a 33% share.[357]

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351 KOREA NEWSREVIEW, Mar. 2, 1996, at 22; HAN'GUK ILBO, Sept. 4, 1996, at 1.

352 KOREA NEWSREVIEW, May 18, 1996, at 14.

353 *Id*.

354 Law No. 3978, Nov. 28, 1987, as last amended by Law No. 4441, Dec. 14, 1991, art. 9.

355 Law No. 3914, Dec. 31, 1986, as last amended by Law No. 4694, Dec. 31, 1993, art. 4.

356 Law No. 4394, Aug. 10, 1991, as last amended by Law No. 4441, Dec. 14, 1991, art. 18.

357 This information was provided by Mr. B. H. Nam of the International Economy Division, the Ministry of Finance and Economy, Seoul, Korea.

However, the Government will continue to prohibit foreign companies from becoming the largest shareholders of Korea-based telecommunications service operators. The new policy is part of the telecommunications market liberalization plan that Korea has presented to the World Trade Organization (WTO) as part of an "initial offer list."

Banking, insurance and securities firms

The Bank Law[358] requires that a license be obtained from the Monetary Board for each branch or agency of a foreign bank upon the recommendation of the Superintendent of the Bank Supervisory Board of the Bank of Korea**.** Under the Securities Transaction Law[359] and the Insurance Business Law,[360] a license must be obtained from the Minister of Finance and Economy for each branch or agency of a foreign securities or insurance company, respectively, to be established in Japan.

Transportation

Under the Aviation Law,[361] no permission to invest is granted to any foreign national or corporation or to any corporation or organization whose representative is an alien, 50% or more of whose representatives are aliens, or 50% or more of whose officers are aliens. The Aviation Law further states that a foreign aircraft must obtain a license to conduct air navigation between points within and outside Korea; to operate a business to transport passengers or freight as set forth in this Law; or to transport passengers or freight between points within Korea (cabotage).[362]

Expropriation and Compensation

Article 23 of the Constitution[363] provides that: "the right of property of all citizens shall be guaranteed.... Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by law. However, in such a case, just compensation shall be paid." Article 126 states that no private enterprises shall be nationalized or transferred to State ownership except in cases as prescribed by law to meet urgent necessities of national defense or the national economy.

The constitutional provisions are spelled out in the Land Appropriation Law.[364] These provisions are also applicable to property owned by foreign nationals. Article VI(3) of the 1956 Treaty of Friendship,

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[358] Law No. 139, May 5, 1950, as last amended by Law No. 4833, Dec. 31, 1994, art. 37-2. There are 52 foreign banks from 13 different countries operating 74 branches in Korea: 26 U.S.branches, 15 Japanese branches, and 17 European branches. *See* THE GUIDE TO FOREIGN INVESTMENT IN KOREA 43 (Seoul, Ministry of Finance, 1995).

[359] Law No. 3043, Dec. 31, 1977, as last amended by Law No. 4865, Jan. 5, 1995.

[360] Law No. 3043, Dec. 31, 1977, as last amended by Law No. 4865, Jan. 5, 1995.

[361] Law No. 4435, Dec. 14, 1991, as last amended by Law No. 4647, Dec. 27, 1993, art. 6.

[362] *Id.*, arts. 145, 147-149.

[363] Promulgated on Oct. 29, 1987.

[364] Law No. 965, Jan. 15, 11962, as last amended by Law No. 5109, Dec. 29, 1995.

Commerce, and Navigation with the United States[365] guarantees American citizens the prompt payment of just compensation for expropriation.

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365 Signed on Nov. 28, 1956; entered into force on Nov. 7, 1957. 8 UST 2217; TIAS 3947.

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THE NETHERLANDS

Dutch law is non-discriminatory regarding the nationality or residence of the parties involved in an investment in the Netherlands. The investment climate in the Netherlands has been described as "a very liberal policy towards foreign investment, similar to U.S. policy."[366]

The status of a foreign-owned company in the Netherlands is exactly the same as that of a purely Dutch enterprise. There are no special rules for foreign-owned businesses, apart from a few exchange-control formalities; and Dutch registered companies may be formed by foreigners without difficulty. At most, the Dutch Central Bank requires that monetary transactions be reported to it, for statistical purposes, so that regulatory action can be taken when needed.

The acquisition of a Dutch company of any substance may trigger the application of laws and rules of regulatory bodies, which are aimed at protecting the rights of parties or persons which may be affected (such as employees and minority shareholders) and at maintaining the financial integrity of the target.

Any company organized under the laws of another country may freely operate in the Netherlands through a Dutch branch, and foreign individuals or companies may be members of Dutch partnerships or may enter into commercial agreements with Dutch companies or individuals.

There are no obstacles for foreigners to acquire real property in the Netherlands, including agricultural, residential or commercial land and their buildings.

With respect to mergers and acquisitions, foreign individuals and entities are generally treated the same as Netherlands individuals and entities. Nationality and/or residency requirements may apply to aviation, shipping, the supply of military goods and services and a few other sectors.[367] For example until 1994, the COMMERCIAL CODE[368] required that for a ship to be registered as a Dutch ship, the ship had to be owned by Dutch nationals or a corporation established in the Netherlands of which at least two-thirds of the stock was owned by Dutch nationals. As a result of a decision of the Court of Justice of the European Community in 1991,[369] the conditions for nationality and registration of ships was changed.[370]

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[366] L. M. Spencer, AMERICAN ASSETS, A EXAMINATION OF FOREIGN INVESTMENTS IN THE UNITED STATES 20 (Congressional Economic Leadership Institute, July 1988), at 20.

[367] P. N. Wakkie & H. T. van der Meer, MERGERS AND ACQUISITIONS IN THE NETHERLANDS, LEGAL AND TAX ASPECTS 9 (Deventer, Kluwer Law and Taxation Publishers, 1992).

[368] COMMERCIAL CODE OF THE NETHERLANDS, art. 311.

[369] July 25, 1991, C-221/89.

[370] Law of June 22, 1994, STAATSBLAD (official law gazette of the Netherlands, Stb.) 507.

From 1994 on, a ship is a Dutch ship if it belongs for at least two-thirds to one or more nationals or corporations who have the nationality of one of the Member States of the European Union. The corporation has to be established in the Netherlands, and the ship has to be managed from the Netherlands. Furthermore the daily management of the corporation has to be in the hands of one or more persons who possess the nationality of one of the Member States of the European Union.

Operations of foreign banks in the Netherlands must be licensed before they may conduct local business.[371] Subsidiaries and branches of foreign banks are whenever possible treated on an equal footing with banks having their head office in the Netherlands. The provisions of the Banking Law also apply to foreign banks' branches and subsidiaries established in the Netherlands. Branches are required to maintain separate accounts and must submit operational returns to the Central Bank in the same manner as Dutch institutions.[372]

The Law on the Supervision of Investment Companies entered into force on April 15, 1991.[373] It prohibits in or from the Netherlands, without a license, for one to request or obtain, outside a limited group, for a participation in an investment fund or to offer participation rights. One must apply for a license from the Netherlands Central Bank. Conditions involving expertise, reliability, and financial guarantees have to be met.

The provisions of this Law also apply to foreign investment undertakings that seek to market their participation rights in or from the Netherlands. However, an exception is made in this respect for investment undertakings which are established in another Member State of the European Union, if the undertaking falls within the 1985 EC Directive relating to undertakings for collective investment in transferable securities.[374] The Minister of Finance may refuse or withdraw a license or make the license subject to certain restrictions or change restrictions if the investment institution has its seat in a non-European Union country where Dutch financial institutions are not admitted or where unreasonable restrictions are imposed on Dutch financial institutions. The Minister of Finance has the same powers if a natural person or legal entity which has such country's nationality can directly or indirectly exercise control in the investment institution.[375]

There are no restrictions with respect to the foreign ownership of radio and television stations. With regard to telecommunications in general, the European Union adopted Council Resolution No. 94/C 379/03 on December 22, 1994, according to which telecommunication services in the Member States of the European

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[371] Law on Banking, Law of Apr. 23, 1948, Stb. I166, as amended, art. 2.

[372] *Id.* art. 27.

[373] Law of July 27, 1990, Stb. 380.

[374] 85/611/EEC, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES (OJ) L 375.

[375] W. A. Hoyng, *et al.*, THE NETHERLANDS PRACTICAL COMMERCIAL LAW 146 (London, Longman Group Ltd., 1992).

Union are to be deregulated by January 1, 1998.[376] Starting on July 1, 1997, the monopoly of the Dutch Government on telephone services will end. This market will also be open to foreign investors.[377]

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376 OJ 1994, C 379.

377 NRC/Handelsblad, July 16, 1996, at 3.

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RUSSIA

Background

Five years ago Russia opened its doors to foreign investments. This process began with the enactment of Presidential Edict No. 213 of November 15, 1991, on Liberalizing Foreign Economic Activities within the RSFSR Territory.[378] Due to the rush with the adoption of the new legislation, attention apparently was not paid to proper legal guarantees for foreign investors. The first legal documents created a controversial situation when all areas of the economy were declared open for foreign investments, but the existing legislation did not reflect the realities of free entrepreneurship.

The orientation of the Russian state's economic policies toward integrating the country into the world economy has made it necessary for Russia to liberalize its foreign economic activities and legislation. Presently, this area is regulated by numerous laws, decrees, orders, and regulations which established a special legal regime for foreigners and created constitutional guarantees for their investments. According to the State Committee for Statistics, foreign investments reached $6 billion U.S. dollars by the beginning of 1996. Russia received $3 billion in foreign investment in 1992-93 and $1 billion in 1994. Last year $1.6 billion was invested in the country; direct investments made up almost $1 billion while credits and investment portfolios accounted for the rest of the sum.[379]

Currently, two major trends dominate the thought patterns of Russian legislators: to encourage foreign investors, and to protect domestic manufacturers. For these purposes, in May 1992, the Russian Parliament passed a Pledge Law.[380] It validated the right of individuals and businesses to encumber real and personal property as security for debts. Before this Law passed, United States banks and investors were reluctant to loan funds to Russian enterprises because of uncertainty concerning the validity of agreements securing repayment. The Pledge Law allows an owner to encumber its interest in an enterprise, a leasehold, land, buildings, receivables, contracts, bank accounts, and securities. Some major problems remain in implementing this Law. These include those involving the verification of title to property asserted by the person pledging that property, recordation of instruments evidencing liens and title to property, and lack of proper foreclosure mechanism and methods for obtaining and enforcing judgments.

