

CHN ¶20-204 GOVERNMENT GUARANTEES FOR FOREIGN INVESTORS

Government guarantees against expropriation of assets, repatriation of foreign currency and the proceeds of compulsory acquisition of assets of a foreign interest in China are assured under the terms of bilateral investment protection agreements.

CHN ¶20-205 PROTECTION FOR FOREIGN INVESTORS

Provisions protecting against expropriation and providing for compensation for compulsory acquisition are contained in bilateral investment protection agreements.

China has put in place a comprehensive set of legislation aimed at encouraging foreign investment in the country. This legislation covers such areas as the establishment of joint ventures, taxation incentives and other provisions intended to facilitate the repatriation of profits such as those contained in the *Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment*, of 11 October 1986.

China has also established special economic zones, economic technological developments zones, open coastal cities and has designated the eastern coastal region and more recently, the western inland region, as areas where special legislative and economic benefits will be given to encourage foreign investment in these specific targeted areas.

Land Tenure — The Site of the Investment

CHN ¶25-001 FORMS OF LAND TENURE

Definition of ownership

The Constitution provides that land is owned either by the state (the whole people) or by collectives (see Art 9 and 10).

Article 10 further provides that the state may in the public interest take over land for its use in accordance with the law. No organisation or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways.

Article 71 of the *General Principles of the Civil Law* defines "ownership" as:

"The owner's right in accordance with law to possess, use, benefit from and dispose of his own property."

The right of individuals to own personal property and the type of property which that includes are set out in Art 75 of the *General Principles of the Civil Law*.

Articles 73 and 74 add to the provisions made in Art 9 and 10 of the Constitution which distinguish between ownership by the whole people (by the state) and ownership by collectives.

It is possible to own buildings and other structures on the land, but not the land they stand on. Land use rights can be acquired.

Leaseholds

After the amendment of Art 10 to the Constitution in 1988, several pieces of legislation were passed to implement the granting and assignment of leaseholds in the land. These include amendments to the following:

- The *Law of Land Administration*. The amended *Land Administration Law* takes effect from 1 January 1999. The amended *Land Law* establishes a new system for controlling land use and protecting cultivated land to ensure the balanced development of total cultivated land, reforms the compensation method for requisition of land, enhances the standard of compensation for land requisition, and elaborates on the implementation and default provisions;
- the *Rules for the Implementation of the Law of Land Administration*. The amended Rules also take effect from 1 January 1999, and contain detailed rules for the implementation of the *Land Administration Law*;
- The *PRC Granting and Assigning Leaseholds in State-owned Urban Land Tentative Regulations*, 24 May 1990;
- The *Land Administration Regulations of Hainan Special Economic Zone*, 18 July 1994; and
- The *Several Provisions on the Administration of Real Estate in the Shenzhen Special Economic Zone Tentative Provisions*, 9 November 1993.

Despite being called leaseholds, it cannot be assumed that a proprietary interest is created in the land. In fact, the *PRC Granting and Assigning Leaseholds in State-owned Urban Land Tentative Regulations*, whilst at the same time creating "leasehold interests", indicates the contractual nature of these interests. For example, Art 8 provides:

- "(a) The term 'grant of a leasehold' refers to the act by which the State, in its capacity as landowner, grants the right to use land for a fixed term in years to a user of land and the user of land pays to the State a sum for the grant of the leasehold.
- (b) When a leasehold is granted, the parties shall enter into a grant contract."

And further at Art 2:

- "(a) In accordance with the principles of separating the ownership of land and the right to use land, the State shall implement a system for the granting and assignment of leaseholds in urban state-owned land. Underground resources, concealed objects and public utilities shall not be included [in leaseholds].
- (b) The term 'urban state-owned land', as used in the preceding paragraph, refers to land owned by the whole people within municipalities, county seats, officially established towns and industrial and mining areas. . ."

restructuring shall be treated as donation and shall not be recognised by the creditor as a debt restructuring loss (Art 10). The Procedures also provide that if the debt restructuring gain so determined is large and results in an amount of income tax difficult to pay in a lump sum, the income tax may be amortised over no more than five years subject to approval of the competent tax authority (Art 8).

