

ARTICLES

THE LEGAL AND ADMINISTRATIVE FRAMEWORK FOR FOREIGN INVESTMENT IN TAIWAN

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Taiwan's record of economic growth over the past three decades is one of outstanding success, with per capita gross national product having increased from less than U.S.\$100 in 1952 to an estimated U.S.\$5,000 in the latter half of 1987. Since the mid-1950s, Taiwan's economy has enjoyed an average annual growth rate of 8.7% and, after a brief period of retrenchment in the early 1980s, in 1987 attained an estimated growth rate of 11.2%.¹ Throughout this period of rapid economic growth, Taiwan has actively sought foreign investment capital, a policy which has been markedly successful. From 1952 through 1987, the island attracted some U.S.\$7.15 billion in direct foreign equity investment, and in recent years the pace of such investment has dramatically increased. Approved foreign investment totalled U.S.\$702 million in 1985, reached U.S.\$770 million the following year, and soared to a record U.S.\$1.35 billion in 1987.²

Although the sums are large, Taiwan has been rather selective about the kinds of investment encouraged and has evolved an elaborate legal and administrative framework for the admission and di-

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1. Sun & Lee, *Economic Development of the Republic of China on Taiwan with Special Reference to ROC-US Trade and Investment Relations*, in *TRADE AND INVESTMENT IN TAIWAN* 63 (H.P. Ma 2d ed. 1985); *Incomes Rise Steeply in Taiwan*, *Asian Wall Street J.*, Dec. 16, 1987, at 6, col. 5; see *ROC's Economy Will Continue to Prosper in New Year*, *TAIWAN INDUS. PANORAMA*, Feb. 1987, at 3.

2. *TAIWAN INDUS. PANORAMA*, Jan. 1988, at 1; *Taiwan Expects Investment Rush*, *Asian Wall Street J.*, Jan. 4, 1988, at 19, col. 3.

rection of foreign investment. This article offers an overview of that framework. The article begins with a brief description of the government and legal system of Taiwan and then proceeds to describe the basic legislation permitting and encouraging foreign investment, the business forms that such investment may take, the essential features of the laws governing technology transfers, the foreign investment approval process, and the manner in which investment disputes may be settled.

I. GOVERNMENT AND LEGAL SYSTEM

The constitution and government of Taiwan are those of the Republic of China, which were extended to the island following the departure of the Japanese colonial government in 1945. The Kuomintang authorities have maintained the Republic of China on Taiwan since fleeing from the Chinese mainland in 1949. As is widely known, the authorities on Taiwan have continuously asserted that they are the legal government of China as a whole, and the constitution, laws, and structure of government on the island continue to reflect that assertion. Although the gap between such pretensions and the political reality of Communist rule of the mainland has led to certain anomalies, these are of little practical significance for foreign investment.

A. System of Government

The Constitution of 1947 provides for a system of government based to some extent on the theories of Sun Yat-sen, a founder of the republican government and of the ruling party, the Kuomintang.³ Its structure consists of an elected National Assembly as the supreme government organ, a President elected by the National Assembly, who is head of state, and five branches of national government, each of which is called a "Yuan." The President is vested with considerable power while the practical tasks of the National Assembly are few and, in the realm of law-making, restricted to amendment of the Constitution. Ordinary legislation is left to an elected Legislative Yuan, one of the five branches of the national government. The remaining four branches are the Executive Yuan, the Examination Yuan, the Control Yuan, and the Judicial Yuan.

The Executive Yuan is headed by a premier appointed by and

3. See generally THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA (J. Hsiung 2d ed. 1983) (discussing the political system). The system has recently been undergoing numerous and potentially far-reaching changes. See generally Shim, *The Legacy of Reform*, FAR EASTERN ECON. REV., Jan. 28, 1988, at 18; Willey, Bogert, Elliott & Newell, *End of a Dynasty and an Era*, NEWSWEEK, Jan. 25, 1988, at 34. For a recent critical appraisal of Taiwan's political system, see ASIA WATCH COMMITTEE, HUMAN RIGHTS IN TAIWAN 1968-1987 (1987). See also G. KERR, THE TAIWAN CONFRONTATION CRISIS (1986).

accountable to the President, and it consists of the various ministries and administrative organs of government. The Executive Yuan is often the initiator of legislation and may, in certain circumstances, with the approval of the President return a bill passed by the Legislative Yuan for reconsideration and revision. Bills returned by the Executive Yuan must be reaffirmed by a two-thirds majority of the Legislative Yuan in order to become law. Laws become effective upon promulgation by the President with the endorsement of the Premier.

The Examination Yuan has clear roots in traditional China and concerns itself primarily with the examination and selection of government officials and establishment of conditions of employment for the civil service. The Control Yuan is a watchdog body empowered to investigate and report on (but not prosecute) allegations of ineptitude and wrongdoing by other government organs. This branch is of potential significance to foreign investors, as was demonstrated during the summer of 1986. At that time there were calls for the Control Yuan to investigate the approval granted to a proposed U.S.\$160 million foreign-invested titanium-dioxide plant, which was felt by some Taiwan residents to be environmentally unsound.⁴

The courts in Taiwan are organized in two tiers of trial courts overseen at the appellate level by the Supreme Court, all of which form part of the Judicial Yuan. In an interesting departure from the prevailing mode in other civil law systems, decisions of the Supreme Court have always been reported and have come to be followed as precedent by the lower courts. The Judicial Yuan also comprises an Administrative Court (which is of particular significance to foreign investors in the areas of customs, tax, patents and trademarks), a Committee on the Discipline of Public Officials, and a Grand Council of Justices. Although the Grand Council is also of potential significance to foreign investors, it rarely sits and never hears cases in the ordinary sense. It nonetheless has the power to interpret the Constitution and to unify interpretation of the laws. Access to the Grand Council on matters of constitutional interpretation is fairly broad, but only a governmental organ may bring an application for uniform interpretation of the laws.⁵

The Taiwan provincial government, the directly-administered municipalities of Taipei and Kaohsiung, and the county governments each have varying degrees of legislative and executive power.

4. BUS. INT'L CORP, INVESTING, LICENSING AND TRADING *Taiwan* ¶ 3.05 (March 1989).

5. For an introduction to the legal system, see Ma, *General Features of the Law and Legal System of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 1-53.

The Constitution places foreign trade and economic relations within the exclusive jurisdiction of the central government.⁶ Within the scheme of Taiwan's foreign investment laws, however, local authorities have been delegated certain administrative responsibilities of concern to investors, notably in the areas of land and labor administration.⁷

B. Basic Laws

The basic laws now in force in Taiwan are those adopted by the Chinese government in the late 1920s and early 1930s. These consist of civil and criminal codes based largely on German and Swiss models and reflect to some extent Japan's experience with modification of European codes during the Meiji Restoration. Those codes, as well as the codes of civil and criminal procedure enacted in the mid-1930s, remain largely unchanged but have since been supplemented by more specialized statutes. Although the main principles of commercial law are found in the Civil Law, those provisions are of general application and have in many cases been preempted by more specific commercial statutes (*e.g.*, the Company Law, the Law of Negotiable Instruments, the Insurance Law, the Banking Law, and the Maritime Law.)⁸

Most of the commercial laws were adopted in the 1930s, and their form was influenced by French, Japanese and Anglo-American law as well as by German and Swiss experience. Taiwan has also enacted comprehensive laws dealing with a host of issues of potential concern to the foreign investor. These include laws governing land, water, mines, fisheries, forests, patents, trademarks, copyright, the issuance and trading of securities, bankruptcy, compulsory execution of judgments, civil matters involving foreign parties, and arbitration.

II. THE STATUTORY FRAMEWORK FOR FOREIGN INVESTMENT

Taiwan's legal regime for foreign investment essentially consists of several statutes authorizing privileged treatment and tax in-

6. CHUNG-HUA MIN-KUO HSIEN-FA (CONSTITUTION OF THE REPUBLIC OF CHINA), promulgated Jan. 1, 1947, arts. 107(11)-(12), 1 CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUEI HUI-PIEN (COMPILATION OF CURRENT LAWS AND REGULATIONS OF THE REPUBLIC OF CHINA) [hereinafter cited as CCL & R] 1 (1981 and supp. 1988).

7. *See, e.g.*, Lao-tung Chi-chun Fa (Labor Standards Law), promulgated July 30, 1984, at art. 4, 5 CCL & R 2145.

8. *See generally* CCL & R, *supra* note 6. There is no official English translation of Taiwan's laws, although a government agency does print unofficial translations of certain statutes and regulations for the reference of foreign investors. A somewhat out-of-date English translation of the basic laws is A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA (1967).

centives for foreign investors. Among these are two foundational laws enabling foreign nationals and overseas Chinese to apply to a special government agency for permission to enjoy privileged treatment of their investments. A statute for the encouragement of investment provides additional tax incentives to certain productive enterprises, and other statutes set up special low-tax zones for export processing and for high-technology enterprises. Foreign investment outside of the special statutory framework is possible but very rare, because it is subjected to all restrictions applicable to domestic investors. In particular, transfer of profits and capital abroad by domestic investors is restricted, and investment is not protected from expropriation. Such investors are also ineligible for tax incentives made available to approved foreign investors.

A. The Statutes for Foreign Investment

The foundation of the legal regime for foreign investment in Taiwan consists of the Statute for Investment by Foreign Nationals, which was enacted in 1954, and the virtually identical Statute for Investment by Overseas Chinese, which was passed in the following year.⁹ The two statutes provide various guarantees and incentives for projects with foreign investment that are approved by an Investment Commission ("IC") under the jurisdiction of the Ministry of Economic Affairs ("MoEA"). The statutes direct the IC to approve foreign-invested projects that (1) will produce goods or services that are needed within the country; (2) have an export market; (3) will contribute to the development of important industrial, mining, or communications enterprises within Taiwan; (4) are engaged in scientific research and development; or (5) are beneficial to national social and economic development.¹⁰ The two foreign investment statutes provide that these rather vague criteria shall be fleshed out from time to time by directives from the Executive Yuan as to the particular kinds of projects then in demand. For example, in recent years the government has been promoting foreign investment in the electronics and high-technology sectors as well as large-scale heavy

9. Wai-kuo-jen T'ou-tzu T'iao-li (Statute for Investment by Foreign Nationals) [hereinafter cited as SIFN], promulgated July 14, 1954, 20 CCL & R 12761 (amended May 14, 1986); Hua-ch'iao Hui-kuo T'ou-tzu T'iao-li (Statute for Investment by Overseas Chinese) [hereinafter cited as SIOC], promulgated Nov. 19, 1955, 20 CCL & R 12755 (amended June 2, 1986). References to foreign investment and foreign investors herein include overseas Chinese, except where otherwise specified. For general overviews of the foreign investment regime in comparative perspective, see Wan, *A Comparative Study of Foreign Investment Laws in Taiwan and China*, 11 CAL. W. INT'L L. J. 236 (1981); Stoltenberg & McClure, *The Joint Venture and Related Contract Laws of Mainland China and Taiwan: A Comparative Analysis*, 17 GA. J. INT'L & COMP. L. 45 (1987).