Of significant importance in reassuring foreign investors on the country's legal framework is Presidential Decree No. 1466 on Improvement of Work with Foreign Investments.[381] Under this Decree, new laws affecting foreign investments shall not apply for three years to enterprises already existing at the time any new law comes into force, unless the foreign investor is entitled to more favorable treatment under

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[378] ROSSIISKAYA GAZETA (official gazette of the Russian Federation Government, RG RF), Nov. 17, 1991.

[379] ROSSIISKIY STATISTICHESKIY EXHEGODNIK (Russian Annual Statistic Report) 27 (Moscow, 1996).

[380] VEDOMOSTI S'EZDA NARODNIH DEPUTATOV I VERHOVNOGO SOVETA RSFSR (Report of the Congress of People Deputies and Supreme Soviet of the Russian Federation, VSND & VS RF), 1992, No. 29, Item 12349.

[381] SOBRANIE AKTOV PRESIDENTA I PRAVITELSTVA RF (Collection of Acts of the President and the Government of the Russian Federation, SAPP RF), 1993, No. 40, Item 3740.

the new law. Thus, foreign investors can essentially lock in the legal framework for their businesses without fear of being locked out of a change in law that works to their advantage. If a change in law is significantly adverse to the business, the three-year lock in the old law should provide enough time to make necessary adjustments. In addition, this Decree clarifies the supremacy of Russian Federation law (including both parliamentary acts and presidential decrees) over all regional, departmental, local, and other *additional restrictions* on foreign investors not expressly stipulated by national law.

Of special importance is RF President's Decree No. 721 of May 16, 1996, on Measures Providing the Transition to Convertibility of the *Ruble*.[382] It recognizes the limited *ruble* convertibility, and amounts to a governmental guarantee to transfer interest and dividends on capital invested in Russia.

At the same time, in July 1996, the State Duma adopted a Law on Measures to Protect Russia's Economic Interests in Trading with Foreign Countries.[383] This Law says that protective measures to prevent a substantial damage to Russian goods can be taken in the form of import quotas, temporary and other special customs taxes. Under the Law, the Government has the right to introduce protective quotas for imports if this measure is called for by the condition of the Russian balance of payments. This statute followed the Law on State Regulation of Foreign Trade Activity.[384] This first post-Soviet comprehensive legislation that defines the state's role in trade implemented quantitative restrictions (art. 15) and protective measures in relation to import of goods (art. 18), providing the government the guidelines it needed to implement *interim* anti-dumping safeguard measures, and a countervailing duty regime.

Some particular legal restrictions on foreign ownership and investments remain in specific areas of the economy.

Corporate issues

The Russian Federation Federal Law on Joint Stock Companies adopted in December 1995[385] established the new procedure for registering branches and representative offices of non-resident companies. It places the creation of new branches and representative offices of the foreign Joint-Stock Company within the exclusive competence of the company's board of directors. However, at the same time, article 5 of the Law provides that the charter of the company must contain information on the company's branch and representative offices. Therefore, the creation of a new branch or a representative office of a company requires amending the charter which, of course, is within the exclusive competence of the company's general meeting of shareholders. Furthermore, in practice, tax authorities require that a company's branch or representative office be registered by the local authority of the city where it is located.

The Joint Stock Company Law also stipulates that non-residents may sell their shares only at their market value in order to prevent share dilution.

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382 SOBRANIE ZAKONADATELSTVA RF (Collection of Legislation, SZ RF), 1996, No. 21, Item 2465.

383 SZ RF, 1996, No. 28, Item 3349.

384 SZ RF, 1995, No. 42, Item 3923.

385 SZ RF, 1996, No. 1, Item 1.

Production sharing legislation

Presently, the right to use mineral resources is regulated by several laws: the Law on Mineral Resources; the Law on Shelves; the Law on Production-Sharing Agreements; the Law on Subsoil; and the Statute on the Procedure and Rules of Licensing. In 1995, only three licenses were issued to 100% foreign capital companies, and 3.5% of all issued licenses were given to companies with foreign participation. For the same period 228 auctions and tenders were held to involve 2,100 contenders, including 211 foreign ones.[386]

The Law on Production Sharing Agreements was passed in December 1995.[387] It is clearly less comforting to foreign investors than had been hoped for by many. It had been expected that by the end of 1996 five or six agreements worth approximately $100 billion would be concluded with investors on output sharing terms. Now all these plans are in serious doubt. It will also be hard to implement the three projects for which agreements have already been reached.[388]

Under this Law, the output by a foreign company is divided into compensatory and profit parts. The compensatory part remains at the disposal of the foreign company to compensate for initial capital inputs and current expenses. The profit part is divided between the investor and the state according to earlier agreed proportions. The investor pays a profit tax at a rate sealed in a relevant agreement, effects payments for natural resources, the size of which depends on the state's concrete share in the use of minerals, established on the basis of a sliding scale where account is taken of the rate of internal profitability, the deposit's yield and other factors.

The *operator under the agreement* concept introduced by the new Law restricts foreigners. The language of the Law states that the investor is prohibited from conducting work under the agreement itself. It is the operator, not the investor, who under the Law is able to conduct all work. The operator functions under a commission agreement. Although, the operator works independently, the investor is liable before the state for the actions of the operator. It is the operator, not the investor, who is exempt from the payment of a value added tax and excise taxes on importation to the customs territory of the Russian Federation of goods and services in accordance with project documentation. The operator must be a Russian legal entity or be specially registered if it is a foreign legal entity.

Some other legal provisions can restrict foreign economic activities also. For instance, not all plots of subsoil may be used on the basis of Production-Sharing Agreements - only those listed in federal law to be published by the Federation Council. To date, such parcels have not been identified. Production-Sharing Agreements must be authorized by a commission created by the Government of the Russian Federation. Again, the commission has not been implemented. The new Law allows for the creation of a special management committee to coordinate activities under the agreement, which in reality increases state control over the implementation of the Agreement. Each party has the right to appoint an equal number of representatives to the committee. Although, the creation of the committee is mentioned in the Law as a permitted element of the Agreement, it seems likely that this will become the general practice. Moreover, the Law provides that each foreign investment in strategic and offshore areas must be approved by the lower chamber of the Parliament.

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386 V. Orlov, *For Lease or For Sale?* PANORAMA (Moscow, 1996) No. 27, at 11.

387 SZ RF, 1996, No. 1, Item 18.

388 *See* FBIS-SOV-96-149, Aug. 1, 1996, at 37.

Banking activities

All activities of foreign banks shall be particularly licensed. The restrictions on foreign banking licenses deal mostly with limitations on services to Russian resident entities and citizens. The RF President's Decree on the Activities of Foreign Banks and Joint Banks Involving the Funds of Nonresidents on the Territory of the Russian Federation of November 17, 1993,[389] prohibited foreign banks from extending their banking services to Russian citizens and companies until January 1, 1996. This prohibition included their branches, as well as joint banks with foreign majority ownership. Consequently, the above banks could transact business in Russia with foreign nationals and companies only.

The legal framework for the licensing of foreign banks and banks with foreign investments was established in April of 1993 in Central Bank Regulations on the Conditions for Opening Banks with the Participation of Foreign Investments on the Territory of the Russian Federation (the *Conditions*).[390] Pursuant to the Conditions, licenses are issued by a Board of Directors of the RF Central Bank after consideration of the following factors:

- the order of submission of application;
- the financial position and business reputation of the founders; and
- geographical representation of the founders and the character of bilateral relations between Russia and the founder's country of domicile.

In addition, the Conditions permit foreign banks with "stable financial conditions and an irreproachable business reputation" to open a branch in Russia if the bank's short-term obligations have ratings not lower than AA, prime-1 or equivalent under the IBCA, Moody's or Standard and Poor's classifications. The foreign bank's home office must agree to provide to the RF Central Bank an unconditional guarantee for the debts of the branch. Each branch of a foreign bank or a local bank with foreign participation must obtain a separate license from the board of directors of the RF Central Bank.

The Conditions set fairly high minimum capital requirements for foreign banks and local banks with foreign participation in comparison with the requirements for the wholly-owned banks. At least one foreign participant of a local bank with any level of foreign participation must contribute the equivalent of at least $2 million to the charter capital of the bank. Under previous regulations still in effect, a bank must have at least three participants (all of which may be foreign), and no participant may hold more than a 35% interest in the bank. The capital requirement for a branch is set at a minimum capital equivalent of $5 million.

Currency regulations

The Russian Federation Law on Currency Regulation and Currency Control was enacted on November 4, 1992.[391] It provides basic concepts governing the currency of the Russian Federation, as well

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389 RG RF, Dec. 1, 1993.

390 EKONOMIKA I ZHIZN (Economy and Life) (Moscow, 1995), No. 15, at 14.

391 VSND & VS RF, 1992, No. 45, Item 252.

as securities, foreign currency, currency transactions for residents and non-residents. For the purpose of the currency transactions, the Law distinguishes between residents and non-residents. The respective rights of the two categories are defined by the Law and related regulations. For example, it simply declares that non-residents have a right to transfer, import and export any currency into or out of the Russian Federation without any restrictions if they observe custom rules (art. 8, ¶ 1). Moreover, the Law does not prescribe the procedure for opening accounts, for transferring funds, for importing currency and other similar activities. Bringing hard currency across the Russian border in either direction remains a major obstacle for foreign investors.

Only authorized banks may engage in the purchase and sale of foreign currency in Russia. All foreign currency transactions must conform to the procedure established by the RF Central Bank. Transactions which violate this rule are invalid.

The vast majority of the Law's provisions consist of delegations of rule-making authority. The Law grants many government agencies the right to enact supplementary rules regulating currency transactions. These are: the President, the Parliament, the Government, the Central Bank, the State Committee on Customs, and the State Commission on Securities and Security Markets.

Treasury bills market

An attempt to establish a system of comprehensive regulation of the Russian treasury bills market comprised of short-term bonds and medium-term, floating-rate notes is the Law on the Security Market of April 23, 1996.[392] However, the Principal Conditions of Treasury Bills Issues adopted by Government Resolution No. 107 of February 8, 1993,[393] remains in force. It provides that the decision to issue each tranche of Treasury Bills is made by the Ministry of Finance pursuant to an agreement with the Central Bank. Pursuant to section 6 of the Principal Conditions, the Ministry of Finance may restrict the scope of potential owners for very tranche of bonds, and to date has usually limited foreign ownership to 10% of each tranche. The Ministry of Finance has regularly exercised this authority at the time of issuance of each tranche of bonds by limiting the percentage of such the bonds available for purchase by foreign investors. The Ministry of Finance and the Central Bank claims that the level of this restriction was not picked randomly but resulted from an economic analysis undertaken by the Ministry of Finance and the Central Bank.