Accounting requirements

Prescribed requirements for keeping books, accounts and supporting documents are general in nature although currently subject to review by relevant authorities. Regulations governing foreign-invested enterprises encompass aspects of fiscal affairs including the employment of a treasurer, the fiscal year to be adopted, the need to appoint an auditor and the use of both the accruals basis and double entry accounting. There is a general requirement to keep accounting books and to file statements with the fiscal and taxation authorities. Failure to comply results in the imposition of fines.

On 6 May 1999, the People's Bank of China (PBOC) promulgated the *Guiding Opinion on External Audit of Foreign Capitalised Banks* (the "Guiding Opinion") under which the following items are covered:

- principles for foreign capitalised banks to retain certified public accountants (CPA);
- qualifications of a firm of CPA engaged in the external audit of a foreign capitalised bank;
- the control on the CPA's work and the appraisal on the quality thereof;
- content and scope of the audit (including assets, liabilities, loss and profits as well as asset quality of a foreign capitalised bank, financial statements submitted by a foreign capitalised bank to PBOC, internal control system as well as computer and information administration system of a foreign capitalised bank, etc);
- training of CPA; and
- audit report and suggestion on administration.

Accounts to be submitted

The accounts required to be submitted to revenue authorities will vary according to the type of investment. However, China's law for joint venture accounting systems may be employed as a model for other foreign-invested projects. The underlying principles of reporting remain the same although the stipulation in the accounting system of joint ventures can be contrasted with those for co-operative enterprises and other foreign business structures.

The principles prescribed in the accounting system for Chinese foreign joint ventures are as follows:

- Legality.
- Authenticity, correctness, completeness and timeliness.
- Consistency in methods adopted for accounting in various periods, changes having to be registered with local tax authorities for reference along with explanatory memoranda.

- Income received and expenses incurred in a period must be entered into records for that period.
- Valuations must be made in accordance with actual cost such that book value should not be adjusted irrespective of whether there is a change in the market price.
- Income and expenses must be coordinated so that income and related costs and expenses in a given period are entered into account books in the same period.
- Capital expenditure and profit expenditure must be distinguished.
- The accounting year begins on 1 January and ends on 31 December.
- Double entry records must be maintained for the borrowing or lending of money.
- All certificates, account books and report forms must be prepared in Chinese.
- The Chinese currency RMB is the standard currency for keeping accounts although this may be varied by negotiation.

Certification by auditors

Accounting statements submitted must enclose audit certificates of chartered public accountants registered in the People's Republic of China.

Registration requirements

Foreign enterprises are required to present relevant certificates to local tax authorities for tax registration when they go into operation.

The *Administrative Provisions on Tax Registration* became effective as of 1 July 1998. The Provisions are formulated in accordance with the *Administrative Provisions on Tax Collection of the PRC* and its implementation rules. According to the Provisions, all kinds of taxpayers and withholding agents shall declare and register with the proper taxation authority. The procedures that either taxpayers and withholding agents or the taxation authorities shall observe are as follows:

Opening business registration

Within 30 days after the taxpayers' business licence or for those without business licence upon becoming taxpayers in the light of tax laws and regulations, taxpayers shall apply to the proper taxation authority for tax registration with documents demanded and complete the registration forms. The result of the examination will be released within 30 days after the tax authority accepts the demanded documents and forms.

Registration of change

Within 30 days after a business licence has been changed or the change of tax registration has been approved or declared by relevant authorities, the taxpayer shall apply to the original tax registration authority for change of tax registration with demanded documents and complete the Tax Change Registration Form.

Closing temporarily and re-opening business registration

In the case that taxpayers need to temporarily stop doing business, the closing business registration is required. Before re-opening business, taxpayers shall apply to taxation authorities for re-opening business registration.

According to the Methods, a re-examination on the high-new technical enterprise is required every two years.

Wholly-owned foreign enterprises

Article 6 of the *Law of the People's Republic of China on Enterprises Operated Exclusively with Foreign Capital* provides:

"The application to establish an enterprise exclusively with foreign capital shall be submitted for examination and approval by the department under the State Council which is in charge of foreign economic relations and trade or by other authorities entrusted with such powers by the State Council. The department or said authorities shall, within 90 days from the date when such application is received, make a decision on whether or not to grant approval."