10. SIFN, *supra* note 9, at art. 5; SIOC, *supra* note 9, at art. 5.

industrial projects.¹¹

The forms of foreign investment eligible under the statutory scheme include the establishment of new enterprises or the expansion of existing ones, either through individual capital investment or in association with other foreigners and/or Taiwan investors, lending to existing enterprises as well as the simple purchase of stocks or bonds of domestic enterprises. The forms of permissible capital contribution to an enterprise with foreign investment include (1) foreign exchange cash; (2) domestically-needed machinery and equipment or raw materials, imported for use by the project; (3) domestically-needed goods or materials, imported for domestic sale to raise working capital; (4) proprietary technology and patent rights; and (5) capital gains on other investments in Taiwan (other than those accruing from reappraisal or disposition of land) which are eligible for remittance abroad.¹²

The two foreign investment statutes provide that an approved investment project (an "FIA" or "Foreign Investment Approved" project) shall be accorded national treatment in all respects and shall also enjoy certain privileges unavailable to purely domestic investment activities.¹³ The most significant of these privileges are the following:

Repatriation of profits, interest and capital. The foreign investor has the right to apply for immediate repatriation of its share of net profits or interest accrued from the FIA investment, as well as the right to apply for repatriation of the total amount of foreign-invested capital, one year following commencement of business by the FIA enterprise.¹⁴

Freedom from expropriation. The statutes guarantee freedom from expropriation for twenty years following commencement of business, provided that 45% or more of the FIA enterprise is owned

11. For a sectoral break-down of foreign investment projects approved in 1986, see 14 TAIWAN INDUS. PANORAMA, Nov. 1986, at 1.

12. SIFN, *supra* note 9, at art. 3; SIOC, *supra* note 9, at art. 3.

13. SIFN, *supra* note 9, at art. 20; SIOC, *supra* note 9, at art. 20. Prior to the relaxation of foreign exchange controls on July 13, 1987, this privilege alone made FIA status the *sine qua non* of most foreign investment in Taiwan. For the foreign exchange control system, see Kuan-li Wai-hui T'iao-li [hereinafter cited as Foreign Exchange Control Statute], promulgated Dec. 31, 1948, 16 CCL & R 9181 (amended June 26, 1987) and the regulations promulgated thereunder by the Central Bank of China, which is charged with administration of the law. See also Liu, *Taiwan's Deregulation of Foreign Exchange*, E. ASIAN EXECUTIVE REP., July 1987, at 7, col. 2.

It is unlikely that the relaxation of exchange controls in respect of outbound investment by domestic individuals and companies will have significant effects on inbound foreign investment, although it is probable that the SIFN and SIOC will be amended somewhat to reflect the new concern about controlling the influx of foreign exchange into Taiwan and limiting currency speculation. See generally *Taiwan Finds Large Reserves a Burden*, Asian Wall Street J., Aug. 28-29, 1987, at 11, col. 1.

14. SIFN, *supra* note 9, at art. 13; SIOC, *supra* note 9, at art. 12.

by foreign investors.¹⁵ For FIA enterprises in which the share of foreign ownership does not exceed 45% of total capital, the government will pay reasonable compensation for any expropriated assets.¹⁶

Company Law exemptions. FIA enterprises are exempted from the Company Law requirement that companies with paid-in capital of 200 million New Taiwan dollars ("N.T.\$") or more (approximately U.S.\$7 million at current exchange rates) publicly issue their shares, provided that 45% or more of the enterprise is owned by foreign investors. The statute also exempts all FIA enterprises from certain requirements regarding the nationality and domicile of the shareholders, directors, and supervisors of the enterprise.¹⁷

Special exemptions. FIA enterprises have the right to apply to the Executive Yuan for additional special privileges. These encompass exemption from certain requirements for the acquisition of land and mining rights and from those setting the number of shareholders and directors who must be Chinese nationals for the purposes of registering ships or aircraft owned by the FIA enterprise in Taiwan, except that the latter right is not extended to Overseas Chinese investors.¹⁸

B. The Statute for the Encouragement of Investment

The two foundational foreign investment statutes are permissive in nature and do not themselves set forth the kind of tax incentives that are now an integral part of the legal regimes for foreign investment created in the newly industrialized countries of East Asia. Taiwan's Statute for the Encouragement of Investment ("SEI"), passed in 1960, is by contrast an integral component of one of the first of such comprehensive schemes.¹⁹ Originally scheduled to last only ten years, the term of the SEI has been twice extended for like periods. The statute offers incentives to an entity located within Taiwan qualifying as a "Productive Enterprise."

15. SIFN, *supra* note 9, at art. 16; SIOC, *supra* note 9, at art. 15.

16. SIFN, *supra* note 9, at art. 15; SIOC, *supra* note 9, at art. 14.

17. SIFN, *supra* note 9, at art. 18; SIOC, *supra* note 9, at art. 18. As of Mar. 1, 1988, the exchange rate was approximately N.T.\$28.50/U.S.\$1.00.

18. SIFN, *supra* note 9, at art. 19.

19. Chiang-li T'ou-tzu T'iao-li (Statute for the Encouragement of Investment) [hereinafter cited as SEI], promulgated Sept. 10, 1960, 20 CCL & R 12697 (amended Jan. 26, 1987). See also Chiang-li T'ou-tzu T'iao-li Shih-hsing Hsi-tse (Enforcement Rules for the Statute for the Encouragement of Investment) [hereinafter cited as SEI Enforcement Rules], promulgated Jan. 11, 1961, 20 CCL & R 12719 (amended Sept. 3, 1986). For a slightly dated but nonetheless valuable overview of this legislation, see Hsu, *Encouragement of Foreign Investment in the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 277-328. It is widely felt in Taiwan legal circles that the SEI will not be extended upon its scheduled expiration in 1990, although tax incentives will still be made available to most of the enterprises presently encouraged.

A Productive Enterprise is defined as one that is engaged in the production of goods or the rendering of services through manufacturing, handicraft, mining, agriculture, forestry, fishery, animal husbandry, transportation, warehousing, public utilities, public facility construction and development, public housing construction, technical services, hotels, or heavy machinery construction. Although the SEI originally restricted Productive Enterprise status to domestic companies limited by shares, the statutory definition was expanded in early 1987 to include venture capital enterprises that conform to Ministry of Finance ("MoF") regulations for such entities, regardless of their corporate form, as well as branch offices of foreign corporations.²⁰

The precise package of incentives available under the SEI has been altered from time to time, and the statute is drafted to make much of it subject to the discretion of executive authorities such as the Executive Yuan, the MoEA, and the MoF. While it would be cumbersome and of limited utility to enumerate all of the specific incentives available under the SEI, some of which pertain to activities of wholly domestic enterprises, the most significant benefits offered to Productive Enterprises with foreign investment are as follows:

Corporate income tax exemption or accelerated depreciation. If a Productive Enterprise engages in an encouraged line of business, as specified from time to time by the Executive Yuan, it may either (a) enjoy a five-year exemption from the Profit-Seeking Enterprise Income Tax ("PSEIT"), with the commencement of the exemption period in some cases deferrable for up to four years following the establishment of the enterprise, or (b) accelerate depreciation of its machinery and equipment. The same two alternatives are available in connection with the expansion of an existing Productive Enterprise, although the exemption from PSEIT in such a case will be limited to the income derived from the expansion, or the accelerated depreciation will be limited to new machinery and equipment acquired in connection with such an expansion, as the case may be.²¹

Corporate income tax reduction. If a Productive Enterprise engaged in a line of business singled out for special encouragement by regulations issued from time to time by the Executive Yuan qualifies as a "big trading company" or a venture capital enterprise, then its maximum PSEIT rate will be 20%. The top PSEIT rate for

20. SEI, *supra* note 19, at art. 3. See generally Liu, *Investment Encouragement Law Amendment: An Analysis*, E. ASIAN EXECUTIVE REP., Feb. 1987, at 8, col. 1.

21. SEI, *supra* note 19, at art. 6. For the list of encouraged lines of business, see Sheng-ch'an Shih-yeh Chiang-li Lei-mu chi Piao-chun (Categories and Criteria of Productive Enterprises Eligible for Encouragement) [hereinafter cited as Criteria for Encouragement Eligibility], promulgated Nov. 11, 1971, 14 CCL & R 8077 (amended Nov. 26, 1986).

other Productive Enterprises is 25%.²²

Investment tax credits. The Executive Yuan may by decree permit Productive Enterprises to credit against PSEIT liability 5% to 20% of the amount invested by them in production equipment during the tax year, subject to a maximum credit of 50% of any PSEIT payable. Any credit in excess of the maximum may be carried over for application in the ensuing five tax years, although the same 50% ceiling will apply in each tax year.²³

Deduction of research and development expenses. Under the SEI and regulations promulgated thereunder by the Executive Yuan, the research and development expenses of a Productive Enterprise may be deducted from income in the year of expenditure. Moreover, equipment relevant to research and development as well as quality control having a useful life in excess of two years may be eligible for accelerated depreciation.²⁴ If the total expenditure of a Productive Enterprise on research and development in a single tax year exceeds the highest research and development expenses incurred by that enterprise during the preceding five-year period, then it may take an amount equal to 20% of the excess as a credit against income tax liability for the current year, provided that the amount credited may not exceed 50% of the PSEIT otherwise payable in that tax year. Any surplus credits may be carried over for five years.²⁵

Retention of earnings. An ordinary Productive Enterprise may retain earnings in an amount equal to its paid-in capital, while a

22. SEI, *supra* note 19, at art. 15. For the list of businesses specially encouraged, see Chung-yao Sheng-ch'an Shih-yeh T'e-pieh Chiang-li Shih-yung Fan-wei ji Piao-chun (Categories and Criteria for Special Encouragement of Important Productive Enterprises), promulgated Oct. 6, 1976, 14 CCL & R 8109 (amended Oct. 27, 1981). For the definition of a "big trading company" (which is tied to the value of its transactions, amount of paid-in capital, corporate form and number of branch offices), see Hua-ch'iao chi Wai-kuo-jen T'ou-tzu Ta Mao-i Shang Piao-chun (Criteria for Big Trading Companies by Overseas Chinese and Foreign Nationals), promulgated Apr. 19, 1984, at art. 2, 20 CCL & R 12788-19 (amended Oct. 17, 1986). For the definition of a venture capital enterprise, see Chuang-yeh T'ou-tzu Shih-yeh Kuan-li Kuei-tse (Regulations Governing the Administration of Venture Capital Investment Enterprises) [hereinafter cited as Venture Capital Regulations], promulgated Nov. 24, 1983, at art. 3, 16 CCL & R 9380-37 (amended Jan. 26, 1987). See also Ohlson & Huang, *Venture Capital Investment*, E. ASIAN EXECUTIVE REP., Apr. 1987, at 7, col. 1.

23. SEI, *supra* note 19, at art. 10. See also Min-ying Sheng-chan Shih-yeh Kou-chih Chi-ch'i She-pei Shih-yung T'ou-tzu Ti-chien Pan-fa (Measures Governing the Deduction for Investment in Procurement of Machinery and Equipment by Private Productive Enterprises), promulgated June 29, 1985, 14 CCL & R 8392-31 (amended June 29, 1986).