> The strategy of the Government has been to establish confidence in short-term bonds, and then create economic incentives for investment in medium and long-term Government debt securities. The Ministry of Finance and the Central Bank want to prevent foreign investors from concentrating exclusively on short-term investments. Another concern is the possibility of market disruption in the event that foreign investors react to political developments by immediately withdrawing from the market. Moreover, the Central Bank purportedly cannot handle more than US $2 billion of volatility in the government securities market and the 10% restriction was based on this determination as well.[394]

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392 SZ RF, 1996, No. 17, Item 1918.

393 SAPP RF, 1993, No. 7, Item 567.

394 S. Mitin, *Foreign Investors will not be discriminated on the GKOs Market*, FINANSOVIYE IZVESTIYA (Financial News), No. 94 (223) (Nov. 30, 1995), at 3.

Although the Russian Central Bank issued an important decision in February of 1996 that non-residents in Russia are now permitted to purchase short-term bonds and repatriate the profit received from the transactions with them, the participation of non-residents in the bond tenders is bound to significant limitations:

- non-residents are permitted to take part only in the primary sales and are not accepted for the transactions in the secondary market; non-residents are not allowed to resell these securities before repayment;

- the Central Bank has introduced the institute of intermediaries; this role will be played by the Russian foreign banks;

- the volume of foreign investments in state securities shall not exceed US $500 million; and

- the bank conversion rate, the fees, and the profitability of the bonds for non-residents shall be fixed by the Central Bank.

Non-residents are allowed to take part in the tenders for both three-month (limit for the first sale) and six-month bonds. The maximum profitability of the treasury bills for non-residents has been fixed. It amounts to about 25% annually.

Insurance activities

Under the Law on Insurance of November 27, 1992,[395] both domestic and foreign insurers may conduct an insurance business in Russia. However, foreign insurers may be subject to special restrictions. The decree implementing the Law states in section 5 that:

> ...foreign legal persons and legal citizens have the right to create insurance organizations on the territory of the Russian federation only in the form of limited partnerships or joint-stock companies.

and that the "foreign investor's share in the charter capital of such an organization may not exceed 49% in the total."

The Law permits intermediary activities by insurance agents and brokers, but it forbids intermediary activity on Russian territory on behalf of foreign insurance companies, unless such activity is authorized by an international treaty.

Real estate ownership

No restrictions exist in this area.

Labor relations

The current Russian Law on Foreign Investments regulates labor relations at all enterprises with foreign participation in a uniform manner, including joint ventures in its article 33.[396] According to the first

[395] VSND & VS RF, 1993, No. 2, Item 56.

[396] VSND & VS RSFSR, 1991, No. 27, Item 1008.

part of this article, labor relations, including matters of hiring, dismissal, guarantees and compensation, at all enterprises in which foreigners participate, are regulated by collective bargaining agreements and individual contracts. This means that the administration cannot resolve labor relations problems independently; relations are required to be resolved on the basis of collective bargaining agreements. Secondly, it is possible to resolve all labor related issues with regard to all workers of the firm, Russian and foreign, in the same collective bargaining agreement. At the same time part 2 of article 33 of the Law on Foreign Investments introduces a reservation: conditions of collective agreements cannot compensate workers at a rate below the minimum established by Russian law.

Communications

Major legal acts which regulate the sphere of communications, such as the RF Law on Communications, the Statute on Licensing of TV and Radio Broadcasting, Rules of the Providing of Telegraph and Telephone Services, and the governmental Decree on Licensing Activities in the Field of Communication do not provide any additional economic restrictions for foreigners. The same rules for foreign investments and enterprises as in other areas of the industry, basically, are valid in the field of communications also. However, there are some prohibitions against foreign use of particular frequencies and transmission channels.

Land ownership

Land ownership, and especially agricultural land ownership, is a sensitive political, economic and public issue in Russia. The right to own land is embodied in the Constitution and the new CIVIL CODE, and most Russian land is now privately, although, collectively owned. President Yeltsin attempted to reform Russian farm ownership early in 1996 by issuing a decree that allowed only members of collective farms to exercise their rights over the land individually. The Parliament retaliated by adopting a land code, which accepted the idea of private ownership but did not allow land to be alienated. The President vetoed that draft of the land code.

Presently, this area is regulated by Presidential Decree No. 1767 of October 27, 1993, on the Regulation of Agricultural Relations and Development of Agrarian Reform in Russia.[397] Foreign nationals and foreign companies are not permitted to obtain land directly through private ownership. Although, the Decree declares the right of foreigners to lease land under certain conditions, it does not allow foreigners to acquire land directly. Despite the right of *citizens and legal entities* which own land to sell, bequeath, give, mortgage, lease, and exchange land and also transfer land or part of it as an investment in the capital fund of joint stock companies, associations and cooperations, including ones that have foreign investment, the regulation sanctions the only mechanism of attaining land ownership by foreigners. This is done by forming an entity to which a Russian citizen or entity transfers its land rights as part of the capital fund.

Conclusion

Serious obstacles lie on the road to foreign investments and obtaining ownership of property in Russia. Just as before, the imperfection of the taxation system, poor availability and a shortage of the economic information, and the problem of investment guarantees should be noted in addition to official legal restrictions on foreign ownership and investment almost in all areas of the national economy. The biggest problems are

[397] SAPP RF, 1993, No. 44, Item 4191.

the legal uncertainty and political instability in Russia, making the potential investors wait, at least, till President Yeltsin's health problems are resolved.

During the last months the legal process which concerned, among others, foreign investors continued. The State Duma at the first reading has passed a draft law On Free Economic Zones in the RF. It fixes a negative trend of the excessive role played by the central authorities in the process of free zone formation. Also, a draft law on Concession Agreements Made with Foreign Investors was adopted in the first reading. It envisages tenders and auctions open both for Russian and foreign partners where the concession term equals 50 years and includes a possible prolongation for 20 years.

No serious changes in the Russian investment climate were registered in 1996. Investment activity is still extremely low. The majority of foreign investors still wait for the outcome of the struggle for power in the Kremlin and for a real evidence of support for the development of market reforms.

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SOUTH AFRICA

South Africa, in its efforts to stimulate economic growth, encourages foreign investment which is regarded as essential for the country's prosperity. It has been the policy of successive governments to facilitate and foster such investment. Hence, in general, "there is no real restrictions on foreign ownership,"[398] except for a few sectors of the economy.

Agricultural land

South African law does not impose any restrictions on foreign ownership of land including farm land. However, in a land sale contract, both the seller and the buyer must show a residential or business addresses in South Africa.[399]

Banks

The Banks Act imposes restrictions on the ownership of bank shares without discrimination against the citizenship of the shareholders. The restrictions are designed to limit the control of any shareholder over a particular bank. No person can hold more than 15% of the total nominal value of all the issued shares of a bank or controlling company without the permission of the Registrar of the Banks.[400]

Foreign banks, if authorized by the Registrar, may establish branches in South Africa and conduct banking services through them.[401]

Businesses

In most sectors businesses may be owned 100% by foreigners. In addition, foreigners may benefit from incentives on an equal basis with South African citizens.

Communications

South African law does not allow foreigners to exercise control, directly or indirectly, over private broadcasting services. Foreigners cannot have more than 20% ownership rights in broadcasting institutions.[402]

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[398] Price Waterhouse, DOING BUSINESS IN SOUTH AFRICA 56 (1990).

[399] Alienation of Land Act No. 68 of 1981, § 6(a) *in* STATUTES OF THE REPUBLIC OF SOUTH AFRICA CLASSIFIED AND ANNOTATED FROM 1910, 307 (Durban, 1967-).

[400] *Id.* Act No. 94 of 1990, § 37, at 781.

[401] *Id.* § 18A, at 763.

[402] *Id.* Act No. 153 of 1993, § 48, at 401.

The South African State has a monopoly over all telecommunications. The State-owned Telecommunication Company may issue licenses to construct, maintain and use telecommunication lines to *any person*.[403] However, the government, to implement its privatization program, is planing to sell 25% to 30% of the Telecommunication Company to foreigners.[404]

Securities

The Stock Exchanges Control Act regulates the sale of securities. The law does not impose any restrictions on selling securities to foreigners.[405]

Transportation

In South Africa, the State owns the public transportation system. This includes railroads, airlines, harbors and airports.[406] Transportation is one of the six State-owned sectors that is included in the privatization program.[407]

Foreigners cannot own South African ships unless they are the citizens of a country with which a bilateral treaty is in force.[408]

Utilities

South African law does not restrict foreign ownership of utilities. However, a license is required for the generation or supply of electricity.[409] The State-owned utilities are another sector that is being considered for privatization.

Expropriation

Under the provisions of the Constitution, expropriation is only allowed in accordance with a law. When a property is expropriated pursuant to a law, the act can only be permitted for a public interest and is subject to the payment of an agreed upon compensation. If no agreement can be reached, a court of law has to determine the compensation taking into account all relevant factors including "the use to which the property is being put, the history of its acquisition, its market value, the value of investments in it."[410]

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403 *Id.* Act No. 44 of 1958, § 78, at 67 & 69.

404 THE FINANCIAL POST (Aug. 21, 1996), NEXIS.

405 *Supra* note 2, Act No. 1 of 1985, at 241-295(4).

406 *Supra* note 1, at 19 & 55.

407 V. C. Williams & W. M. Hannay, *eds.*, A LAWYER'S GUIDE TO DOING BUSINESS IN SOUTH AFRICA 139 (1996).

408 *Supra* note 2, Act No. 57 of 1957, § 11, at 97.

409 *Id.* Act No. 41 of 1987, § 6, at 259(3).

410 *Id.* Act No. 200, § 28, at 1219.

The Expropriation Act[411] implements the principles set by the Constitution. Under the provisions of the Act, to determine the compensation, the expropriating authority must take into consideration:

- …the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and

- an amount to make good any actual financial loss caused by the expropriation.[412]

Section 12 also requires the following percentages to be added to the total amount of compensation determined by the expropriating authority:

- 10% of such total amount, if it does not exceed R 100 000; plus

- 5% of the amount by which it exceeds R 100 000, if it does not exceed 500 000; plus

- 3% of the amount by which it exceeds R 500 000, if it does not exceed R 1 000 000; plus

- 1% (but not amounting to more than R 10 000) of the amount by which it exceeds R 1 000 000.

The section also provides interest for the outstanding portion of the amount of compensation from the date the State takes possession of the expropriated property.

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411 *Id*. Act No. 63 of 1975, at 1071-1107.

412 *Id*. § 12, at 1083.