After obtaining approval, the foreign investor must apply to SAIC for registration and obtain a business licence from the relevant level of SAIC.

The scope of business that is permitted to be undertaken by the foreign investor must be set out on prior approval from the appropriate level of MOFTEC and will be set out in the business licence issued by SAIC. Failure to operate the business in conformity with the business licence will result in its revocation. SAIC is responsible for inspection and monitoring the investment situation of the wholly-owned foreign enterprise or foreign investment enterprise (Art 9). Joint annual inspections by SAIC's various departments will be carried out between 1 January and 30 April. The *Circular on Carrying on Joint Annual Inspection of Foreign Investment Enterprises* came into effect on 1 January 1997, and sets out documents required for submission to the inspecting departments. After inspection, various departments may conduct random inspections. Those enterprises which make false statements or withhold information will have to pay a penalty as will accountants, auditors and other intermediaries on their behalf.

Equity and contractual joint ventures

The scope and permitted activities of the equity joint venture and the co-operative joint venture are similarly set out in the laws relating to each of those investment vehicles. The scope of the business permitted to be undertaken by joint ventures is set out in the joint venture contract which must be approved by the relevant level of MOFTEC before an application for a business licence can be made to SAIC. The scope of the business licence will reflect the scope of the approved joint venture contract. Supervision of the activities of the joint venture is the responsibility of the relevant level of SAIC.

There are also a wide range of controls placed upon the conduct of foreign investment enterprises in specific areas. For example, books of account are required to be kept in China and the enterprise is subject to relevant Chinese taxation laws. The import and export of products is controlled in accordance with the State Plan and specific legal regulation through the issue of import and export licences, the obtaining of foreign exchange is controlled through the State Administration of Foreign Exchange Control and enterprises are required to open a bank account with the Bank of China, through which banking activities and the remission of foreign exchange is conducted.

Asset evaluation procedures for foreign firms

All non-cash contributions of assets (contributions of "assets in kind") made by foreign parties investing into China must now undergo detailed evaluation procedures. As of 1 May 1994, assets in kind which contributed by foreign investors are subject to evaluation by the PRC Import and Export Commodities Inspection Bureau.

Asset valuation is particularly significant in the context of foreign investment enterprises because the value given to asset contributions may affect procedures for the registration and approval of foreign investments in China.

Parties applying for asset evaluation must provide invoices, customs reports, insurance policy information and copies of their contracts, and must also provide the reason for requesting the evaluation. Once evaluation procedures have been completed, the Bureau will issue an Evaluation Certificate. This certificate must be referred to by Chinese certified accountants when verifying contributions of assets in kind made by foreign investment enterprises.

CHN ¶45-103 DEFINITION OF FOREIGN BUSINESSMAN OR INVESTOR

There are no definitive guidelines by which to determine conclusively in which situations a businessman or investor will be categorised as "foreign".

The nationality law provides that nationality is the basis for determining foreign or other status in China. As a result, Hong Kong, Macao and Taiwan "compatriots" are considered to be of Chinese nationality and so receive different treatment from "foreigners" under the Chinese law. However, in principle, all those investment from foreign countries, Hong Kong, Macao and Taiwan are regarded as foreign investment though Hong Kong, Macao and Taiwan have been regarded as a part of China by the Chinese government. Investors from these areas receive the same treatment as those from foreign countries. Companies incorporated outside China will be considered to be foreign corporations whilst legal persons registered within China will be considered Chinese entities. For example, the legal person formed pursuant to an equity joint venture is a Chinese entity. Recently, the question of the nationality status of a wholly-owned subsidiary of a Chinese corporation incorporated overseas was considered by MOFTEC. MOFTEC decided that despite the fact that the capital of the corporation came from China, because its place of incorporation was not within China, it would be considered to be a foreign entity. However, there have been accounts of recent situations where wholly-owned subsidiaries of Chinese corporations incorporated overseas have not been granted "foreign" status.

CHN ¶45-104 SPECIAL REGULATIONS COVERING JOINT VENTURES

The establishment of both forms of joint ventures, ie equity and contractual, are governed by individual laws and implementing regulations.