24. SEI, *supra* note 19, at art. 34.

25. SEI, *supra* note 19, at art. 34-1. See also Sheng-chan Shih-yeh Yen-chiu Fa-chan Fei-yung T'ou-tzu Ti-chien Pan-fa (Measures Governing the Deduction for Investment in Research and Development Expenses by Productive Enterprises), promulgated Sept. 18, 1985, 20 CCL & R 12788-21.

Productive Enterprise in a strategic industry, as determined by the Executive Yuan, may retain earnings up to a ceiling of twice its paid-in capital (or its working capital, in the case of a branch office). Where these limits are exceeded, the excess amount will be subject to PSEIT at a rate of 10% but not the more stringent rules of the Income Tax Law governing taxation of retained earnings.²⁶

Income tax deferral in respect of capital increases. When a Productive Enterprise invests retained earnings in an expansion project for the purchase or renovation of production machinery and equipment or transportation facilities used for the production of goods, rendering of services, research and development, quality control, pollution control, conservation of energy, or improvement of safety, or when a venture capital company uses undistributed earnings to increase the company's capital base, stock dividends issued to shareholders as a result of the capital increase may be deferred from inclusion in the shareholders' personal income for tax purposes until the dates on which the shares are transferred by each shareholder. When a foreign branch office uses undistributed earnings as working capital for the purpose of investment in an expansion project involving the purchase or renovation of production equipment and machinery or transportation facilities for the uses mentioned above, the amount thereof may be excluded from income until such time as the working capital of the branch is reduced or the branch is closed by the foreign company or the government.²⁷

Preferential income tax treatment for foreign personnel. Where a foreign corporation assigns personnel to work in Taiwan on a non-permanent basis in connection with an FIA Productive Enterprise in which the foreign entity is an investor, salaries and other remuneration paid to such personnel by their foreign employer outside of Taiwan shall not be considered Taiwan-source income subject to local income tax, provided that such persons are not physically present within the country for more than 183 days in a tax year.²⁸

Reduced withholding on dividends. A non-resident shareholder in an FIA Productive Enterprise will be entitled to a 20% rate of withholding on dividend income remitted abroad. If a foreign investor can prove that the tax paid in Taiwan will not be creditable against its home country's tax, then an application may be made to further reduce withholding to 15%. By comparison, the rate applicable to dividends of a Productive Enterprise that is not an FIA is

26. SEI, *supra* note 19, at art. 41; Suo-te Shui Fa [hereinafter cited as Income Tax Law], promulgated Feb. 17, 1942, at art. 76-1, 14 CCL & R 7909 (amended Dec. 30, 1985). See generally Ts'e-lüeh-hsing Kung-yeh Chih Shih-yung Fan-wei (Applicable Scope of Strategic Industry), promulgated Aug. 21, 1982, 20 CCL & R 12788-3 (amended Dec. 23, 1987).

27. SEI, *supra* note 19, at art. 13.

28. *Id.*, at art. 18.

35%. The 20% rate will also apply to dividend income received by a non-resident individual who is involved in the management of an FIA Productive Enterprise, even if the individual is physically present within Taiwan for that purpose for more than 183 days in a taxable year. As a result of the January 1987 amendment of the SEI, a branch of a foreign corporation that qualifies as a Productive Enterprise will also be entitled to a 20% rate of withholding on profits remitted to its head office overseas.²⁹

Deferral or exemption of customs duties. Payment of customs duties on machinery or equipment imported for use by a Productive Enterprise may, following approval by the IC, be paid in installments, with the first payment deferred until one year after the machinery or equipment is put into use. Moreover, machinery or equipment not manufactured within Taiwan imported for use by an industrial or mining enterprise may, following IC approval, be exempted from customs duties. The SEI provides for reassessment of such duties, however, if the machinery is transferred or if the enterprise reduces its capital within five years following importation of the machinery or equipment. Finally, the importation of quality control inspection equipment not produced within Taiwan for the purpose of research and development of new products, improvement of quality standards, conservation of energy, or environmental protection is duty-free.³⁰

In addition to the benefits set forth above, the SEI provides for a number of other incentives and privileges relating to such matters as simplified import procedures, the public listing of an enterprise's shares, acquisition and sale of land, allocation of foreign exchange reserves, and so forth.³¹ Many of these are potentially relevant to a Productive Enterprise with foreign investment, and it is therefore always necessary to reexamine the SEI and the relevant regulations thereunder in light of an actual project to make sure that full use is made of all available incentives.

29. *Id.*, at art. 16.

30. *Id.*, at art. 21. See also Sheng-ch'an Shih-yeh Shu-ju Chi-ch'i She-pei Fen-ch'i Chiao-na chi Mien-cheng Chin-k'ou Shui-chuan Shih-shih Pan-fa (Enforcement Measures Governing Payment in Instalments and Exemption from Duties and Dues Chargeable in respect of Machinery and Equipment Imported by Productive Enterprises), promulgated Nov. 5, 1971, 15 CCL & R 8565 (amended May 27, 1988); Kung-k'uang-yeh huo Shih-yeh Ch'uang-li huo K'uo-ch'ung Chiang-li Piao-chun (Criteria for Encouragement of Establishment or Expansion of Industrial and Mining Enterprises), promulgated Mar. 12, 1975, 15 CCL & R 8577 (amended Nov. 30, 1987).

31. In addition to the relevant articles of the SEI and the SEI Enforcement Rules, there are various regulations setting forth rules for enjoyment of incentives. See, e.g., Hua-ch'iao chi Wai-kuo-jen T'ou-tzu Sheng-chan Shih-yeh Shu-ju Tsu-yung Chi-ch'i She-pei Chien-hua Tso-yeh Yao-tien (Key Points of the Simplified Procedure for the Importation of Machinery and Equipment by Overseas Chinese and Foreign Investors in Productive Enterprises), promulgated Aug. 19, 1982, SHIH-YUNG SHUI-WU LIU-FA CH'UAN-SHU (COMPLETE PRACTICAL TAX LAWS) 365 (1986).

C. The Export Processing Zones

Taiwan has three export processing zones ("EPZs"), which are combinations of free ports and industrial parks. Land within the EPZs is owned by the EPZ authority, which leases it to enterprises located therein. These enterprises also have an option to lease or purchase standard factory buildings constructed and maintained by the EPZ authority.³²

The first EPZ was established in Kaohsiung at the end of 1966, and it was completely filled within three years. Two additional EPZs were established in 1971, at Tantz in Taichung and at Nantze in Kaohsiung. By 1986 the three zones had attracted a combined total investment of U.S.\$425.09 million, 90% of which was from outside of Taiwan, and enterprises within the EPZs had exported some U.S.\$17.53 billion of goods, while importing U.S.\$9.38 billion in raw materials.³³

Enterprises operating in the EPZs are entitled to import machinery and raw materials required for export processing duty free. They may also apply for (a) exemption from PSEIT for a period of five years or accelerated depreciation for fixed assets, provided the enterprise is engaged in a line of business listed in the Categories and Criteria of Productive Enterprises Eligible for Encouragement, and (b) repatriation of profits and invested capital by foreign investors where the enterprise has FIA status. Provided that the company's line of business is an encouraged one, the finished export goods will be exempt from commodity tax, while exporters also benefit by having business tax assessed on export products at a zero rate.³⁴

Ordinarily, an enterprise within an EPZ is to export all of the goods it produces. But, in cases where the goods are needed within Taiwan, upon approval by the MoEA an enterprise may sell a certain amount of its output on the domestic market. The ceiling on domestic sales by EPZ enterprises is 20% of total output, although in early 1988 the MoEA was reportedly considering increasing the maximum to 50%. In any event, an EPZ enterprise will be liable for payment of customs duties on goods sold domestically.³⁵

32. See generally Chia-kung Ch'u-k'ou Ch'ü T'u-ti Fang-tsu Ho-p'ie Piao-chun (Criteria for Allocation of Land for Lease in the Export Processing Zones), promulgated Sept. 25, 1970, 20 CCL & R 12837 (amended Nov. 23, 1972).

33. TAIWAN INDUS. PANORAMA, Mar. 1987, at 3-4.

34. Chia-kung Ch'u-k'ou Ch'ü She-chih Kuan-li T'iao-li (Statute for the Establishment and Management of Export Processing Zones) [hereinafter cited as EPZ Statute], promulgated Jan. 30, 1965, at art. 13, 20 CCL & R 12789 (amended Dec. 24, 1979); Ying-yeh Shui-fa (Business Tax Law), promulgated June 13, 1931, at art. 7, 14 CCL & R 8257 (amended Nov. 15, 1985). For the list of encouraged lines of business, see Criteria for Encouragement Eligibility, *supra* note 21.

35. EPZ Statute, *supra* note 34, at arts. 5, 14.

The EPZ authorities are directed to screen applications for investment with a view to encouraging new or underdeveloped industries. Currently, they discourage labor-intensive and low value-added industries by requiring generally that the value added by processing exceed 25%. An initial minimum investment of N.T.\$6 million is also required.³⁶

D. The Science-based Industrial Park

In 1980, the government established the Hsinchu Science-based Industrial Park ("SIP") for the purpose of attracting high-technology enterprises. The SIP offers investors a package of incentives in addition to those otherwise available under the SEI, including (a) duty-free importation of raw materials, machinery and equipment;³⁷ (b) exemption from PSEIT for a period of five years, the commencement of which can be deferred for up to four years following the establishment of the enterprise; (c) a maximum PSEIT rate of 22%; (d) an investment tax credit of 15% of the cost of new equipment obtained as part of an expansion project;³⁸ and (e) an option to lease or purchase standard factory buildings constructed and maintained by the SIP administration or authorization to construct a factory building.³⁹

As in the EPZs, the SIP administration leases land to enterprises located within the park. As an additional incentive, the authorities may exempt an enterprise from the payment of land rental for up to five years in special cases where the enterprise has very advanced technology.⁴⁰ The SIP is a customs-bonded area, and the SIP authorities are empowered to issue import and export licenses directly to enterprises located therein. As in the EPZs, domestic sales of products manufactured by enterprises within the park require special approval, but unlike EPZ-based companies, which may currently sell no more than 20% of their output within Taiwan, there is no ceiling on domestic sales applicable to SIP-based enterprises.⁴¹

Investors applying to establish enterprises within the SIP must meet several threshold requirements. They must demonstrate that

36. Chia-kung Ch'u-k'ou Ch'ü Wai-hsiao Shih-yeh Shen-ch'ing She-li Shen-ch'a Pan-fa (Measures for Examining Applications for Establishment of Export Enterprises in the Export Processing Zones), promulgated July 19, 1965, at art. 2, 20 CCL & R 12817 (amended Jan. 21, 1985).

37. K'o-hsüeh Kung-yeh Yüan-ch'ü She-chih Kuan-li T'iao-li (Statute for the Establishment of a Science-based Industrial Park) [hereinafter cited as SIP Statute], promulgated July 27, 1979, at art. 17, 31 CCL & R 19347 (amended May 20, 1981).