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SWEDEN

Background

Until 1982, restrictions on foreign acquisition of real property in Sweden was governed by a law which was enacted in 1916.[413] Matters concerning restrictions on foreign investment were contained in a law which was enacted in 1968.[414] This law, in its turn, had replaced a 1895 law and a 1916 law on the same subject.

In 1982, Sweden enacted two new laws which replaced the old laws on the restriction of foreign ownership in Sweden. These laws were the 1982 Law on Foreign Acquisition of Real Property[415] and the 1982 Law on Foreign Acquisition of Swedish Companies and Businesses.[416]

The Law on Foreign Acquisition of Real Property prescribed that only by an acquisition permit could a foreigner acquire a real property right in Sweden. However, the Law contained exemptions from the general rule. These exemptions applied in situations where acquisitions were made:

- by means of estate distribution, inheritance, or bequest;
- through a merger;
- through a bid in a court-enforced auction;
- where the property was transferred by a spouse to the other spouse or when the spouses acquired a property jointly, one of them was the transferor's offspring.

As to the prerequisites for an acquisition permit, the Law prescribed that an acquisition permit had to be sought within three months after the acquisition had taken place. With regard to a property which was acquired through a court-enforced auction, the Law required the transferee to apply for a permit within two years or transfer the property by the end of the two years.

Under all circumstances, if an acquisition permit was not sought within the prescribed time period, or if a permit application was rejected, the acquisition was null and void *ab initio*.

The Law on the Acquisition of Swedish Companies and Businesses contained several restrictions respecting the right of foreigners to invest or to do business in Sweden. The Law prescribed rules according to which an acquisition permit was required for every transaction regarding stocks in companies whenever such acquisition could exceed certain established limits. Moreover, shares in commercial establishments

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413 SVENSK FÖRFATTNINSSAMLING (SFS) 1916: 156.

414 SFS 1968: 557.

415 SFS 1982: 618.

416 SFS 1982: 617.

and ownership, in part or as a whole, of various types of retail businesses conducted in the country required a special permit, although there were some exceptions to the general rule.

Due to Swedish participation in the European Economic Area, and later membership in the European Union, the Law on Foreign Acquisition of Real Property was replaced by a 1992 Law on Permission to Acquire Certain Real Property.[417] The Law on Foreign Acquisition of Swedish Companies and Businesses was fully repealed in 1991.[418]

Present restrictions on the acquisition of real property

A new law replaced the 1982 Law on Foreign Acquisition of Real Property. The new Law which was enacted on December 10, 1992, and entered into force on December 31, 1992, does not contain any provisions with respect to foreigners. However, it requires that in order to acquire real property which is taxed as a small family home or is used for agricultural purposes, an acquisition permit should be obtained.

The following persons are exempted from the requirement of a permit:

- a person who is a resident in Sweden;
- a person who has earlier been a resident in Sweden for a total period of five years;
- a person who is married with somebody who does not need to obtain a permit;
- a person who is married to the transferor;
- one of the transferees is the offspring of the transferor; or
- a Swedish legal person.

No permit is required when the acquisition is through estate distribution, inheritance, bequest or an acquisition through a bid in a court-enforced auction.

A condition for issuing an acquisition permit is that the property is not used for leisure or a vacation home. If an acquisition concerns a vacation home, the permit may still be issued if the acquisition does not have a negative effect on an essential common interest. However, in principle, an application for acquisition of real property must be rejected, if the application concerns a vacation home which is located in an area of major common interest and the acquisition may cause a rise in property value in the area.

If a property is acquired without a permit, or if no application for the permit is submitted within the prescribed time, or the application for a permit has been rejected, the property transaction will be considered null and void *ab initio*.

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[417] SFS 1992:1368.

[418] The repealing law was SFS 1991:1898.

Restrictions on investment

At present there are no rules requiring foreign investment approvals of general application, nor are there any currency exchange controls for business activities in Sweden. There are, however, certain provisions contained in various commercial laws requiring a permit for the conduct of certain business activities.

Banking and insurance

Until recently, foreign banks were not allowed to open subsidiaries in Sweden. Today, according to the provisions of Chapter 1:4 and 5 of the Banking Companies Law,[419] a foreign banking company that wishes to open a branch office in Sweden may do so after obtaining a permit. For opening a representation office, no permit is required; however, the intention to open a representation office must be reported to the appropriate authority before such an office is opened. The only requirement for issuing a permit is that the applicant meets the requirements of sound banking activities.

A banking company which conducts banking activities in a member State of the European Economic Area (EEA) is exempted from the permit requirement.

In order to conduct insurance activities in Sweden, a foreign insurance company must seek a concession from the Swedish Government. A foreign insurance company working in Sweden must conduct its activities through a general agent.[420]

A concession is granted by the Government if certain conditions such as depositing a fixed amount of money, meeting the requirements of a sound business practice, and the approval of the general agent are met. [421]

Insurance activities conducted by the companies within the EEA are regulated by the 1993 Law on the EEA Insurance Provider's Activities in Sweden.[422]

Securities

In conformity with the provisions of Chapter 1:3c and 3d of the 1991 Law on Dealing with Securities,[423] a foreign company which deals with securities in an EEA country does not need to obtain a permit to conduct the same activities in Sweden. Other foreign companies must obtain a permit in order to conduct business activities in securities in Sweden. Such permit will be issued if the applicant is conducting the same business in the home country under the supervision of an appropriate authority, and if it can be assumed that the applicant company will conduct its activities on a sound business basis.

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[419] SFS 1987:617, as amended.

[420] SFS 1950:272. The latest amendments: SFS 1995:781, 1568 and 1575.

[421] *Id*. §§ 6 & 7.

[422] SFS 1993:1302.

[423] SFS 1991:981.

Finance and credit market

According to the provisions of Chapter 2:9 and 10 of the 1992 Law on Credit Market Companies,[424] companies conducting credit and finance activities in a member State of the EEA do not need to obtain a permit to conduct the same business in Sweden. With respect to other foreign companies, Chapter 2:8 of the Law prescribes that in order to conduct activities in the area of credit and financing, a foreign company must obtain a permit. A permit is granted only if the applicant conducts the same business in the home country under the supervision of an appropriate authority. Also, the applicant company must meet the requirement of sound business practice in Sweden.

Stock exchange and funds

Chapter 2:7 and Chapter 8:3 of the 1992 Law on Stock Exchange and Clearing Houses[425] prescribe that an authorization permit is required for a foreign company to conduct business in stock exchange and clearing houses. Such permit can be granted only if the company conducts the same type of business in the home country under the supervision of an appropriate authority. Furthermore, it is required that the activities be conducted in a manner that the public's confidence for exchange and securities is protected.

Concerning the funds and capital building activities, the provisions of section 7a-c of the 1990 Law on Securities' Funds (*Värdepappersfonder*)[426] contain rules on conduct of business by foreign companies. Accordingly, a foreign company aiming to do business in funds must obtain a permit. Such permit can be granted only if:

- the company conducts the same type of business in the home country;
- the planned activities in Sweden can be assumed to fulfill the requirement of a sound business practice; and
- the company takes the necessary measures to make payments to the shareholders in Sweden, to buy back shares, and to submit the same kind of information that the company is obligated to provide in the home country.

According to section 7b of the Law, companies that conduct the same kind of business within the EEA countries are not required to obtain a permit. Moreover, according to the provisions of section 7c, the companies dealing with funds must conduct their activities in conformity with the 1992 Law on Foreign Subsidiaries.[427]

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[424] SFS 1992:1610.

[425] SFS 1992:543.

[426] SFS 1990:1114.

[427] SFS 1992:160.

The Law on Foreign Subsidiaries, which replaced an earlier law on the Right of Foreigners to Do Business in Sweden,[428] contains rules by which foreign companies, individual foreigners (non-residents), and Swedish citizens living abroad can do business in Sweden. Accordingly, a foreign company that wishes to conduct business in Sweden must have an independent branch office in Sweden. For Swedish nationals living abroad and individual foreigners, responsibility for conducting business must be borne by a person who resides in Sweden. For those business activities for which specific laws are enacted, the provisions of the relevant laws are applicable in the respective areas.

All foreign companies and foreign individuals who conduct business in Sweden are subjected to Swedish law with regard to disputes and other matters concerning their business activities in Sweden.

Finally, it should be noted that with respect to expropriation and compensation for expropriated property, the Swedish law does not make any distinction between Swedish nationals and foreigners.

Conclusion

The above review of the Swedish laws indicates that today, with a minor exception in acquisition of real property, Sweden no longer has any restrictions for foreign investment in movable or immovable, tangible or intangible, property. In most areas where foreign companies are required to obtain a permit, the law imposes the requirement of a permit on domestic companies as well. Even where the law exempts the companies which conduct business within the EEA countries, prerequisite for such an exemption is that those companies are already established under the law and in accordance with the rules governing in each individual EEA country. On the whole the commercial laws that contain rules regarding the conduct of business by foreigners are rather of a regulating nature than of a restrictive nature.

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[428] SFS 1968: 555, which has been repealed.

96-2855

TAIWAN

Background

According to statistics of the Investment Commission of the Ministry of Economic Affairs, foreign and Overseas Chinese investment in Taiwan totaled 840 million dollars in the first half of 1996.[429] Because the Republic of China (ROC) on Taiwan is amending many of its laws relating to investment in order to conform to requirements for entry into the World Trade Organization, the status of permissible, prohibited, and restricted foreign investment in some sectors is currently in flux. For example, on May 9, 1996, the Executive Yüan (Cabinet) approved a bundled package of revisions liberalizing 20 laws--the first bundling of mixed legislative bill amendments of its kind--having to do with market-opening measures in such areas as banking and securities, construction, and highway transportation, among others.[430]

A second factor contributing to the changing scheme of foreign investment in Taiwan is the Government's major policy initiative, born in January 1995, to establish Taiwan as an Asian-Pacific Regional Operations Center. The plan prescribes that six sectors of the economy in which Taiwan is viewed as holding a competitive edge are to be developed: banking, telecommunications, media production and programming, air transportation, shipping, and manufacturing. Amendment of 23 laws and enactment of 15 new ones by the end of 1996 were part of the means of reaching that goal.[431] As of April 1996, 12 of 29 bills submitted to the Legislative Yüan had been enacted into law in furtherance of the business hub plan.[432]

Third, the Government's Council for Economic Planning and Development has formulated a four-pronged strategy to enhance Taiwan's competitiveness, which will also have an impact on foreign investment. According to the short-term plan, the Government should overhaul the fee structure for telephone calls, relax controls on foreign reserves and remove obstacles to capital flow, abandon limits on foreign institutional investment and free local investors' access to fund-raising tools overseas, and simplify foreign investment procedures.[433] Top priorities will reportedly be to hasten privatization of telecommunications and to deregulate the local stock exchange.