The basic laws regulating the establishment of an equity joint venture are as follows:

- the *Regulations of the People's Republic of China on Foreign Exchange Control* amended on 14 January 1997 (replaces the *Provisional Regulations for Foreign Exchange Control of the People's Republic of China* of 18 December 1980);
- the *Administrative Measures on Foreign Exchange Control in Bonded Area* on 14 August 2002;
- the *Administrative Regulations on Domestic Foreign Exchange Accounts* on 7 October 1997;
- the *Provisional Administrative Regulations on Domestic Allocation and Transfer of Foreign Exchange* on 25 September 1997;
- the *Announcement of the People's Bank of China concerning Further Reform of Foreign Exchange Control System* on 28 December 1993;
- the *Administrative Regulations on Foreign Exchange Settlements, Sales and Payments* on 20 June 1996; and
- the *Provisional Measures of Foreign Debt Administration*, effective as of 1 March 2003.

Regulations on Foreign Exchange Control

The *Regulations on Foreign Exchange Control* came into effect on 1 April 1996 and was amended on 14 January 1997. The Regulations mark a further move towards full convertibility of the renminbi. Foreign-invested enterprises with foreign currency accounts are permitted under the Regulations to exchange renminbi for foreign currency at the local branches of authorised local PRC banks, rather than handling such transactions through the swap centres. This is seen as a step towards the elimination of swap centres.

On 28 December 1993, the *Announcement of the People's Bank of China concerning the Further Reform of the Foreign Exchange Control System* was issued stipulating that the renminbi exchange rate will be subject to a single rate based on market supply and demand. The Regulations support this 1993 policy and further emphasise the prohibition against circulation of foreign currency within the PRC and the pricing of goods in foreign currency. The law governs the foreign exchange business of financial institutions, the setting of currency exchange rates, the administration of foreign exchange revenue relating to current and capital account items, as well as the handling of foreign exchange violations.

The purpose of the above Regulations is to exert uniform control over all foreign exchange issue and expenditure, the issuance of all foreign currency payment instruments, the transportation into and out of China of foreign exchange, and precious metals. The principle features of those laws and regulations are as follows:

- Foreign exchange is defined to include:
 - foreign currencies, including bank notes, coins, etc;
 - securities in foreign currency, including government bonds, treasury bills, corporate bonds and debentures, shares, interest and dividend coupons, etc;

- instruments payable in foreign currency, including bills, drafts, cheques, bank deposit certificates, postal savings certificates, etc; and
- other foreign exchange funds.
- Foreign exchange revenue must be sold to a designated foreign exchange bank or deposited in a foreign exchange account (upon approval) with a designated foreign exchange bank. Approval is necessary before foreign exchange is deposited outside the PRC.
- Foreign exchange held by individuals may be deposited in a bank or sold to a designated foreign exchange bank. Expatriate experts recruited by organisations inside the PRC may remit their after-tax wages out of the PRC. If they are paid in renminbi, they can remit their after-tax wages in foreign currencies purchased from a designated foreign exchange bank.
- Organisations within the PRC who wish to invest outside the country must first obtain approval from the foreign exchange control authorities concerning the source of foreign exchange funds.
- A foreign venture shall apply for and obtain permission from SAFE before it can establish a foreign exchange deposit account with an overseas bank. Those enterprises with approval to open such accounts must report receipts and expenditures of that account to the administration within 30 days at the end of each quarter. Offshore oil resource exploration organisations enjoy certain special exemptions from this rule.
- Excepting foreign exchange approvals by the administration, foreign-invested enterprises are required to remit to China foreign exchange earned by export products and deposit it in foreign exchange accounts and generally go through procedures of accounting and verification. Export and foreign exchange sold by a foreign investment enterprise to the Bank of China is calculated in accordance with the exchange rate issued by SAFE.
- Financial institutions, which operate foreign exchange business, require approval from the foreign exchange control authorities. These bodies are also required to submit foreign exchange balance sheets, profit and loss statements and accounting statements and information to the foreign exchange authorities.
- Following liquidation of a foreign investment enterprise, the renminbi belonging to the foreign investor may be remitted out of the PRC in foreign exchange and that belonging to the Chinese investor may be sold to a designated foreign exchange bank.
- Where foreign-invested enterprises are unable to balance foreign exchange receipts and expenditure, foreign exchange control regulations provide that accounts may be settled and paid in foreign exchange for products sold domestically where the following criteria are met:
 - On approval by foreign trade departments of the government, accounts may be settled in foreign currency for products needed by China which are sold to Chinese institutions engaged in foreign trade so as to replace imports with these products.