38. SIP Statute, *supra* note 37, at art. 15.

39. *Id.*, at art. 13.

40. *Id.*, at art. 19.

41. *Id.*, at arts. 17, 18.

they have conducted relevant feasibility studies and have a viable business plan for the production of the proposed goods. They must also demonstrate that they will utilize advanced technology in their production activities, carry on significant research and development activities within the park, and train an agreed upon number of local technical personnel, or otherwise make a significant contribution to the development of the economy. Unlike the SEI, the SIP Statute limits eligibility for incentives to companies limited by shares and organized in Taiwan.⁴² There are also certain restrictions and fees payable by enterprises within the SIP that do not apply to those outside. Of note are requirements regarding investment in equipment used for research and development, quotas for employment of local technical personnel, and payment of an administration fee tied to gross sales.⁴³ The SIP Statute does contain a "best treatment" provision, however, whereby an applicant wishing to invest in the park may request the most favorable treatment available under either the statute or the SEI.⁴⁴ By the end of 1987 the Hsinchu SIP had managed to attract more than seventy manufacturers who in that year alone exported goods valued at some U.S.\$850 million.⁴⁵

III. FORMS OF FOREIGN INVESTMENT IN TAIWAN

In choosing a business form for investment in Taiwan, foreign investors are free to acquire shares in an existing domestic company, form a new company in Taiwan, or register a branch office of their foreign corporation.

A. Branches of Foreign Corporations

Foreign corporations wishing to establish branch offices in Taiwan are to file applications with the MoEA, which seeks evidence that applicants are duly constituted and authorized to do business in the country of incorporation.⁴⁶ There are few restrictions in this regard, but corporations organized in countries that do not grant recognition to companies organized in Taiwan may not establish branch offices there.⁴⁷ Once duly recognized, a branch office is, with minor exceptions, entitled to the same treatment accorded to companies incorporated in Taiwan.⁴⁸ Since a branch is not a sepa-

42. *Id.*, at art. 3. It appears that incentives may soon be made available to foreign branches as well. See TAIWAN INDUS. PANORAMA, Aug. 1987, at 1.

43. SIP Statute, *supra* note 37, at arts. 3, 27, 29.

44. *Id.*, at art. 2.

45. *Taiwan Pinning High Hopes on Industrial Park*, Asian Wall Street J., Jan. 29-30, 1988, at 6, col. 3.

46. Kung-ssu Fa [hereinafter cited as Company Law], promulgated Dec. 26, 1929, at art. 371, 21 CCL & R 12987 (amended Dec. 7, 1983).

47. *Id.*, at art. 373.

48. *Id.*, at art. 375.

rate legal entity, however, the presence of a branch on Taiwan will also subject the head office and all other branch offices of the foreign corporation to the jurisdiction of the local courts and government authorities.

A branch office recognized by the MoEA must have an operating fund placed at the exclusive disposal of the branch, the amount of which is prescribed by regulations that differentiate according to the nature of the company and its line of business.⁴⁹ This operating fund will be regarded as "paid-in capital" for the purposes of computing incentives available under the SEI.⁵⁰

The government is now seeking to encourage foreign corporations to establish branches in Taiwan. This is apparent from both the revised definition of a Productive Enterprise and additional provisions permitting a tax-free exchange when a wholly-owned subsidiary is transformed into a branch having an organizational form similar to that of a company limited by shares. Further, the government allows the new branch to enjoy any income tax deferrals accrued by the subsidiary.⁵¹

B. Wholly Foreign-Owned Companies

The Company Law in Taiwan is a comprehensive statute originally modelled on Continental legislation but gradually revised to follow Anglo-American corporation laws.⁵² Apart from companies limited by shares, discussed in more detail below, the Company Law recognizes three types of business organization. These include (1) unlimited companies, which resemble partnerships in that their shareholders have unlimited joint and several liability for the debts of what are nonetheless separate legal entities;⁵³ (2) limited companies, which are akin to small closely-held corporations;⁵⁴ and (3) companies with shareholders of unlimited and limited liability, which resemble limited partnerships.⁵⁵ None of these forms have attracted significant interest from foreign investors, primarily because they do not fall within the SEI's definition of a Productive Enterprise.⁵⁶

Although foreign investors who wish to wholly-own a Taiwan

49. *Id.*, at art. 372.

50. SEI, *supra* note 19, at art. 3.

51. *Id.*, at arts. 38, 38-1.

52. For an overview, see generally Liu, *The Status of Aliens and Recognized Foreign Corporations under the Law of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 241-275; Wang, *Company Law of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN 511-550.

53. Company Law, *supra* note 46, at arts. 40-97.

54. *Id.*, at arts. 98-113.

55. *Id.*, at arts. 114-127.

56. SEI, *supra* note 19, at art. 3.

company will usually form a new entity, it is also possible for foreigners to purchase an existing concern. Apart from restrictions on foreign ownership in certain sectors, there is no special legislation governing investment in existing enterprises, although a foreign investor must apply to the IC for approval prior to acquiring shares if FIA status is desired.⁵⁷ One reason for forming a new company rather than acquiring an existing concern, however, is that technology may only be capitalized by an incorporator.⁵⁸

Under the Company Law, a company limited by shares must have at least seven incorporators and must maintain at least that number of shareholders. However, because there is no individual minimum shareholding required, six of the seven shareholders may be nominal.⁵⁹ A common procedure is to have the nominee shareholders sign declarations of trust assigning their shares back to the foreign investor. According to Taipei lawyers, this practice is widespread but of uncertain legality.

The Company Law imposes a number of restrictions potentially of concern to foreign investors. These include the requirements that (1) not fewer than half of the incorporators of a company limited by shares should be domiciled within Taiwan;⁶⁰ (2) for at least one year following incorporation, the incorporators may not transfer their shares;⁶¹ (3) both the chairman and the vice chairman must be Chinese citizens and they, as well as at least half of the company's managing directors, must be domiciled within Taiwan;⁶² (4) at least one of the elected supervisors (akin to independent auditors) must be domiciled within Taiwan;⁶³ and (5) a company with paid-in capital of N.T.\$200 million or more must apply to offer its shares to the public and comply with certain requirements regarding shareholder diversification and financial re-

57. SIFN, *supra* note 9, at arts. 4(2), 8; SIOC, *supra* note 9, at arts. 4(2), 7. Sectors in which foreign investment is prohibited or restricted include inland transportation, public utilities and certain defense-related industries. While the restrictions on investment in inland transportation are found in law, the remainder are matters of IC policy, not officially published. See Kung-lu Fa (Public Highways Law), promulgated Feb. 1, 1971, at art. 35, 24 CCL & R 14463 (amended Jan. 23, 1984). In early 1988, the Economic Planning and Development Council reportedly proposed that the number of categories of business closed to foreigners should be reduced to around ninety. *Taiwan Drafting Plan on Foreign Investment*, Asian Wall Street J., Feb. 12-13, 1988, at 8, col. 3. See also TAIWAN INDUS. PANORAMA, Oct. 1987, at 1.

58. Company Law, *supra* note 46, at art. 156. See also Chuan-li-ch'üan chi Chuanmen Chi-shu Tso-wei Ku-pen T'ou-tzu Pan-fa (Measures for the Use of Patent Rights and Technical Know-How as Equity Investment) [hereinafter cited as Technology Capitalization Measures], promulgated June 3, 1968, 20 CCL & R 12771.

59. Company Law, *supra* note 46, at arts. 128, 315(4).

60. *Id.*, at art. 128.

61. *Id.*, at art. 163.

62. *Id.*, at art. 208.

63. *Id.*, at art. 216.

porting prescribed by the Securities and Exchange Commission.⁶⁴ In the case of most foreign-invested companies, and clearly with respect to a wholly foreign-owned enterprise, these requirements may be waived by the IC, provided an application for waiver is made pursuant to the provisions of the Foreign Investment Statute.

Other features of the Company Law of concern to foreign investors include:

Minimum capitalization and legal reserve. A company limited by shares must have a minimum capital base of N.T.\$1 million, with at least that amount plus 25% of any authorized capital in excess of N.T.\$1 million to be paid-in upon registration.⁶⁵ Venture capital companies that wish to qualify under the SEI must have a minimum capitalization of N.T.\$200 million, with the entire amount to be paid in cash upon registration.⁶⁶ The Company Law further requires that 10% of an enterprise's annual net income be set aside as a legal reserve, unless the built-up legal reserve is equal to the total capital of the company.⁶⁷

Restrictions and tax on transfer of shares. Under the Company Law, incorporators may not transfer their shares for a period of one year following the incorporation of a company limited by shares.⁶⁸ In practice any transfer of shares in an FIA enterprise is subject to IC approval. The procedure for transfer requires the transferor and proposed transferee to submit a joint application, which the IC will scrutinize in light of the investment project to ensure that the transfer will in no way endanger the project. There is also a securities transaction tax, currently imposed at a rate of 0.3% of the value of the shares transferred.⁶⁹

Residency requirement for managerial personnel. The managers of a Taiwan company must be domiciled or resident in Taiwan, a fact which must in practice be established before they can be registered as officers of the company.⁷⁰ Unlike the exemptions for direc-

64. *Id.*, at art. 156; Cheng-ch'üan Chiao-i Fa [hereinafter cited as Securities Transfer Law], promulgated Apr. 30, 1968, at arts. 22-1, 28-1, 36, 16 CCL & R 9581 (amended Jan. 29, 1988).

65. *Id.*, at art. 156; Yu-hsien Kung-ssu chi Ku-fen Yu-hsien Kung-ssu Tsui-ti Tzu-pen-o Piao-chun (Minimum Capitalization Standards for Limited Companies and Companies Limited by Shares), promulgated May 31, 1969, at art. 2, 21 CCL & R 13063 (amended Oct. 15, 1980).

66. Venture Capital Regulations, *supra* note 22, at art. 7; SEI, *supra* note 19, at art. 8.

67. Company Law, *supra* note 46, at art. 237.

68. *Id.*, at art. 163.

69. Cheng-ch'üan Chiao-i Shui T'iao-li (Securities Transfer Tax Statute), promulgated Sept. 12, 1946, at art. 2, 14 CCL & R 8253 (amended Nov. 27, 1978). See generally Securities Transfer Law, *supra* note 64. See also Deng & Ma, *Update on Securities Regulation in Taiwan*, E. ASIAN EXECUTIVE REP., Oct. 1987, at 20, col. 1.

70. Company Law, *supra* note 46, at art. 29.

tors and shareholders, there is no exemption from this requirement, even for an FIA enterprise.