Current targets of investment of the ROC Government include: Ten Emerging Industries (e.g., environmental protection, semiconductors, telecommunications), Eight Key Technologies (e.g., energy

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[429] CHING-CHI JIH-PAO, July 11, 1996, at 2, as summarized in English by the Foreign Broadcast Information Service (FBIS), ASIAN PACIFIC...., July 31, 1996, at 29. The amount of investment was down by 16% in comparison with the same period of 1995, attributable, in the view of Ministry officials, to the military exercises conducted in the Taiwan Strait by mainland China in the spring of 1996.

[430] *Market Revisions in 'Bundled' Bill*, THE FREE CHINA JOURNAL, May 17, 1996, at 3.

[431] *Taiwan Set To Relax Restrictions on Foreign Investment,* 17 EAST ASIAN EXECUTIVE REPORTS 16 (Aug. 15, 1995).

[432] Kelly Her, *ROC Resets Focus on Business Hub Goal*, THE FREE CHINA JOURNAL, Apr. 19, 1996, at 7.

[433] Maubo Chang, *CEPD Maps Out 4-Pronged Strategy To Promote Competitiveness,* Taiwan Central News Agency WWW in English, June 7, 1996, FBIS DAILY REPORT: CHINA, June 10, 1996, at 64-65.

conservation, biotechnology, software), and 66 Key Products and Components (mainly high technology and high value-added items).

Overall legal framework of foreign investment

The Negative List for Investment by Overseas Chinese and Foreign Nationals[434] sets forth categories of items that are prohibited or restricted for foreign investment. The 1990 List[435] defined *prohibited industries* as "those industries...not allowed Overseas Chinese and Foreign Nationals investment." *Restricted industries* refers to those for which there is a "special prescription of investment to Overseas Chinese and Foreign Nationals such as the limitation of investment capital; however, if the investment project is in compliance with the Prescription of the competent authorities, the investment project may be approved."[436]

The Statute for Investment by Foreign Nationals[437] and the Statute for Investment by Overseas Chinese[438] are two major laws governing foreign investment in general. The former prohibits investment in enterprises that run counter to public safety, enterprises that violate good customs, enterprises that are highly polluting in nature, and enterprises that the law endows as monopolies or prohibits investors from investing in (art. 5, ¶ 1, items 1-4). In applying to invest in public utilities, finance and insurance enterprises, newspaper publishing enterprises, or enterprises on which legal restrictions are placed on investors, foreign investors must conform to the stipulations of the supervisory organs of the target enterprises and go through their examination and approval (art. 5, ¶ 2, items 1-4).[439] The same prohibitions and restrictions are found in the Statute for Investment by Overseas Chinese (also in art. 5). In addition, there is the Statute for Upgrading Industries, which replaced the Statute for Encouragement of Investment in December 1990.[440] It "represents a major policy change by switching encouragement from more general investment to more specific capital and technology-intensive industries and industries that can prevent environmental pollution."[441]

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434 Promulgated by decree of the Executive Yüan (Cabinet) on July 11, 1990; as amended on Sept. 6, 1995. Bilingual text issued by the Industrial Development and Investment Center of the Ministry of Economic Affairs, Taipei, Jan. 1996; English translation courtesy of Lee & Li, Attorneys-at-Law, Taipei.

435 Negative List for Investment by Overseas Chinese and Foreign Nationals, bilingual text issued by the Industrial Development and Investment Center of the Ministry of Economic Affairs, July 1992, at 19.

436 *Id.* at 16.

437 Promulgated on and effective as of July 14, 1954. For the Chinese text as amended on May 26, 1989, *see* T'AO PAI-CH'UAN, *et al.,* TSUI HSIN TSUNG-HO LIU FA CH'ÜAN SHU (Most Recent Comprehensive Complete Book of the Six Codes) 2045-2047 (Taipei, San Min Books, 1996) (Six Codes).

438 Promulgated and effective on Nov. 19, 1955; as last amended on May 26, 1989. For the Chinese text, *see* Six Codes, *id.* at 2043-2045.

439 The Executive Yüan will make the differentiation between enterprises that prohibit or restrict investment as set forth in paragraphs one and two of article 5 [art. 5, ¶ 3].

440 Promulgated on Dec. 29, 1990, and effective as of Jan. 1, 1991, until Dec. 31, 1999; as amended on Jan. 27, 1995. For the Chinese text, *see* Six Codes, *supra* note 9, at 2025-2031. The Statute's Detailed Rules of Implementation follow, at 2031-2039. They were promulgated on Apr. 24, 1991, but went into effective on Jan. 1, 1991; as amended on Oct. 27, 1993.

441 C. Y. Huang, *Protection and Encouragement of Investment in the Republic of China--A Case Study of Successful*

In January 1995, amendments to both the Statute for Investment by Foreign Nationals and the Statute for Investment by Overseas Chinese were approved by the Executive Yüan, with the aim of "removing all unnecessary foreign investment restrictions."[442] It was reported that "the definition of the term 'investment' will be expanded to include holdings of capital shares or capital contributions to a Taiwan company, establishment of a branch office, sole proprietorship or partnership, and provision of a loan with a term of one year or longer to the invested enterprise."[443] At present, prior government approval must be obtained for reinvestments made by an invested enterprise; under the proposed amendments, prior approval will only be necessary when 20% or more of the invested enterprise is owned by foreign/Overseas Chinese investors.[444] In addition, the categories prohibited or restricted to foreign/Overseas Chinese investment will be limited to those that adversely affect public order, national security, national health, or good morals or that are otherwise prohibited by law. Restrictions that have been imposed by means of administrative decrees will also be removed.[445]

Agriculture

According to the Negative List, agriculture (agronomic and horticultural), animal husbandry, hunting, and forestry are prohibited categories of foreign investment. However, Overseas Chinese are not restricted in the growing of flowers or in forestry. Real estate trading, leasing, and land development are areas in which foreign investment is prohibited.

The Land Law[446] of the ROC stipulates that foreigners can lease or purchase land only for the following purposes, and the size and location of such leased or purchased land are to be governed by the laws of the local government in charge: residence; stores or factories; churches; hospitals; schools for the children of foreign residents; embassies; consulates, and headquarters of non-profit organizations; cemeteries (art. 19). The Law sets forth procedures for the foreign purchase or lease of land (art. 20). It is stipulated that the following kinds of land cannot be transferred to foreign ownership or leased to foreigners: farmland; forestry land; land for fisheries; land for raising domestic animals; land set aside for hunting; salt land; mines; water resources; areas where there are military bases and land in border areas (art. 17).

Implementation, in HUNGDAH CHIU, *et al., ed.,* PROCEEDINGS OF THE INTERNATIONAL LAW ASSOCIATION (ILA) FIRST ASIAN-PACIFIC REGIONAL CONFERENCE (May 27-30, 1995, Taipei, Taiwan) 320 (Taipei, Chinese Society of International Law, 1996).

[442] M. L. Yeh, *Proposed Amendments to SIFN and SIOC,* 17 EAST ASIAN EXECUTIVE REPORTS 16-17 (Apr. 15, 1995).

[443] *Id.*

[444] *Id.*

[445] *Id.* at 17. The author mentions by way of example that the operation of gas stations and the quarrying business are not on the Negative List but are currently restricted by administrative decrees.

[446] Promulgated on June 30, 1930, and entered into force on Mar. 1, 1936; last amended on Jan. 20, 1995. For the Chinese text, *see* Six Codes, *supra* note 9, at 1642-1665.

Banking

The Negative List indicates that domestic banking, foreign banks, credit cooperatives, trust and investment, finance bill financing, and other non-classified financial services are areas of restricted investment to foreigners and Overseas Chinese.[447] The Banking Law[448] prescribes that setting up a domestic or foreign bank in Taiwan requires the approval of the central competent authorities (arts. 26, 52, 117).

Communications

Radio and television

Radio and television broadcasting are not open to foreign investment. The Broadcast and Television Law[449] stipulates that the frequencies used by broadcast and television enterprises (enterprises that manage broadcast or TV stations) are State-owned and are programmed and allocated by the Ministry of Communications together with the Information Office (art. 4). As for programming, ROC-produced programs cannot be less than 70%; foreign language programs must have Chinese subtitles or Chinese-language explications, and when necessary the Information Office may order dubbing (art. 19, ¶¶ 1 & 2).

Under the Cable Television Law, "only ROC nationals may establish companies to operate cable TV systems and apply for approval with the competent authority. A foreign entity may not be a shareholder of such undertaking."[450]

Telecommunications

According to the Telecommunications Law,[451] in Type One telecommunications enterprises (those that install telecommunications machinery and line facilities to provide telecommunications services)[452] the chairman of the board and over half of the board members must be ROC nationals and only one-fifth of the shares may be foreign-owned (art. 12, ¶ 3). Type Two telecommunications enterprises are all other types of

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447 The 1990 Negative List, referring to letter Tai-Tsai-Chian No. 17863 of the Ministry of Finance, Aug. 5, 1975, notes that investment in credit cooperatives is not restricted for Overseas Chinese with an identity card and residency in the ROC are not restricted; however, this note is not included in the 1995 List.

448 Promulgated on Mar. 28, 1931, and effective the same day, as amended on June 29, 1995. For the Chinese text, *see* Six Codes, *supra* note 9, at 1777-1789.

449 Promulgated on Jan. 8, 1976, and entered into force the same day; as amended on Aug. 2, 1993. For the Chinese text, *see* Six Codes, *supra* note 9, at 1440-1443.

450 IP ASIA 24 (Oct. 26, 1993). The Cable TV Law was passed by the Legislative Yüan on July 16, 1993, and promulgated by the President of the ROC on Aug. 11, 1993. For the Chinese text, *see* Six Codes, *supra* note 9, at 1444-1449.

451 Adopted on Oct. 4, 1958, and promulgated on Oct. 23, 1958; as amended on Jan. 16, 1996, and promulgated on Feb. 5, 1996, effective on the date of promulgation. For the Chinese text, *see* 47 FA-LING YÜEH-K'AN (The Law Monthly) 339-344 (June 1, 1996). An unofficial English translation is available from the American Institute on Taiwan (AIT).