Copyright

Registration of copyrightable materials is optional. However, registration is required in case of seeking damages of copyright infringement. Chinese Copyright Office is the administrative body for copyright registrations and administrative enforcement.

Registration of computer software

Registration of computer software for copyright purposes is subject to procedures and to a formal administrative review process. The China Software Registration Centre has been established to administer all aspects of computer software registration, including examining applications for software registration and maintaining software registration files. Under the current *Computer Software Protection Regulations*, the registration of software for copyright purpose is optional, not compulsory.

Trademarks

The *Trademark Law* provides that where the state prescribes that certain kinds of goods or services must bear a registered trademark, registration must be applied for in respect of such goods. In the absence of registration, such goods or services shall not be sold in the market (Art 5). This provision is in accordance with the purposes of the Law which, *inter alia*, are to encourage producers to guarantee the quality of their goods or services and maintain the reputation of their trademarks (Art 1).

Pharmaceuticals for human use and tobacco products listed by the state and publicly announced by SAIC shall be required to use a registered trademark.

CHN ¶65-022 TRANSFERS AND LICENSING AGREEMENTS

Trademarks

A registered trademark may be assigned by an application filed jointly by an assignee and an assignor, and the assignee is required to guarantee the quality of goods/services in respect of which the registered trademark is used (Art 25). The registered proprietor may also license the others to use its registered trademark. Article 26 provides that the licensor shall supervise the quality of the goods or services in respect of which the licensee uses its registered trademark, and the licensee shall guarantee the quality of the goods or services in respect of which the registered trademark is used. Trademark license agreements are required to be recorded with the Trademark Office for record (Art 26).

Patents

Patent rights and the right to apply for a patent may be assigned (Art 10). Any assignment to a foreigner by a Chinese entity or individual must be approved by the appropriate department of the State Council. In the case of an assignment, the parties must conclude a written contract which will come into effect after it is duly registered with the department in charge of patent administration (Art 10).

Patent rights may be licensed to third parties. The entity or individual exploiting the patent of another must pay the patentee a fee and conclude with him or her, a written licence contract for exploitation (Art 12). The licensee cannot authorise a third party to exploit the patent. With the approval of the State Council, a patent right to an invention of great significance to the interests of the state or public interest that is owned by a state-owned entity may be distributed to allow other entities designated by the relevant ministries or provincial governments to exploit the right (Art 14). Patents of a Chinese individual or entity under collective ownership, which are of great significance to the interests of the state or public interest, may be treated likewise (Art 14).

Copyright

Article 23 requires that a licence be obtained if the works of another person are to be used, except where the law provides that licensing is not necessary. No rights over a work may be exercised by a licensee which have not been explicitly licensed (Art 25).

The contents required to be contained in a licensing contract are set out in Art 24.

The term of a licensing contract is limited to 10 years but may be renewed on the expiration of that term (Art 26).

Rates of remuneration are set by the copyright administrative departments of the State Council, though the parties may be able to agree to a fee among themselves (Art 27).

Article 28 protects the moral rights of another to licensed materials, to be attributed, to revision of their works, to protection of the integrity of their works and to receiving remuneration.

Foreign technology licensing

The *Regulations of the PRC on the Administration of Technology Import and Export* promulgated on 10 December 2001 went into effect as of 1 January 2002. By asserting to cover all kinds of cross-border technology transfer activities, the Regulations have a broader scope of application as it applies to both technology import and technology export.

Under the new regulation and other related implementation rules introduced thereafter, for both import and export of technology, technology is classified into three categories, ie technology prohibited from import or export ("prohibited technology"), technology restrictive for import or export ("restrictive technology") and technology for import or export freely ("non-restrictive technology"). The import/export of non-restrictive technology is subject to registration, while the import/export of restrictive technology, will be subject to approval of foreign trade administration authorities.

CHN ¶65-023 COMPULSORY LICENSES

Trademarks

No compulsory licensing is provided for in the *Trademark Law* and its implementing rules.