Requirements for the board of directors. The Company Law requires that a company limited by shares have a minimum of three directors but imposes no maximum number.⁷¹ Broadly speaking, the directors of a Taiwan-organized company play the same role as those of corporations organized under Anglo-American corporation laws, with directors being both fiduciaries and the highest authorities within the company. In certain circumstances, the Company Law permits their indemnification by the company for liabilities incurred by virtue of their service as directors. In connection with a wholly-owned subsidiary, these issues do not loom large, as most foreign investors are more concerned with practical matters, such as the use of proxies and the location of meetings, than directors' fiduciary duties. In this regard, board meetings of FIA companies need not be held in Taiwan. Moreover, directors not resident in Taiwan may appoint shareholders or other directors as proxies to attend meetings of the board, although a director may not act as proxy for more than one absent director, and the appointment of a shareholder requires registration with the Commercial Registrar in the MoEA.⁷²

Limitation on lending by parent. A foreign parent may extend an investment loan to its Taiwan subsidiary, subject to approval by the IC and the following internal policy restrictions: (1) absent special approval from the Central Bank of China ("CBC"), the loan must not exceed an amount equal to three times the parent's equity investment in the subsidiary; (2) the loan may be used for offshore procurement only and may not be converted into ROC currency; and (3) the loan shall be for a period of not less than two years, although the rate of interest may be fixed or floating.⁷³ The IC has recently become quite concerned about currency speculation, and from June to September 1987 the CBC took measures against speculators by sharply restricting foreign borrowing by domestic banks and by the Taiwan branches of foreign banks. It appears, however, that lending by foreign parents of FIA enterprises was not directly affected by these temporary measures.⁷⁴

Employees' pre-emptive rights to purchase shares. Generally, 10% to 15% of new shares issued must be offered to the employees of a company limited by shares. However, the rule does not apply where the new shares are issued to existing shareholders by capital-

71. *Id.*, at art. 192.

72. *Id.*, at art. 205.

73. See generally Yeh, *Loan Investments Cannot be Converted into Local Currency*, E. ASIAN EXECUTIVE REP., Dec. 1987, at 18, col. 2.

74. *Taiwan to End Freeze*, Asian Wall Street J., Sept. 29, 1987, at 17, col. 6. See also *Taipei Moves Against Speculators*, Asian Wall Street J., Jan. 19, 1988, at 11, col. 2.

izing reserves or capital surplus arising as a result of asset revaluation. It also does not apply to the issuance of shares pursuant to a merger or the conversion of existing debt into equity.⁷⁵ The common practice of having new employees waive their pre-emptive rights to purchase shares at the time of commencing employment is an issue that has not yet been tested in the courts.

Employee bonuses. It is customary in Taiwan to pay employees a year-end bonus, paid out of pre-tax profit and deductible as a business expense. The Company Law also requires, however, that a company's articles of association specify an amount to be allocated out of after-tax profits to an employee bonus fund, such allocation to occur at the outset of operations and on a monthly basis thereafter.⁷⁶ The Statute on Employee Welfare Funds provides that each enterprise must allocate to this fund 1% to 5% of total capital at the time of the establishment of the company and 0.05% to 0.15% of monthly revenues thereafter. The statute also requires the withholding of 0.5% of each employee's monthly wages for contribution to the fund as well as allocation thereto of 20% to 40% of the proceeds when the enterprise sells its waste materials.⁷⁷ Such funds are to be administered by committees formed within each company by its employees and management, pursuant to rules promulgated by the Ministry of the Interior.⁷⁸

C. Joint Ventures

Most foreign investment in Taiwan takes the form of joint ventures between foreign and domestic investors because the government clearly prefers that such investment involve local partners. This preference is not expressed in legislation but rather is apparent from the pattern of IC approvals of foreign investment applications: nearly three-quarters of FIA enterprises on Taiwan are joint ventures having local participation.⁷⁹ There is no legislation to deal with joint ventures *per se*, and such ventures could adopt any of the four types of corporate structure recognized by the Company Law, or could take the form of a contractual joint venture or simple partnership. In practice, however, virtually all joint ventures with foreign investment in Taiwan are organized as companies limited by shares in order to make the enterprise eligible for incentives under the SEI or the SIP statute.

75. Company Law, *supra* note 46, at art. 267.

76. *Id.*, at art. 235.

77. Chih-kung Fu-li-chin T'iao-li (Statute on Employee Welfare Funds), promulgated Jan. 26, 1943, at art. 2, 5 CCL & R 2775 (amended Dec. 16, 1948).

78. *Id.*, at art. 5.

79. See generally Hsu, Li & Wang, *Joint Ventures in the Republic of China: A Study of International Business Cooperation*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 551-557.

The basic features of a company limited by shares have been briefly described above. The exemption from the shareholder and director nationality and domicile requirements available to a wholly foreign-owned subsidiary is also available to a joint venture in which 45% or more of the enterprise is owned by foreign investors, subject to approval by the IC of an application made under the Statutes for Foreign Investment. There are a number of other features of a company limited by shares of particular interest to foreign investors considering this form as a joint venture vehicle. These features principally concern the role of the joint venture contract and the control of the enterprise after incorporation and may be summarized as follows:

Capacity to enter into a joint venture contract. In theory, when a foreign corporation is to be a party to any contract signed within Taiwan, such as a joint venture agreement with a domestic investor, it should comply with Company Law provisions requiring registration of foreign companies with the MoEA. In practice, however, registration is not necessary where the foreign company is not itself engaging in business within Taiwan. Even an unrecognized foreign corporation may litigate to enforce a contract under the provisions of the Civil Procedure Law.⁸⁰

Joint venture contracts generally. It is typical in Taiwan foreign investment practice to enter into comprehensive joint venture contracts dealing with the usual range of concerns. These include such matters as initial capital structure, distribution of profits, methods of raising new capital, restrictions on share transfer, technology transfer, composition of the board, appointment of key personnel, confidentiality, non-competition, product range, export sales, accounting, parent company guarantees, dispute settlement, dissolution, and responsibility for obtaining government approvals. Joint venture contracts may be written in a foreign language and may be made subject to a choice of foreign governing law. Such contracts will generally be enforceable in the local courts, although certain clauses, such as those dealing with share transfer and non-competition, may be controversial.⁸¹

Enforceability of shareholder agreements. The Company Law forbids the inclusion of restrictions on the transfer of shares in the articles of incorporation of a Taiwan company.⁸² Shareholder agreements are permissible, although under the Civil Law they are not capable of specific enforcement, and the only remedy for breach

80. See generally Liu, *supra* note 52; Min-shih Su-sung Fa [hereinafter cited as Civil Procedure Law], promulgated on Feb. 1, 1935, at art. 40, 34 CCL & R 19935 (amended Apr. 25, 1986; Company Law, *supra* note 46, at art. 386.

81. See Part VI *infra* regarding choice of foreign governing law.

82. Company Law, *supra* note 46, at art. 163.

is to seek damages from the breaching party.⁸³

Control generally. Under the Company Law, control generally follows ownership on a one-share one-vote basis, although this legislation does provide for the possibility of preferred shares and differentiation in voting power.⁸⁴ In practice, preferred shares are rarely issued because of the general reluctance of the IC to permit control to be shifted by their use and uncertainties about how such shares would be treated by the courts. It is therefore advisable for foreign investors who wish to maintain control of a local company to take a majority equity position. There are no restrictions in that regard, and the authorities do not attempt to force joint venture arrangements into difficult fifty-fifty deals.

Preparatory office. The implementing rules under the SEI recognize that an investor planning to organize a new entity under the Company Law may set up a preparatory office for the negotiation of matters relating to its establishment.⁸⁵ Under general principles of company law, such a preparatory office will not be a legal person and may not perform juristic acts, although in practice it may have a bank account that can be used for the inward remittance of funds to be invested.

Powers of the Chairman. The chairman of the board of a Taiwan company has sweeping powers as the statutory representative of the company and may commit it despite internal agreements to the contrary, which agreements may not be invoked against *bona fide* third parties.⁸⁶ In practice, therefore, foreign partners in Taiwan joint ventures always seek to appoint the chairman of the company, and it is typical to specify their power to do so in the joint venture contract. It is also possible to designate the initial chairman in the company's articles of association.

Extraordinary quorum requirements. The Company Law provides that a company may carry out certain important actions only where (1) the action has been proposed in a resolution passed by the board of directors at a meeting attended by two-thirds or more of the members of the board or their proxies, and (2) a majority of the shares voted at a shareholders meeting attended by shareholders or their proxies holding at least two-thirds of the total number of is-

83. The Civil Law does not provide for the remedy of specific performance, although in certain cases it may be possible to compel a seller to perform a contract of sale. See Chung-hua Min-kuo Min-fa (Civil Law of the Republic of China), promulgated May 23, 1929, at art. 227, 34 CCL & R 19789 (amended July 1, 1982). See also Ning, *Chinese Law of Sales*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 389-425; Yang, *Contract Law of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN 361-388.

84. Company Law, *supra* note 46, at arts. 157, 179.

85. SEI Enforcement Rules, *supra* note 19, at art. 66.

86. *Id.*, at arts. 36 (restrictions on authority of manager not effective vis a vis third parties), 192-215 (setting out powers of directors).

sued and outstanding shares approve a resolution to carry out the action. Among the "important actions" covered by this provision are transfers of all or a substantial portion of a company's property and significant acquisitions of property that may substantially affect a company's business.⁸⁷ In cases of shareholders meetings at which decisions of dissolution or merger are made, the quorum is set by the Company Law at three-quarters of issued and outstanding shares.⁸⁸ The statute also permits the articles of association of a company to set even higher quorums for shareholders meetings involving important decisions or dissolution.⁸⁹ The use or abuse of such extraordinary quorum requirements is an important consideration for investors contemplating a joint venture in Taiwan.

Selection of a joint venture partner. The selection of a joint venture partner is left to the foreign party, although certain government agencies will assist in match-making if desired. A foreign investor should note, however, the restriction in the Company Law that prohibits a Taiwan company (other than an investment or venture capital company) from investing an amount in excess of 40% of its paid-in capital in another company. This restriction may limit the ability of a small local partner to have a substantial stake in the proposed joint venture.⁹⁰

IV. TECHNOLOGY TRANSFER LEGISLATION

Foreign investors often contribute technology as a component of their equity investment in a company in Taiwan (that is, "capitalize" the technology), or license their proprietary technology to the enterprise. Occasionally both are done. Until recently, however, Taiwan enjoyed possibly the world's worst national reputation for protection of foreign intellectual property. The government has taken steps in the past few years to improve the legal protection of intellectual property, both through the passage of new laws and by the amendment and more vigorous enforcement of existing patent, trademark, and copyright legislation.⁹¹ Moreover, the Criminal

87. *Id.*, at arts. 185, 277.

88. *Id.*, at art. 316.

89. *Id.*, at arts. 185, 277, 316.

90. *Id.*, at art. 13. It appears that this rule may soon be changed with respect to investment in companies located within the Hsinchu SIP. See TAIWAN INDUS. PANORAMA, Aug. 1987, at 1.