452 As defined in art. 11, ¶ 2. *Facilities* are defined in the same paragraph as referring to the network transmission and switching equipment connected to the transmitting and receiving terminals, and support equipment

telecommunications enterprises; the Law apparently does not have a provision on restrictions regarding board membership of and foreign ownership of shares in these enterprises. Companies or individuals who violate article 12, ¶ 3, where the chairman of the board is not an ROC national or where over half of the board members are not ROC nationals, or where more than one-fifth of the shares are foreign-owned, will be fined more than NT500,000 (about US$18,182) but not more than NT2,500,000 (about US$90,909). The offenders must rectify any violation with a specified period of time, or face revocation of their license (art. 62).

It may be noted that in another move to liberalize the telecommunications sector, the business operations of the Directorate General of Telecommunications (DGT) are being taken over by the State-run China Telecommunications Company (CTC), to be established by the Ministry of Transportation and Communications (MOTC) in accordance with the China Telecommunications Company Organization Law (Telecommunications Law, art. 72, ¶ 2).[453] As of July 1, 1996, the DGT is authorized only to "formulate Taiwan's future telecommunications policies, to build an environment of fair competition, to ensure fair access to the use of networks, and to facilitate telecommunications services in Taiwan."[454] The new State-run CTC is to set up seven business divisions. Under a non-binding supplementary resolution to the telecommunications legislation passed on January 16, the DGT is to become an independent regulatory commission within five years after the Telecommunications Law takes effect. Under the China Telecommunications Company Organization Law, the CTC is to be privatized in five years.[455]

According to the timetable for privatization worked out by the MOTC, by the end of 1996 wireless services (e.g., mobile phones, paging systems) will be opened to private and foreign investment. However, foreign firms will not be permitted to hold more than 20% of the total shares of any ROC telecommunications company.[456]

Securities

The Negative List prescribes that investment is restricted in the securities business, the securities investment and trust business, and the futures commission merchant business. According to the Securities and Exchange Law,[457] the government agency in charge will decide whether securities investment trust businesses, securities finance enterprises, securities investment advisor enterprises, and the like will be approved (art. 18).

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[453] Two other laws were passed on Jan. 16, 1996, along with the Telecommunications Law: the Directorate General of Telecommunications Organization Law and the China Telecommunications Company Law.

[454] Benjamin Yeh, (Internet) Taiwan Central News Agency WWW in English, July 1, 1996, as carried in FBIS, July 2, 1996, at 93.

[455] *Id.*

[456] Kelly Her, *Telecommunications Firm Privatizes Its Business Arm*, THE FREE CHINA JOURNAL, July 5, 1996, at 3.

[457] Promulgated and entered into effect on Apr. 30, 1968, as last amended on Jan. 29, 1988. For the Chinese text, *see* Six Codes, *supra* note 9, at 2051-2067. Detailed Rules of Implementation of the Law were issued on Aug. 6, 1988, by the Ministry of Finance. *Id.* at 2067-2069.

It was reported that in 1995, the limit on overseas capital in the Taiwan stock market was raised from 10% to 20% of the total share value; the Central Bank was planning to increase the figure to 30% before June 1996.[458] The ceiling on investment in Taiwan securities by foreign professional investment institutions was also raised, from US$200 million to US$400 million.[459] Originally, the Taiwan stock market was to be completely opened to foreign investment by 1997, but the date has been pushed back to the year 2000.[460] Plans have recently been announced to further relax some restrictions on foreign investment in the Taiwan Stock Exchange (TAIEX). At present, each foreign institutional investor is prohibited from holding more than 7.5% of any TAIEX company; that ceiling would be raised to not more than 10%. In addition, the 20% ceiling on combined foreign investment in any one company was raised to 25%.[461] The measures are to take effect in October 1996 at the earliest, pending Executive Yüan approval.[462]

Transportation

According to the Negative List, railway transport, formerly prohibited to foreign investment, is now a restricted category for foreign investment. Foreign investment in navigation and air transport is restricted for foreign investors but not for Overseas Chinese. The Navigation Law[463] (*Hang-yeh fa*) stipulates that only an ROC citizen or juridical person may establish an organization or manage the work of a shipping agency, ocean shipping contract business, or container distribution and collection terminal enterprises. However, if a foreign government accords reciprocal treatment to ROC citizens or juridical persons and approval is obtained from the Ministry of Communications, the foreigners of that other country will not be subject to the above restriction (art. 6). The Law thus enables foreign shippers to compete on an equal basis with their local counterparts in the leasing and use of harbor facilities, abolishing the priority given to local shippers in leasing wharves, container distribution terminals, and transshipment facilities. It also gives the Ministry of Transportation and Communications the authority to increase the minimum capital requirement for foreign shipping company branches (art. 36).[464] The Negative List indicates that foreign investment in harbor-related services is also restricted.

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458 Her, *supra* note 4.

459 *Id.*

460 *Full Opening of Bourse Delayed,* THE FREE CHINA JOURNAL, Sept. 6, 1996, at 8. The article claims that the original date was set with a view to attracting capital that might exit Hong Kong upon the British colony's reversion to mainland China's rule on July 1, 1997. The article also states that "On Sept. 2, the Taiwan Stock Exchange was formally listed on the Emerging Markets Free Index of the U.S.-based Morgan Stanley Capital International. A total of 77 different kinds of Taiwan stocks have been included on the EMF Index," a move that may more than double foreign investment in the Taiwan Stock Exchange by the end of 1996.

461 Benjamin Yeh, *Restrictions Eased on Foreign Investment in Stock Exchange,* CNA WWW (in English), Sept. 23, 1996, as carried by FBIS, DAILY REPORT online, Sept. 23, 1996, at http://fbis.fedworld.gov. According to the Finance Minister, thus far no single foreign investor has owned more than a 6.5% stake in a TAIEX listed company, and only five companies have combined foreign investment holdings of more than 15%.

462 *Id.*

463 Promulgated on June 3, 1981, and entered into effect the same day; as last amended on Aug. 9, 1995. For the Chinese text, *see* Six Codes, *supra* note 9, at 2164-2168.

464 *Creating the Legal Framework for a Regional Operations Center,* 17 EAST ASIAN EXECUTIVE REPORTS 18 (Aug. 15, 1995).

The Shipping Law (*Ch'uan-po fa*)[465] stipulates which ships may be deemed ROC ships. Among them are those owned by companies, established in accordance with ROC law, that are companies in the ROC, including: unlimited companies whose whole body of shareholders are ROC citizens; limited companies over two-thirds of whose capital is owned by ROC citizens and whose directors representing the company are ROC citizens; a mixed company all of whose unlimited liability shareholders are ROC citizens; companies limited by shares whose chairman of the board and more than two-thirds of whose directors are ROC citizens and more than two-thirds of whose capital is owned by ROC citizens (art. 2, sub-paragraph 3, items 1-4). Furthermore, as established according to ROC law, corporations with corporate headquarters in the ROC must have more than two-thirds of their staff members and responsible personnel as ROC citizens (sub-paragraph 4).

The Civil Aviation Law,[466] like the Shipping Law, provides that aircraft will be considered ROC aircraft if, among other stipulations, they are owned by juridical persons with their headquarters in the ROC, established in accordance with ROC law, that are one of the four types of companies indicated (same as in article 2 of the Shipping Law cited immediately above) (art. 10, ¶ 1, sub-paragraph 3, items 1-4), or other juridical persons all of whose representatives are ROC citizens (item 5). It is also stipulated that civil aviation transport enterprises organized as juridical persons must conform with article 10, ¶ 1, sub-paragraph 3 (art. 45, ¶ 1). The Civil Aviation Law further provides that foreign nationality aircraft or foreign nationality civil use transport enterprises may not transport passenger cargo or postal items between two places within ROC territory, with or without compensation, nor manage ordinary civil aviation business within ROC territory (art. 61).

Passenger bus, taxi transport, tour bus, car rental, and trucking services remain prohibited categories of foreign investment on the Negative List. The Highway Law[467] prescribes that foreigners may not invest in managing motor vehicle transport business within the territory of the ROC (art. 35).

Utilities

In regard to electric light, power, and gas supply, the Negative List indicates that power transmission and distribution and fuel gas supply by pipeline are prohibited to foreign investment; power generation is a restricted category of investment, as is water supply.

Some other aspects

Industrial property rights

A bill that was before the ROC legislature as of August 1995 was aimed at expanding the range of industrial property rights (to include not only technologies and patents but also trademarks, copyrights, and other intellectual property rights) that can be treated as investment, allowing foreign firms to invest in New

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[465] Promulgated on Dec. 4, 1930, and effective the same day; as amended on Dec. 28, 1983. For the Chinese text, *see* Six Codes, *supra* note 9, at 556-561.

[466] Promulgated on May 30, 1943, and effective the same day; as last amended on Jan. 27, 1995. For the Chinese text, *see* Six Codes, *supra* note 9, at 2132-2138.

[467] Promulgated on June 26, 1959, and entered into effect on the same day; as last amended on Jan. 23, 1984. For the Chinese text, *see* Six Codes, *supra* note 9, at 2151-2156.

Taiwan (NT) dollars, and relaxing restrictions not only on investment by foreign-invested companies but also on repatriation.[468]

Manufacturing

According to the Negative List, manufacturing oil and coal products (e.g., refining gasoline and diesel fuel, coking) is now restricted for foreign investment; until only recently, such activities were prohibited. The manufacture of chemical materials such as nitroglycerine and alcohol; of chemical products such as certain pesticides and herbicides, certain toxic chemicals, CFC, HCFCS, Halon, and gun powder fuses, etc; of metals such as those used for sabers; and of equipment and machinery such as weapons and ammunition is prohibited. Basic metal industries such as cadmium refining and gun barrel forging are also closed to foreign investment. Manufacture of chemical products such as certain approved toxic chemicals, medicine, Chinese medicine, and approved pesticides and herbicides; of electronic equipment such as switching systems; and of sundry industrial products such as ivory processing is restricted, as is the basic metal industry of mixed waste metal recycling.

Mining

Mining of coal, crude oil, natural gas, geothermal energy, metal ore, and non-metal ore are restricted categories of foreign investment on the Negative List. The Mining Law[469] stipulates that ROC citizens may obtain mining enterprise rights, in accordance with the Mining Law, over the various types of mines (set forth in article 2 of the Law), with the exception of those designated under article 8 as State monopolies and those designated in article 9 as national reserves (art. 5, ¶ 1). Foreign investment is permitted in mining companies that are companies limited by shares, but they must be examined by the Ministry of Economic Affairs and approved by the Executive Yüan and accept the following restrictions: the majority of shares must be held by ROC citizens; the majority of the board of directors must be ROC citizens; the chairman of the board must be an ROC citizen (art. 5, ¶ 3). The Law prescribes that oil fields, natural gas fields, thorium mines, and rich coal mines suited to refining and smelting should be managed by the State, and in cases where the State does not carry out exploration itself, they can be leased to ROC citizens (art. 8, ¶ 1). Mining rights should be immediately abrogated if they are transferred or mortgaged to foreigners (art. 43, item 2).