Foreign financial institutions (FFIs)

Foreign banks and other foreign financial institutions are governed by the *Administrative Rules of the People's Republic of China governing Foreign-Funded Financial Institutions* and its detailed implementation rules, both of which became effective from 1 February 2002, and thus replaced those previous rules promulgated in 1994. These Rules have incorporated relevant commitments made by China in its WTO accession agreements.

On 8 July 2002, the *Administrative Measures of Representative Offices in China of Foreign Financial Institutions*, which repeals the *Administration of Representative Offices in China of Foreign Financial Institutions Procedures*, was effective as of 8 July 1996. The Administrative Rules apply to representative offices in China of FFIs registered outside China and also FFIs registered in Hong Kong, Macao and Taiwan. The procedures detail the requirements for setting up a representative office, the management of representative offices, closing such offices and penalties for acts in violation of the procedures. The procedures also provide that if a FFI has set up five or more representative offices in China then it can apply to set up a general representative office.

The PBOC is the authority in charge of administering foreign financial institutions. The following types of financial institutions are covered by the new law:

- banks holding foreign capital which have their head office in China (referred to as "foreign investment banks");
- branches of foreign banks;
- banks formed as equity joint ventures between foreign and Chinese financial institutions (referred to as "joint venture banks");
- finance companies holding foreign capital which have their head office in China (referred to as "foreign investment finance companies"); and
- finance companies which are formed as equity joint ventures between foreign and Chinese financial institutions (referred to as "joint venture finance companies").

Preconditions have been set out for establishing a FFI including minimum capital requirements according to the type of institution being set up. Other preconditions include minimum total assets and that a representative office must have been maintained for more than two years. Foreign banks may operate in China through a representative office, a branch or by participation in a joint venture. Bank representative offices are the most common but they are not permitted to engage in direct business operations, only in a liaison capacity.

On 3 January 2003, the PBOC promulgated the *Large and Suspicious Renminbi Payment Transactions Reporting Administrative Procedures* (the "Procedures") and the *Financial Institutions Anti-money Laundering Provisions* (the "Provisions") which became effective on 1 March 2003. The Procedures strengthen supervision of renminbi payment transactions and standardise the reporting procedures thereof in the aim of preventing the payment and settlement facilities of financial institutions from being used to launder funds (Art 1). Financial institutions shall integrate anti-money laundering mechanisms into their organisation, and appoint one or more staff who will be responsible for recording, analysing and reporting large and suspicious transactions (Art

6). Large transactions include: a single transfer of RMB1 million or more between the accounts of legal persons, other organisations or individually-owned household businesses; a single cash transaction of RMB200,000 or more (including deposits, withdrawals, cash transfers, money orders and cashier's cheques); and transfers of RMB200,000 or more between two accounts of an individual or an organisation (Art 7). The Procedures also list a wide range of financial activities that shall be considered suspicious, including: transactions in a frequency or of an amount that obviously do not accord with the account holder's scope of business; and a noticeable increase in transactions with bank accounts in regions where drug trafficking, smuggling and terrorism are frequent (Art 8). Financial institutions shall establish a client database for recording pertinent data, including registered capital, scope of business, principle senders and recipients of funds, and daily average account transaction amounts (Art 10). Financial institutions should report large or suspicious transactions to the People's Bank of China or its branches (Art 16). When the financial institution discovers a transaction that is clearly related to illegal activity, it should immediately notify public security authorities (Art 18). The Provisions mainly provide that financial institutions are required by law to assist and co-operate with judicial authorities, customs and taxation authorities in investigating, freezing or withholding account funds (Art 6). In conformity with the provisions of the People's Bank, financial institutions shall set up a sound anti-money laundering internal control mechanism (Art 8). This will include establishing a specialised department to handle anti-money laundering, or designating an already established department to handle the task (Art 9). The Provisions also require that financial institutions demand and record client identification (Art 10 and 11). When a financial institution suspects that a large or suspicious transaction may be linked to criminal activity, it should promptly notify the local public security department (Art 16). Account and transaction records shall be kept for a minimum of five years (Art 17). The Provisions provide for a fine of up to RMB30,000 for actions breaching the Provisions.