91. See generally Chuan-li Fa [hereinafter cited as Patent Law], promulgated May 29, 1944, 21 CCL & R 12963 (amended Dec. 24, 1986); Chuan-li Fa Shih-hsing Hsi-tse (Enforcement Rules for the Patent Law), promulgated Sept. 24, 1947, 21 CCL & R 12979 (amended July 10, 1987); Shang-piao Fa (Trademark Law), promulgated May 6, 1930, 21 CCL & R 12933 (amended Nov. 29, 1985); Shang-piao Fa Shih-hsing Hsi-tse (Enforcement Rules for the Trademark Law), promulgated Dec. 30, 1930, 21 CCL & R 12943 (amended Oct. 19, 1987); Chu-tso-ch'üan Fa [hereinafter cited as Copyright Law], promulgated May 14, 1928, 7 CCL & R 4117 (amended July 10, 1985); Chu-tso-

Code provision for fines or imprisonment of not more than one year as sanctions for disclosure of confidential industrial or commercial information is now being more frequently invoked.⁹² While these reform efforts are significant, their effect on foreign investment in Taiwan remains unclear.

A. Capitalization of Technology

Capitalization of technology in a local company is permitted by the two foreign investment statutes, but only subject to rather severe restrictions. The principal rules are found in regulations issued by the MoEA, although the SIP statute also contains provisions concerning capitalization of technology in enterprises located within the Hsinchu SIP.⁹³ Generally speaking, patent rights and technical know-how may be contributed to capital only when such technology can be used for production of goods not yet produced on Taiwan or when the technology can be used to reduce production costs or improve the quality of goods already being produced.⁹⁴ The definition of patent rights in the regulations extends only to rights granted under the Patent Law, while technical know-how is defined as "newly-developed technology, having economic value, required by the enterprise and not previously in use" in Taiwan.⁹⁵

Unless the investor is a general partner in the enterprise to which the technology is being contributed, use of patent rights as a capital investment is limited to an amount equal to 20% of the company's paid-in capital.⁹⁶ With regard to technical know-how, the limit imposed is an amount equal to 15% of paid-in capital coupled with a requirement that the investor contribute in cash or in kind an amount at least equal to that representing capitalized technical

ch'üan Fa Shih-hsing Hsi-tse (Enforcement Rules for the Copyright Law), promulgated May 14, 1928, 7 CCL & R 4123 (amended June 16, 1986). See also Cheng & Chao, *Update on Intellectual Property Rights Protection in Taiwan*, E. ASIAN EXECUTIVE REP., June 1987, at 7, col. 1; Liu & Chiang, *Patent Law Amended*, E. ASIAN EXECUTIVE REP., Jan. 15, 1987, at 7, col. 1; and Wang, *Revision of Enforcement Rules of the Taiwan Patent Law*, 15 INT'L BUS. LAW. 475 (1987). In late 1987 Taipei lawyers indicated that the creation of a new bureau for the administration of patents and trademarks was being considered by the MoEA as a means of dealing with the recent rapid growth in patent and trademark applications.

92. Chung-hua Min-kuo Hsing-fa (Criminal Law of the Republic of China), promulgated Jan. 1, 1935, at art. 317, 34 CCL & R 20197 (amended Dec. 26, 1969).

93. SIP Statute, *supra* note 37, at art. 23. The Technology Capitalization Measures, *supra* note 58, remain applicable within the SIP, however, except where explicitly superceded by the SIP Statute. K'o-hsüeh Kung-yeh Yuan-ch'u She-chih Kuan-li T'iao-li Shih-hsing Hsi-tse (Enforcement Rules for the Statute for the Establishment and Administration of a Science-Based Industrial Park), promulgated June 19, 1981, at art. 40, 31 CCL & R 19355 (amended May 20, 1987).

94. Technology Capitalization Measures, *supra* note 58, at art. 4.

95. *Id.*, at arts. 2, 3.

96. *Id.*, at art. 6(1).

know-how.⁹⁷ The IC has indicated that, as a matter of policy, an investor may choose to capitalize either patented technology or technical know-how, but not both. Different rules apply to an enterprise located within the Hsinchu SIP, where an investor is permitted to contribute as much as 25% of its investment in the form of technology, as agreed by contract with other investors and subject to an overall limitation on capitalization of technology in the enterprise of 49% of its total capital.⁹⁸

In addition to the limit on investment that may be contributed in the form of technology, shares representing capitalized patent rights may not be transferred while the patent right is effective, and shares representing capitalized technical know-how may not be transferred for a period of two years following the completion of the investment plan.⁹⁹ Moreover, where technology has been capitalized in one Taiwan enterprise, the regulations forbid the investor to license the same technology to another party in Taiwan or to capitalize it in another entity within the country, regardless of whether the first entity is willing to consent to such use.¹⁰⁰

A party wishing to contribute technology as an equity investment must first submit to the IC a detailed application explaining the technology and setting forth the basis for its valuation. Along with the application, the potential investor must provide evidence of ownership of the technology and copies of any agreements relating to the technology reached with other parties in the enterprise or under which the same technology has been capitalized in enterprises located in other countries.¹⁰¹ If approved, the proposed capitalization may go forward.

B. The Technical Cooperation Statute

The basic legal framework for direct transfer of technology to Taiwan, apart from its capitalization in an enterprise with foreign investment, is set forth in the Technical Cooperation Statute.¹⁰² Under that statute, enacted in 1962 pursuant to the two foreign investment statutes, "technical cooperation" refers to the furnishing of rights to use patented technology or non-patented technical know-how by a foreign party ("Technician") to a party located in Taiwan ("Cooperator") in exchange for payment of royalties.¹⁰³ The law does not extend to the licensing of trademarks, although, as

97. *Id.*, at art. 6(2).

98. SIP Statute, *supra* note 37, at art. 23.

99. Technology Capitalization Measures, *supra* note 58, at art. 7.

100. *Id.*, at art. 8.

101. *Id.*, at art. 5.

102. Chi-shu Ho-tso T'iao-li (Technical Cooperation Statute) [hereinafter cited as TCS], promulgated Aug. 8, 1962, 20 CCL & R 12767 (amended May 29, 1964).

103. *Id.*, at arts. 3, 5.

discussed below, it is sometimes possible to license such rights incidentally to a transfer of technology.

Where technical cooperation involves patented technology, the law requires that such patent rights have been granted under the Patent Law.¹⁰⁴ Unlike the technology capitalization regulations, the technical cooperation statute contains no definition of technical know-how. It does, however, require that technology to be transferred facilitate the production of new products, increase the volume of production and improve the quality or reduce the production costs of products, or improve the management, design or operational efficiency of the Cooperator.¹⁰⁵ Interestingly, copyright licensing is nowhere referred to in laws or regulations in force in Taiwan, although the Copyright Law clearly protects elements of technical know-how such as designs, drawings and computer programs.¹⁰⁶ In practice, and presumably until rules to the contrary are enacted, licensing of copyrights is to be carried out under the provisions of the technical cooperation statute relating to technical know-how.

Repatriation of royalties under a technical cooperation contract may only be effected following approval of the contract by the IC.¹⁰⁷ The approval procedure requires the Technician and the Cooperator to file a joint application, which must include a copy of the technical cooperation contract as well as a statement of the parties' business conditions and plan for the cooperative project.¹⁰⁸ If the application is related to a foreign investment, it may either be submitted simultaneously with the foreign investment application or afterwards, as the parties deem fit. In practice, Taipei lawyers advise that only a draft of the contract be submitted for approval, as it will often be necessary to include revisions suggested by the authorities, and in many cases the Cooperator will be an entity that has not yet been formed.

The technical cooperation contract must include (a) the names, specifications and estimated quantities of the products to be manufactured or the type of services to be furnished by means of the technical cooperation; (b) details about the technical know-how or patent rights to be furnished to the licensee, the licensee's plan for utilization of the know-how or rights, and the benefits expected to result therefrom; and (c) the period of technical cooperation (*i.e.*, the term of the contract).¹⁰⁹

104. *Id.*, at art. 4.

105. *Id.*, at art. 4; Technology Capitalization Measures, *supra* note 58, at art. 3 (defining know-how).

106. Copyright Law, *supra* note 91, at art. 4.

107. TCS, *supra* note 101, at arts. 11, 12, 13.

108. *Id.*, at art. 6.

109. *Id.*, at art. 7.

There are no provisions in the technical cooperation statute dealing with tie-in arrangements whereby the Cooperator agrees to purchase parts or raw materials from the Technician. However, the Patent Law provides that a provision of a patent licensing agreement that prohibits the licensee from using materials not furnished by the licensor is unenforceable.¹¹⁰ As for export restrictions, technical cooperation contracts may not restrict the Cooperator's sales "to the territory under the jurisdiction" of the Taiwan government.¹¹¹ Although it be may possible to restrict export sales of goods produced with licensed technology by means of a separate contract between the parties, which would not require approval by the IC, it is likely that a court in Taiwan would not enforce such a side agreement on the grounds that it is contrary to public policy.¹¹²

As for the term of a technical cooperation contract, the law leaves the matter open to negotiation. Although in practice the approval of a term in excess of five years is unlikely, longer terms are possible in special cases. Taipei lawyers advise that a technical cooperation contract may be renewed only by filing another application, because provisions for automatic renewal have been uniformly rejected by the approval authority. The statute requires disputes arising out of technical cooperation contracts to be resolved by arbitration, although the parties remain free to fix the place and the procedures.¹¹³

In deciding whether to approve an application for technical cooperation, the IC scrutinizes the contract in light of prevailing policies and, as noted above, may suggest modifications. Such suggestions are virtually mandatory, although negotiations with the authorities are reportedly sometimes successful. The IC seems particularly concerned about payment terms, especially the amount of and manner of calculating royalties. In the 1980s, applications setting royalties between 1% and 10% of the net sales of the licensed product have thus far seemed acceptable, with 3% to 5% being the norm. According to practitioners in Taipei, the term "net sales" has been informally defined by the IC as gross sales net of taxes and customs duties, freight and shipping costs, packing expenses, commissions, discounts or rebates, the CIF price of any raw materials, parts and components, and any duties thereon. The use of a front-end lump sum payment as a way of dealing with this narrow royalty base is not addressed by the law, although in any given case that method may be criticized by the IC.

110. Patent Law, *supra* note 91, at art. 46.

111. TCS, *supra* note 102, at art. 9.

112. See generally H.P. MA, KUO-CHI SSU-FA TSUNG-LUN (GENERAL STUDY OF PRIVATE INTERNATIONAL LAW) 236-242 (9th ed. 1986).

113. TCS, *supra* note 102, at art. 8.

Examination and approval of technical cooperation contracts generally takes about one month from the time the application and supporting documentation are filed. Once approved, the signed contract is again filed with the IC for the record, although it remains a confidential document unavailable to the public. The technical cooperation statute provides that the period of cooperation shall begin on the date of approval by the IC, although calculation of royalties may not begin until the contract is actually implemented. Implementation must begin within six months of the date of approval unless good reason for delay is shown and a timely application for a six months' extension is filed with the IC.¹¹⁴ Remittance of royalties pursuant to an approved technical cooperation contract may be accomplished by application to any of the banks designated by the CBC to handle foreign exchange business.