Exceptions to the law

The Statute for Investment by Foreign Nationals (art. 19) stipulates that once a foreign investor or the enterprise in which he has invested has been approved by the Executive Yüan as a special case, said investor or enterprise will not be subject to the following restrictions: The Mining Law, article 5, ¶¶ 1 & 3; article 8, ¶ 1; or article 43, item 2; The Land Law, article 17, item 7 (mines); the Shipping Law, sub-paragraph 3, items 1-4, and sub-paragraph 4 (provided, however, that inland and coastal navigation enterprises or those not in the form of joint capital enterprises as set forth in article 4, item 1, of the Statute for Investment by Foreign

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468 *Taiwan Set To Relax Restrictions on Foreign Investment*, 17 EAST ASIAN EXECUTIVE REPORTS 16-17 (Aug. 15, 1995). However, the repatriation of investment principal or earnings coming from the NT dollar denominated part of the investment would continue to be denied.

469 Promulgated on May 26, 1930, and entered into effect on Dec. 1, 1930, as amended on Apr. 14, 1978. For the Chinese text, *see* Six Codes, *supra* note 9, at 2077-2085.

Nationals will still be subject to the restriction); the Civil Aviation Law, article 10, ¶ 1, item 3 (1-5) and article 45, ¶ 1.

Buy-back provisions

The Statute for Investment by Foreign Nationals has the following provisions concerning expropriation:

Article 15. In case the investor's investment is less than 45 per cent of the total capital of the enterprise in which he invests, he shall be reasonably compensated if the government acquires or expropriates the invested enterprise because of national defense needs.

The compensation referred to in the preceding paragraph shall be permitted for outward remittance.

Article 16. In case the investor's investment is 45 per cent or more of the total capital of the enterprise in which he invests, such an enterprise shall not be subject to requisition or expropriation for a period of twenty years after commencement of business as long as the investor continues to hold 45 per cent 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 their aggregate amount of investment is 45 per cent or more of the total capital of the enterprise involved, the provision of the preceding paragraph shall still apply.[470]

Moreover, according to the Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States, signed at Nanking on November 4, 1946, and ratification exchanged at Nanking on November 30, 1948:

Art. 6.2 The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article 19 of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation, or association, upon the most favorable terms applicable to such currency at the time application therefor is filed, provided application is made within one year after receipt of the compensation to which it relates. The High Contracting Party allowing such withdrawal reserves the right, if it deems necessary, to allow such withdrawal in reasonable installments over a period not to exceed three years.

3. The nationals, corporations and associations of either High Contracting Party shall throughout the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 [re nationals] and 2 of this Article, upon compliance with the laws and regulations, if any, which are or may hereafter be

[470] MAJOR STATUTES OF THE REPUBLIC OF CHINA, VOLUME I: CONSTITUTIONAL AND ADMINISTRATIVE STATUTES 268-269 (Taipei, Judicial Yuan, Nov. 1990)

> enforced by the duly constituted authorities, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country.[471]

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[471] YIN CHING CHEN, *comp.*, TREATIES AND AGREEMENTS BETWEEN THE REPUBLIC OF CHINA AND OTHER POWERS, 1929-1954 300-301 (Washington, D.C., Sino-American Publishing Service, 1957).

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TURKEY

Turkey welcomes foreign investment and encourages such investments if they are deemed beneficial to its economy. Under the provisions of the Encouragement of Foreign Investment Law, foreign investors must obtain investment permits from the Foreign Investment Directorate. A permit grants the right to repatriate capital and to transfer profits abroad.[472]

Under article 10 of the Law, foreign investors have the same rights as Turkish citizens and may apply for incentives which may be granted by the Foreign Investment Directorate. Incentives may be in the form of taxes, low interest loans and other subsides.

In general, 100% ownership is possible for foreigners, except for those sectors considered of national interest. The Privatization Law of 1994 made owning shares in state companies possible for private parties including foreigners.[473] Since then, all successive Turkish governments have supported an ambitious privatization program which is increasing the number of sectors open for foreign investment.

Agricultural land

In Turkey, foreigners may own land based on reciprocity, except in villages and national security zones.[474] The reciprocity may be based on a treaty or the foreigner's national laws allowing Turkish citizens to own land.

Foreigners can own farm land outside villages for up to 30 *hectares* (approximately 74 acres). Government permission is needed for more than such acreage.[475]

Banks

Banking is one of the sectors in which a 100% foreign ownership is allowed. The Banking Law regulates domestic and foreign banks alike. A bank can only be established with the permission of the Council of Ministers.[476]

Businesses

Businesses may be owned 100% by foreigners in most sectors. However, ownership in some sectors is still reserved partly or as a whole to Turkish citizens, such as postal service, transportation in the country, utilities, radio and television.

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[472] Law No. 6224 of 1954, art. 4, *in* F. Coker & S. Kazanci, TURKIYE CUMHURIYETI KANUNLARI 4855 (Ankara, 1972-).

[473] *Id.* Law No. 4046 of 1994, at 11708-11726.

[474] *Id.* Law No. 442 of 1920, art. 87; and Law No. 2644, art. 35, at 300 and 2345, respectively.

[475] *Id.* Law No. 2644 of 1924, art. 36, at 2345.

[476] *Id.* Law No. 3182 of 1985, art. 4, at 10492.

Communications

Under the provisions of the Radio and Television Law,[477] foreign individuals or companies can own only up to 20% of the capital of a broadcast company. Furthermore, they cannot have the shares of more than one broadcast company even when the total shares are below 20%.[478]

The Telecommunication Corporation was established by the provisions of the Telegraph and Telephone Law.[479] The Corporation is owned by the government. However, the law allows 34% of its shares to be sold to the public and does not provide any limitations on the foreign ownership of such shares.[480] The corporation has a monopoly over telecommunication services. It may issue licenses that allow certain services to be provided by private companies.[481]

Securities

The Securities Market Law regulates the sale of securities. The Law does not impose any restrictions on selling securities to foreigners.[482]

Transportation

Transportation services in Turkey can only be provided by vehicles registered in Turkey. Vehicles, including ships and planes, may be registered in the name of individuals or companies. Commercial vehicles can be registered in Turkey if they are owned by a Turkish citizen or a Turkish company. If the owner is a company, the majority votes must be held by Turkish citizens and the majority of the officers of the company must be Turkish.[483]

Utilities

Until recently, the state owned all power companies and monopolized power generation, transmission and distribution. Under the Privatization Law, the State is privatizing these companies, and foreigners may buy the shares of such privatized companies.[484]

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[477] *Id*. Law No. 3984 of 1994, at 11635-11648.

[478] *Id*. art. 29, at 11645.

[479] *Id*. Law No. 406 of 1920, art. 1, at 263.

[480] *Id*. art. 17, at 270(2).

[481] *Id*. art. 18.

[482] *Id*. Law No. 2499 of 1981, at 9177-9192.

[483] *Id*. Law No. 815 of 1926, art. 1; Law No. 6762 of 1956, art. 823; Law No. 2920 of 1983, arts. 31, 49 at 746, 5400, 9981, 9985, respectively.

[484] *Id*. Law No. 4046 of 1994, at 11708-11726.

Foreigners may also invest in power generation, transmission and distribution projects under concession agreements that are entered on a build, operate and transfer basis. Concessions may be granted for up to 99 years.[485] At the end of this period, such projects are transferred to the State free of charge.[486]

Expropriation

Under the Turkish Constitution, private property can only be expropriated wholly or in part if public interest requires. Compensation must be paid in advance except when the property is expropriated for land reform, major energy and irrigation projects, housing and resettlement schemes, forestation, protection of the coast line and tourist facilities. The procedure of payment must be regulated by law; however, the payment period cannot be for more than five years; and payments must be made in equal installments. Interest must be paid at the rate equivalent to the highest interest paid on the public debt.[487]

The Expropriation Law implements principles set by the Constitution.[488] Under article 11 of the Law, tax declarations, current value established by an official assessment made at the time of expropriation, sale prices of comparable properties, construction costs, income of the property and other objective criteria must be taken into consideration in determining the compensation for the expropriated property.

The owner of the expropriated property may file a suit in a civil court at the location of the property against the expropriating authority to increase the compensation within a month from the notification date. The court may grant an extra amount with interest.[489] The owner may also file a suit in the administrative court for the annulment of the expropriation decision based on an irregularity.

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485 *Id*. Law No. 3096 of 1984, art. 7, at 10366.

486 *Id*. Law No. 3996 of 1994, art. 9, at 11670.

487 *Id*. Law No. 2709, art. 46, at 136(11).

488 *Id*. Law No. 2942 of 1983, at 10083-10097.

489 *Id*. art. 14, at 1089.

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UNITED KINGDOM

Britain has an open policy towards foreign investments and ranks next to the United States in its accessibility to foreign investors. Foreign investment in Britain has risen from £52 billion in 1986 to £131 billion in 1995, and foreign owned companies now account for a full 40% of Britain's manufacturing exports and 32% of manufacturing investment.[490] The government thus claims to be turning Britain into the "enterprise center of Europe."[491]

While few foreign investment controls remain, there does formally exist the grant of statutory authority to the government to prohibit the takeover of important manufacturing undertakings by non-residents. The Industry Act 1975, Part II, also grants the power to the Secretary of State to compulsorily acquire the assets of important manufacturing businesses which are threatened for takeover by foreign interests or have already been acquired. The powers must only be used if the government is satisfied that the prohibition is necessary in the national interest and that, under the circumstances, that interest cannot be protected in any other way. No orders have ever been issued under the Act.

Restrictions on foreign investment in British commercial broadcasting facilities were removed in 1990 while, at the same time, overall control was kept out of the hands of non-European Union (EU) individuals and corporations. Under the Broadcasting Act 1990,[492] a non-EU corporation is qualified to participate in a television or radio license provided its interest does not exceed 5%. The British Broadcasting Corporation continues to function as an independent entity which is not open to private investment.

Foreign investment is also allowed in telecommunications services, except in the short term for the provision of international telecommunications services.[493]

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[490] *Britain Still Tops EU Foreign Investor's Lists*, THE FINANCIAL POST (June 14, 1996), in Nexis.

[491] *Investment Data Boost British Enterprise Claims*, Reuter European Business Report (July 9, 1996), in Nexis.