C. Licensing of Trademark Rights

The technical cooperation statute does not address trademark licensing, although special MoEA regulations permit licensing of a trademark owned by a foreign enterprise and registered in Taiwan in four situations, including (a) in connection with goods manufactured by an FIA enterprise in which the trademark owner has contributed 20% or more of invested capital;¹¹⁵ (b) in connection with goods manufactured by an FIA enterprise in which the parent or subsidiary of the trademark owner has contributed 20% or more of invested capital;¹¹⁶ (c) where the trademark relates to goods produced in connection with an approved technical cooperation contract, provided the term of the trademark license contract does not extend beyond that of the technical cooperation contract;¹¹⁷ and (d) where the goods are of superior quality and have an export market, provided the licensor exercises quality control.¹¹⁸

Whenever licensing trademarks, the licensor and licensee must jointly apply to the Trademark Office of the National Bureau of Standards ("NBS") for approval of the license contract. The sanction for unauthorized licensing is cancellation of the local registration for the marks in question.¹¹⁹

A trademark license linked to a technology transfer should be separated from the technical cooperation contract, even when the

114. *Id.*, at arts. 11, 12.

115. Wai-kuo Shih-yeh Shang-piao Shou-ch'uan Ch'u-li Chun-tse (Criteria for the Handling of Trademark Licensing by Foreign Enterprises), promulgated June 16, 1970, at art. 2, 21 CCL & R 13167 (amended June 3, 1985).

116. *Id.*, at art. 3.

117. *Id.*, at art. 4.

118. *Id.*, at art. 5.

119. Trademark Law, *supra* note 91, at art. 31. The NBS usually requires licensors to agree to exercise quality control over goods bearing licensed trademarks.

latter has already received IC approval. Not only do tax benefits (discussed below) mandate this but also NBS conservatism may compel the practice. For example, when a trademark license is connected to a technical cooperation contract under which royalties are paid, the NBS will often reject an additional royalty for the trademark rights. Even when approving additional royalties, the NBS generally keeps them low, at 0.5% to 1.5% of the gross sales of the products to which the marks are affixed. Once the NBS approves a trademark license contract, the parties may proceed to any of the banks designated by the CBC for handling foreign exchange business to remit royalties abroad.

As for the term of a trademark license, those connected with a technical cooperation contract may not extend beyond the latter contract's term, and a trademark license may not in any case extend beyond the period of the trademark's registration in Taiwan. Under the Trademark Law, trademarks may be registered for renewable ten-year periods.¹²⁰

D. Exemption of Royalties from Domestic Taxation

The payment of royalties or technical fees to a foreign party having no fixed place of business in Taiwan will ordinarily be subject to PSEIT withholding at the rate of 20%.¹²¹ Contract provisions that explicitly require the licensee to bear all taxes are unlikely to be approved, although they are not expressly forbidden by law. The Income Tax Law provides, however, for discretionary exemption from PSEIT for royalties or fees paid to a foreign enterprise for the use of certain proprietary rights or as payment for certain technical services.¹²²

Royalties for patented technology and certain technical know-how may be exempted from PSEIT where the underlying technical cooperation contract has been approved pursuant to the STC. The kinds of know-how eligible for tax exemption are those relating to plant design and construction and to product design and manufacture, for enterprises falling within either the Categories and Criteria for Special Encouragement of Important Productive Industries or the Criteria for Encouragement of Establishment or Expansion of Industrial and Mining Enterprises. Fees for technical services performed in connection with plant design and construction of such enterprises are also eligible for exemption, provided that the contract under which such services were rendered has been approved

120. *Id.*, at art. 24.

121. Income Tax Law, *supra* note 26, at arts. 3, 8(6), 73, 88(2); Ko-lei So-ti K'ou-chiao-lü Piao-chun (Criteria for Withholding Rates in Respect of All Kinds of Income), promulgated Dec. 31, 1973, at art. 3(6), 14 CCL & R 8932-11 (amended May 27, 1988).

122. Income Tax Law, *supra* note 26, at art. 4(21).

by the Industrial Development Board under the MoEA.¹²³

Tax exemption is not available for royalties from licensing of other kinds of technical know-how, even when such know-how is transferred pursuant to an approved technical cooperation contract. As for other kinds of technical services, the Income Tax Law permits foreign parties to opt for taxation on a deemed income basis that almost invariably results in a tax burden lower than the 20% withholding rate.¹²⁴ With respect to trademark licenses, once the contract is approved, the transferor may apply to the NBS for exemption from income tax of royalties to be paid thereunder.¹²⁵

V. FOREIGN INVESTMENT APPROVAL PROCEDURES

Foreign investors often criticize Taiwan as being too bureaucratic, and the foregoing describes the high degree to which the government is involved in the investment process. The principal government agency with which a foreign investor must deal is the IC, but a number of other government entities at the national and local levels also have a role in foreign investment. These include the MoF, which has overall responsibility for foreign exchange control policy, supervises customs and handles applications for tax reduction or exemption; the CBC, which administers foreign exchange controls; the NBS, relevant to registration and licensing of patents and trademarks; the Board of Foreign Trade, responsible for issuing import and export licenses; the Commercial Registrar, responsible for issuing certificates of incorporation and for recognizing foreign branches; the national and local tax bureaus; the provincial or municipal departments of reconstruction, which issue business licenses and register branches of foreign corporations; the administrative authorities of the special zones, who act together with and sometimes in place of other authorities in supervising enterprises located within their borders; and various local authorities responsible for factory licensing, labor, and land use under the direction of the central or provincial governments.

Rather than describing every governmental unit with which a foreign investor will have to deal, it may be useful to introduce the

123. Wai-kuo Ying-li Shih-yeh Shou-ch'ü chih Chüan-li Chin-chi Chi-shu Fu-wu Pao-ch'ou Shen-ch'ing Mien-shui An-chien Shen-ch'a Yüan-tse (Principles for Examining Applications for Exemption from Income Tax on Royalty Payments and Technical Service Fees Collected by Foreign Profit-Seeking Enterprises) [hereinafter cited as Tax Exemption Principles], promulgated Apr. 20, 1983, COMPLETE PRACTICAL TAX LAWS, *supra* note 31, at 369 (amended July 4, 1985).

124. Income Tax Law, *supra* note 26, at art. 25 (pursuant to this method, a percentage of the taxpayer's total business revenue is deemed to represent income derived from operations within the country).

125. Tax Exemption Principles, *supra* note 123.

basic procedure involved in obtaining FIA status, the *sine qua non* of most foreign investment in Taiwan.

A. The Foreign Investment Approval Process Generally

An application for the approval of a foreign investment proposal requires completing a set of prescribed forms obtainable from the IC which call for, *inter alia*, the following information: (1) the total capital requirements, foreign exchange requirements, and a rough outline of the proposed capital structure for the venture; (2) a description of proposed products or services, output capacity of the proposed facility, production plans, and domestic and export sales forecasts; (3) details about the machinery, equipment, or raw materials to be imported in connection with the project; and (4) the project's economic benefits to Taiwan, such as technology transfer and training of local personnel. The IC's form application must be prepared in Chinese, although technical appendices may be in English or other foreign languages.

An investment application should also specify each item of preferential treatment sought under the two foreign investment statutes and the SEI along with any special exemptions desired in connection with the proposed project. It is possible to ask for protection from domestic competition, but in practice approval for this is very difficult to obtain unless the proportion of goods manufactured for export is very great or the project is a high priority for the government.

In most cases, an application for FIA status will be filed with the IC. Although an entity under the MoEA, the IC is in fact made up of high-level officials from various ministries and government agencies. In reviewing foreign investment applications and applications for approval of technical cooperation contracts, the IC solicits views from all relevant governmental agencies. These agencies will often suggest revisions of an investment plan to suit prevailing policies and will often condition approval on implementation of such suggestions. For example, to implement government policies promoting the use of local suppliers, the IC may require that certain machinery, equipment, or raw materials be procured within Taiwan. In formulating such suggestions, which can be negotiated by the foreign investor, Taipei lawyers advise that the IC may refer to such seemingly extraneous factors as trade imbalances existing between Taiwan and countries from which imported machinery, equipment, or raw materials may be sourced.

As a matter of policy, the IC will process investment applications within two months following filing and will usually reach a

decision within about six weeks.¹²⁶ Following any negotiations about proposed changes to the investment plan and the making of any necessary revisions by the applicant, the IC will issue an approval document. Approval of a project does not, however, obligate an investor to proceed with the proposed investment. The approval is valid for six months and may be renewed upon application for further six-month periods. Once the implementation of an approved investment begins, the IC requires reports from the investor prior to the latter's taking certain actions, such as the importation of machinery and equipment.¹²⁷

B. Approval by Special Zone Authorities

Where an investment is to be made in one of the EPZs or in the Hsinchu SIP, the zone administration authorities step into the shoes of the IC. The application procedure in one of the special zones is very similar to that for investments elsewhere in Taiwan, except that the EPZs and the SIP each have their own separate criteria for the screening of investments. The MoEA's Export Processing Zone Administration examines and approves foreign investments, technical cooperation contracts, and, in place of the NBS, trademark licensing contracts for enterprises located in one of the three EPZs. The local zone authorities also issue business and factory licenses as well as import and export licenses, which are normally issued by other agencies.¹²⁸ As to enterprises located within the Hsinchu SIP, the Science-based Industrial Park Administration under the National Science Council fulfils similar roles. An important difference between investment in the SIP and investment elsewhere is that an applicant wishing to invest in the zone must post a bond with the SIP administration, which is subject to forfeiture if the investment plan is not completed.¹²⁹

C. Remittance of Capital and Profits

Foreign investors may apply annually for permission to remit profits from FIA enterprises. Dividends may be remitted to the for-

126. See generally Hua-ch'iao chi Wai-kuo-jen T'ou-tsu Shih-yeh Pan-li Kung-ssu Teng-chi Pu-ch'ung Pan-fa (Supplementary Measures for the Company Registration in respect of Overseas Chinese and Foreign Investments) [hereinafter cited as Company Registration Measures], promulgated Apr. 22, 1975, 20 CCL & R 12785 (amended July 28, 1982).

127. It was reported in early 1988 that the Economic Planning and Development Council had proposed to streamline the foreign investment application procedure in respect of about 310 types of business in order to reduce the processing period for such applications to a mere two weeks. *Taiwan Drafting Plan on Foreign Investment*, *supra* note 57.

128. EPZ Statute, *supra* note 34, at art. 8; SIP Statute, *supra* note 37, at art. 7. See also Company Registration Measures, *supra* note 126, at art. 3.