[492] Ch. 42, §§5, 84 & Sched. 2, Part II, as amended by the Broadcasting Act 1996, ch. 55.

[493] Department of Trade, *Competition and Choice: Telecommunications Policy for the 1990s*, Cm. 1461, ¶¶ 3.6 & 3.12.

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VIETNAM

Introduction

Adopted as the result of a shift to a new market-oriented economy in 1986, Vietnam's Renovation Policy (*Doi moi*) clearly shows the country's interest in attracting foreign investors to Vietnam. From 1987 to the present time, there have been many laws, regulations issued by decrees, and ordinances, as well as numerous ministerial decisions, notices, circulars that deal with foreign investment and other related economic activities. The original Foreign Investment Law was first promulgated in 1987 and was amended in 1990 and 1992. The 1992 version of the Foreign Investment Law is considered to be very liberal since its purpose is to encourage foreign corporations or individuals to invest in Vietnam.[494] Specifically, the matter of aliens' rights to invest and to own property in Vietnam is currently determined by the above-mentioned law and other laws and regulations such as laws on land, banking, companies, joint ventures, industrial property, mineral resources, etc.[495] In spite the promulgation of the Law on the Promotion of Domestic Investment in 1994, foreign investors may still receive a more favorable treatment.[496] Again, there may be changes affecting economic activities in Vietnam when the new COMMERCIAL CODE (CC) is promulgated. But the CC is unlikely to change the fundamental direction of policy pursued for the last decade. A draft of this CODE is currently under the examination of the country's National Assembly.

Foreign investment

Under Article 4 of the Vietnamese Foreign Investment Law,[497] a foreign organization or individual is allowed to invest in any of the following types of business organizations, subject to the control of the Ministry of Planning and Investment (MPI):[498]

- contractual business cooperation: In this form of business, a foreign company or individual will come into a partnership with Vietnamese partners based on a contractual agreement. In order to obtain a license for this form of business, the MPI has to review and approve the partners' agreement, legal and financial status, and their economic relationship.

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494 FOREIGN INVESTMENT LAWS OF VIETNAM (Hanoi and Melbourne, SCCI and Philipps Fox, 1993).

495 *Id*.

496 G. Spencer & G. Heiji, A GUIDE TO DOING BUSINESS IN VIETNAM 28 (Western Australia, Department of Commerce and Trade, 1995).

497 *Id*. at I-1 to I-15, Law on Foreign Investment as amended on Dec. 23, 1992.

498 The Ministry of Planning and Investment is a newly created Ministry (Nov. 1995) which combines the former State Committee for Cooperation and Investment (SCCI) and the former State Planning Committee (SPC).

- joint venture enterprises: The joint venture under Vietnamese law is a form of business with limited liability.[499] Foreign organizations or individuals are required to contribute a minimum of 30% of the total prescribed capital contributed by both sides.[500] In practice, the Vietnamese Government prefers a 50% or higher foreign contribution.[501] The contribution from the foreign organization or individual can be in foreign currency; the plant, buildings, equipment, tools, components, or spare parts; or patents, technical knowledge and applications, and technology.[502]

- 100% owned enterprises: According to article 14 of the Foreign Investment Law, Vietnam allows a foreign company to own 100% of the business conducted in Vietnam. But after being legally licensed, the foreign enterprise is considered a legal entity subject to the laws of Vietnam.

The duration of all forms of enterprises with foreign investment, as described earlier, will be determined by the Vietnamese Government depending on each project and cannot be for more than 50 years.[503]

Land

Under the Land Law of July 14, 1993,[504] the Government of Vietnam considers land to be the most valuable national resource, and as such it is the property of the people and is under the exclusive administration of the State. Therefore, neither nationals nor foreigners have the right to own land. Foreigners who do business in Vietnam, however, have the right to rent and to use land.

The right to use land, if legally allocated by the State, can be exchanged, transferred, rented, inherited, or mortgaged.[505] Although land is categorized by types and each type is governed by different provisions of this Law, there is no restriction on the right to use land applied specifically for foreigners. Under article 11 of the Land Law, land in Vietnam is divided into the following categories: farm land, forest land, residential land, urban land, land used for special purposes, and unused land.[506]

The State will determine the planning and zoning of land as well as the allocation of land to be used. The rights to use land are guaranteed by the State as long as the users carry out their responsibility to protect

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[499] *Supra* note 4, arts. 4 & 6-13, at I-4 to I-7.

[500] *Id*. art. 8, at I-6.

[501] R. L. Wunker, *The Laws of Vietnam Affecting Foreign Investment* 2 THE INTERNATIONAL LAWYER 366 (Washington, D.C., Section of International Law and Practice/ABA, summer 1994).

[502] *Supra* note 4, art. 7, at I-5.

[503] *Id*. art. 15, at I-7.

[504] *Id*. Law on Land, at X-1 to X-28.

[505] *Id*. art. 3.2, at X-3.

[506] *Id*. art. 11, at X-4.

and improve the land in accordance with its purposes and during the period for which it has been allocated and in accordance to its zoning and rules provided by law.

The duration during which a particular type or location of land can be rented by foreign organizations, individuals, and overseas Vietnamese (Vietnamese residing abroad) who invest in Vietnam must correspond to the duration of the investment governed by the Foreign Investment Law in Vietnam.[507]

The Council of Ministers is responsible for the allotment of land to foreign investment projects, and the Prime Minister has the authority to determine the duration of their leases.

Banking

In accordance with the Regulations on Foreign Bank Branches and Joint Venture Banks Operating in Vietnam, a foreign bank can open and operate a branch office in Vietnam; or a foreign investor can open and operate a bank jointly with a Vietnamese bank with a head office in Vietnam. Both types of banks are considered by this Ordinance as legal entities and are subject to the laws of Vietnam.[508] The operating capital required for a foreign bank's branch is no less than 15 million U.S. dollars, and no less than ten million U.S. dollars for a joint venture bank.[509] The duration of both types of banks in Vietnam is not more than 20 years. This duration may be extended if approved by the Vietnam State Bank.[510]

Telecommunications, transportation and utilities

There are no specific provisions in the laws of Vietnam concerning investment in the sectors of telecommunications, transportation, and utilities. However, these sectors fit the types of investment described in the Decree Regarding Regulations on Build-Operate-Transfer (BOT) Contract which was promulgated on November 23, 1993, for the purpose of encouraging investments by foreign companies in the construction and development of infrastructures and technology in Vietnam.[511] According to article 1 of the Decree, a BOT project means any project approved by the government for the purpose of constructing and carrying on businesses operating infrastructure projects, including the expanding, upgrading and modernization of infrastructures in Vietnam. According to article 18, many Ministers are responsible for formulating plans and proposing lists of BOT projects as well as implementing provisions of this Decree. These include the Ministers of Energy, Transport, Technology and Environment.

Under Vietnamese law, a BOT company is defined as a company with foreign-owned capital which is incorporated in accordance with the laws of Vietnam to carry out a BOT project. An authorized State administrative body will be appointed by the government to enter into a BOT contract and to perform such contract. Under this form of investment, a foreign company contracts with a government agency or entity

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507 *Id*. art. 83, at X-26.

508 Regulations on Foreign Bank Branches and Joint Venture Banks Operating in Vietnam, issued by Decree No. 189-HDBT of the Council of Ministers dated June 15, 1991 [*supra* note 1, art. 3, at VI-35 to VI-36].

509 *Id*. art. 4, at VI-36.

510 *Id*. art. 5.

511 Decree on Build-Operate-Transfer (BOT) Contracts, No. 87-CP dated Nov. 23, 1993 [*supra* note 1, 1994, at I-291 to I-300].

in order to develop an infrastructure project and operate it for the duration stated in the contract. At the end of the period of the operation of the project, a BOT company will have to transfer the whole of the BOT project, without compensation, to the Vietnamese Government. Thus, under this form of investment, the ownership rights of foreign investors over their capital and other assets are protected by the law only during the life of the contract.

Information regarding the involvement of foreign companies in the telecommunications sector, for example, indicates that many foreign companies, notably Korea Telecom, Australia's Telstra, France's Telecom and Telstra, Japan's NTT, Cable and Wireless, Germany's Siemens, are either already partners in joint ventures with the Vietnamese Government or are negotiating with Vietnam's General Department of Post and Telecommunications (VNPT) for the production of telecommunication equipment or for the development and upgrading of many networks in Vietnam. The contribution of capital and technology of these companies is about 50% to 60% of the capital invested, and the duration of most projects is 20 years.[512]

Securities

At the moment, Vietnam does not have a law or a market for securities. However, an independent committee is preparing a law on a securities market.

Expropriation

In accordance to Article 21 of the Foreign Investment Law, the Government of Vietnam will not requisition or expropriate foreign-owned businesses by administrative measures, and enterprises with foreign owned capital will not be nationalized. However, it should be noted that article 23 of the 1992 Constitution reserves the State's right to expropriate property under certain conditions. In this case, the State has to provide appropriate compensation.[513]

Conclusion

Although the whole legal system of the country has developed steadily since 1986 in support of the Renovation Policy, the structure is still incomplete; and the laws are sometimes inconsistent in their application. It should be noted that, although the country's policy and the Foreign Investment Law indicate the interest of Vietnam in attracting and encouraging foreign investors, foreign investors have to follow many regulations controlling the activities and operations of their businesses, e.g.: the Circular on the Use of Postal Services (by foreign companies); the Circular on the Collection of Application Fees Paid in Respect of Foreign-Owned Capital; the Circular on Accounting Standards for Enterprises with Foreign-Owned Capital, Regulations and Decision on the Lease of Land, Water, and Sea Surfaces for Foreign Investment in Vietnam; Regulations on the Evaluation of Projects with Foreign-Owned Capital; the Circular on Inspection of Licensed Projects, etc.[514] It is also difficult to study the laws and regulations regarding foreign investment and ownership in Vietnam, not because there are too many laws and regulations, but because there are indications

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[512] *Telecom: A year of Lightning Growth Yields Opportunity and Challenge* IV/5 THE VIETNAM BUSINESS JOURNAL 25-26 (New York, VIAM Communications Group Ltd, Sept./Oct. 1996).

[513] *Socialist Republic of Vietnam, in* A. P. Blaustein & G. H. Flanz, CONSTITUTION OF THE COUNTRIES OF THE WORLD (Dobbs Ferry, N.Y., Oceana Publications, Inc., 1992).

[514] English texts of these regulations are published in the publication cited in *supra* note 1.

that the laws are not applied uniformly and that there are inconsistencies between the texts of the laws and actual practice. Such problems have sometimes created confusion and frustration among foreign investors.

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