129. SIP Statute, *supra* note 37, at art. 10.

eign investor, in the currency it used to make the investment, within six months following the annual tax assessment on the invested company's profits. The amount which may be remitted is limited to the tax-assessed amount. If remittance is deferred beyond six months, the IC requires an application for deferred remittance, although this requirement apparently is not strictly enforced in practice. Once the investor obtains approval, the CBC will grant permission to remit the necessary funds as a matter of course.¹³⁰

As noted above, a foreign investor in an FIA enterprise may apply to repatriate capital one year following commencement of business.¹³¹ In order to preserve the repatriation privilege, a foreign investor remitting capital to its preparatory office bank account in Taiwan must route the remittance through one of the designated foreign exchange banks and report the transfer to the IC for investment appraisal and recordation. For the same reason, foreign investors should also submit to the IC documents supporting their valuation of non-cash capital contributions sourced abroad. Under the SEI, FIA enterprises may also remit abroad all capital gains in foreign currency not resulting from appreciation of land values. Currently, capital gains from sales of securities (other than those listed on the Taipei Stock Exchange) and from the sale of machinery and equipment are included in taxable income. Investors wishing to remit such gains must apply to the IC for permission within six months of their realization, submitting evidence of relevant tax clearance.¹³²

VI. INVESTMENT DISPUTE SETTLEMENT

Taiwan's private international law, based primarily upon that of the European civil law systems, follows the practice of most capital-exporting countries in allowing parties to private contracts considerable autonomy to select both governing law and dispute resolution mechanisms.¹³³ Foreign investors often avail themselves

130. Company Registration Measures, *supra* note 126, at art. 6. Of course, under the relaxed foreign exchange controls in effect from July 13, 1987, remittances of less than U.S.\$5 million per annum (and less than U.S.\$1 million per remittance) will not require prior approval. See the foreign exchange regulations promulgated under the Foreign Exchange Control Statute, *supra* note 13. In early 1988, the MoEA was reportedly working on additional amendments to the foreign exchange regulations whereby FIA enterprises would no longer require any approvals for remittance of funds abroad. TAIWAN INDUS. PANORAMA, Jan. 1988, at 2.

131. See text accompanying note 14 *supra*.

132. Company Registration Measures, *supra* note 126, at art. 6.

133. Basic conflicts rules are set forth in She-wai Min-shih Fa-lü Shih-yung Fa (Law Governing the Application of Laws to Civil Matters Involving Foreign Elements) [hereinafter cited as Conflicts Rules for Civil Matters], promulgated June 6, 1953, 34 CCL & R 19931. There is very little secondary material available in English, the only readily available treatment being the very general discussion in Ou, *A General Survey of the Private International Law of the Republic of China*, in TRADE AND INVESTMENT IN

of this freedom to select the laws and, to a lesser extent, the courts of their home countries for use in respect of at least certain aspects of investment transactions. Moreover, Taiwan also permits resort to such international dispute settlement bodies as the Court of Arbitration of the International Chamber of Commerce and the World Bank's International Center for the Settlement of Investment Disputes.¹³⁴ Because choice of law rules and the availability of impartial dispute settlement mechanisms are important considerations for foreign investment, it is useful to briefly survey Taiwan's ground rules.

A. Choice of Law and Choice of Forum

Parties to a commercial transaction that does not involve real property situated in Taiwan may select the governing law for their contract. Their choice will be respected by the courts if (1) the law chosen has some minimal connection with the parties and/or the underlying transaction, and (2) the application of the chosen law to the particular case would not violate domestic laws or public policy.¹³⁵ Where parties desire foreign law to govern a contract, the choice should be made in an express and positive manner. Taipei lawyers have advised that the inclusion of a negative choice clause (*i.e.*, one providing that domestic laws shall *not* apply to a transaction) may increase the likelihood that a court in Taiwan will not respect the choice. In cases where a court rejects a choice of law, or where the intentions of the parties cannot be discerned, a court in Taiwan will follow fairly standard private international law rules for determining the governing law. In most cases, a court applying these rules would probably find that a contract relating to investment is to be governed by local law.¹³⁶

When parties to an investment transaction in Taiwan expressly choose a foreign forum for the settlement of disputes, it is similarly important that they frame the choice as a positive submission to the jurisdiction of a foreign court. It is very unlikely that the courts in Taiwan would respect a clause that purported to oust them from jurisdiction over an investment contract or any other commercial

TAIWAN, *supra* note 1, at 451-469. For an excellent collection of essays in Chinese, see generally KUO-CHI SSU-FA LUN-WEN HSÜAN-CHI (COLLECTED ESSAYS ON PRIVATE INTERNATIONAL LAW) [hereinafter cited as Private International Law] (H.P. Ma ed. 1984).

134. Chieh-chüeh Kuo-chia yü T'a-kuo Kuo-min chien T'ou-tzu Cheng-tuan Kung-yüeh Shih-hsing T'iao-li (Statute Governing Implementation of the Convention for the Settlement of International Investment Disputes) [hereinafter cited as Investment Convention Implementation Statute], promulgated Dec. 21, 1968, 20 CCL & R 12777.

135. Conflicts Rules for Civil Matters, *supra* note 133, at arts. 6, 25. See generally Ma, *Wai-kuo-jen T'ou-tzu Chih Fa-lü Shih-yung Wen-t'i* (Problems of Applicable Law in Foreign Investment), in 2 Private International Law, *supra* note 133, at 973-988.

136. Conflicts Rules for Civil Matters, *supra* note 133, at art. 6.

contract to be performed wholly or in significant part within the country. Courts may well respect a reasonable agreement to submit all disputes to the courts of the country with which the foreign party is most closely connected, although the matter remains completely within their discretion. A clause requiring submission of all disputes to a foreign country's courts is more likely to be respected when it appears in a technical cooperation or trademark license contract, where the licensor is a foreign party that does not maintain a permanent presence in Taiwan, than in the case of an investment contract, such as a joint venture agreement.¹³⁷

B. Access to the Courts in Taiwan

Direct access to the local courts is not a problem for foreign investors. A foreign corporation recognized in Taiwan has all the rights and obligations of a domestic company and will be accorded full national treatment.¹³⁸ Moreover, the Supreme Court has held that even non-recognized foreign corporations may enjoy rights and have access to the courts under the Civil Procedure Law.¹³⁹ The only significant exception to the above obtains with respect to corporations organized in jurisdictions that do not recognize corporations organized in Taiwan, as strict reciprocity is required.¹⁴⁰

The Civil Procedure Law also generally permits the enforcement of foreign judgments in Taiwan, subject to certain exceptions. Enforcement is prohibited in cases where (1) under the principles of domestic law in Taiwan, the foreign court that rendered the judgment was without jurisdiction; (2) the judgment debtor is a Chinese national who has not responded to the action, unless such person was personally served in the jurisdiction in which the award was rendered or was served in Taiwan with the assistance of the government; (3) the judgment is not compatible with Taiwan's public order or good morals; or (4) there is no reciprocity (*i.e.*, if the courts of the jurisdiction in which the award was rendered would not enforce a judgment of the courts in Taiwan).¹⁴¹

C. Alternative Dispute Settlement Mechanisms

Apart from litigation, arbitration is a permissible and, indeed,

137. *Id.* See generally Li, *Kuo-chi Ssu-fa Shang Ho-i Hsüan-tse Kuan-hsia Fa-yüan T'iao-k'uan Chih Yen-chiu* (Studies in Choice of Forum Clauses Under Private International Law), in 1 Private International Law, *supra* note 133, at 285-296.

138. Company Law, *supra* note 46, at art. 375.

139. Civil Procedure Law, *supra* note 80, at art. 46; 3 SSU-FA-YÜAN KUNG-PAO (JUDICIAL YUAN GAZETTE) No. 12 (1961), at 14-15. See generally Liu, *The Status of Aliens and Recognized Foreign Corporations Under the Law of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN, *supra* note 1, at 241-275.

140. Company Law, *supra* note 46, at art. 373.

141. Civil Procedure Law, *supra* note 80, at art. 402.

typical procedure for resolving disputes concerning foreign investment contracts. The enforcement of foreign arbitral awards, however, is a matter left to the discretion of the courts, because the Republic of China is not a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. One option open to the party prevailing in a foreign arbitration is to obtain a foreign judgment based on the arbitral award and then seek to enforce the award under the provisions of the Civil Procedure Law for the enforcement of foreign judgments.¹⁴² A more foresighted approach is to invoke domestic arbitration law in the contract itself. The arbitration law appears to permit contracting parties to agree to adopt a system of procedures, such as those of the International Chamber of Commerce or the American Arbitration Association, and to select a site within Taiwan or abroad for arbitration proceedings.¹⁴³ According to Taipei lawyers, the courts are more likely to enforce an award rendered by a tribunal constituted in accordance with both domestic legislation and international rules. Even in such cases, however, the courts retain considerable discretion to issue or deny orders of execution.

With regard to investment disputes involving the government itself, the Statute Governing the Enforcement of the Convention for the Settlement of International Investment Disputes permits foreigners investing amounts exceeding U.S.\$100,000 to request government consent to the submission of any investment dispute to settlement under the provisions of the convention, at the time the dispute arises. Where the amount of the investment exceeds U.S.\$400,000 and will make a significant contribution to the domestic economy, technological development or exports, or in any case where the amount of investment exceeds U.S.\$2.5 million, the foreign investor may request consent when applying for FIA status, and such consent will be given at the time of approval.¹⁴⁴

VII. CONCLUSION

There can be no doubt that the spectacular growth of Taiwan's economy in the years since enactment of the two foreign investment

142. The procedure is set forth in the Ch'iang Chih-hsing Fa (Law on Compulsory Execution), promulgated Jan. 19, 1940, at arts. 1, 43, 34 CCL & R 20017 (amended Apr. 22, 1975). See generally Su, *Wai-kuo Fa-yüan P'an-chüeh Chih Ch'eng-jen Chi Chih-hsing (Recognition and Enforcement of Foreign Judgments)*, in 1 Private International Law, *supra* note 132, at 316-327.

143. See Shang-wu Chung-ts'ai T'iao-li (Statute for Commercial Arbitration), promulgated Jan. 20, 1961, at art. 12, 18 CCL & R 10781 (amended Dec. 26, 1986); Shang-wu Chung-ts'ai Hsieh-hui Tsu-chih chi Chung-ts'ai Fei-yung Kuei-tse (Regulations on Composition of the Commercial Arbitration Organization and Arbitration Fees), promulgated Apr. 6, 1973, 18 CCL & R 10785 (amended Nov. 19, 1983)

144. Investment Convention Implementation Statute, *supra* note 134, at art. 4.

statutes has been due primarily to such factors as political stability, a successful land reform program, significant foreign aid in the development of basic infrastructure, Chinese cultural attitudes favourable to education of the labor force, and to the carrying on of profit-making economic activities as well as the dramatic expansion of world trade in the post-war era. Nonetheless, it must also be assumed that foreign investment of the magnitude experienced by Taiwan has also played an important role in the island's economic performance.

In the period since Taiwan enacted the two foreign investment statutes, and especially since the adoption of the SEI, Taiwan's success in attracting foreign investment has been outstanding. Whether Taiwan would have been as successful in the absence of this legislation cannot be ascertained, but the experience of other developing countries suggests that it has played an important role. Certainly, the government has demonstrated that a strong legal and administrative regime is an important element in the attraction of foreign investment. Although foreign investors in Taiwan often complain that the island's legal and administrative system is excessively bureaucratic, they nonetheless tend to agree that such a regime has a significant virtue — the elimination of uncertainty about the manner in which the government will treat their investments.

Investment almost always involves risks, but even the most daring investor will seek to eliminate risks within his control. By selecting a country in which there exists an established legal and administrative regime for investment, an investor will be best able to minimize risks. While the existence of such a framework will not attract investment where the economic fundamentals are lacking, in an international environment characterized by fierce competition for foreign investment such a developed and stable legal regime for investment represents a significant advantage. In this, as in many other respects, Taiwan is clearly a formidable competitor.