On 5 November 2002, the China Securities Regulatory Commission (CSRC) and the PBOC jointly promulgated the *Administration of Securities Investments in China by Qualified Foreign Institutional Investors Tentative Procedures* which became effective on 1 December 2002. The Procedures open the A share and domestic bond markets to foreign investment for the first time. There are restrictions on the size (measured in percentages and monetary terms) of investments made by qualified foreign institutional investors (QFIIs). The monetary limits are set out in the *Administration of Foreign Exchange for Securities Investments in the PRC by QFIIs Tentative Provisions* issued on 28 November 2002 and effective 1 December 2002 (the "QFII Forex Provisions"). These provide that the minimum investment limit that has to be applied for by a QFII is US\$50 million, while the maximum is US\$800 million. The Implementing Regulations specify that the percentage of shares held by a single QFII in a single listed company cannot exceed 10% of the total A shares in that company and similarly the aggregate percentage of shares held by all QFIIs in a single listed company must not exceed 20% of the total A shares in that company. However, these percentages are subject to "adjustment" by the CSRC. Under the Implementing Regulations, shares held by a QFII or by two or more QFIIs collectively at the end of each trading day that are in excess of the 10% or 20% cap, respectively, must be resold in the market following the issue of a "sell down" notice. The sell down notice is sent by the relevant stock exchange to the

The company must also file accounts in the income tax return required by the Inland Revenue Department (IRD).

Local agents

A strict requirement of the overseas company registration provisions in the Ordinance is that there must be nominated one or more persons resident in Hong Kong who are authorised to accept service of process and any other notices required to be served on the company. The company must file a memorandum of appointment or power of attorney under the seal of the company authorising these people to act in the capacity of the company's representative in Hong Kong. Further, under sec 333A, the overseas company must maintain an authorised representative in Hong Kong for at least three years from the date on which it ceases to operate a place of business in Hong Kong. The company must maintain a person in this position and must file a notice of authorisation of a new agent within six weeks of its original agent ceasing to act. Section 333B allows an authorised representative to withdraw from his position by notifying the company and filing a statutory declaration with the Registrar of Companies that the company has been notified of the decision.

The Ordinance does not specify any qualifications for the authorised representative. Under sec 333C, the Registrar is required to keep an index of every person who is a director of a foreign company.

Documents to be filed

Section 333 sets out in detail the documents which must be filed with an application to be registered as an overseas company. Section 333 has been amended to make these reporting details more stringent, and to make the amendments retrospective. A certified copy of the charter or memorandum of articles establishing the constitution of the company is required in English or with a certified translation. There must be a list of directors and the secretary of the company, including present and former names, usual residential address, nationality, business occupation, and particulars of other directorships. There must also be a list of persons authorised to act on behalf of the company in Hong Kong and, in particular, to accept service of process on behalf of the company. A certified copy of the company's certificate of incorporation, together with a certified translation if it is in a language other than English, must be provided, together with a certified copy of the latest accounts of the company in the form required by the law of its place of incorporation. Under sec 333(1A), where it is not the practice in the overseas country to require a certificate of incorporation, then other documentary evidence will be required. There does not seem to be any requirement to file copies of mortgages or other charges executed outside the country which could affect assets within the country but it may be expected that the accounts would disclose any significant mortgages or charges which would affect the financial standing of the company. The accounts must include a balance sheet and a profit and loss account.

Statutory approvals

There are no special government approvals required for a foreign investment. The company must make the relevant application under Pt XI but the Registrar cannot object to the content, simply the form, of the application. The only area which is likely to cause

trouble is in the regulation of the corporate name. Under sec 337B, the Registrar may refuse to allow a company to use its name if there is already an active corporation operating within the HKSAR with an identical name, or a name so similar that it is likely to lead to misunderstandings. The overseas company may be required to change the name under which it operates in Hong Kong.

Jurisdiction

The Registrar of Companies and the Companies Registration Office exercise jurisdiction in the area of foreign companies.

HKG ¶30-104 REQUIREMENTS FOR ESTABLISHMENT OF SUBSIDIARIES

A wholly or partly-owned subsidiary must follow the incorporation processes specified for a company formed entirely by Hong Kong investors. There are no special rules in the *Companies Ordinance* relating to companies which have overseas promoters. In addition, there are no foreign investment regulations which would place any other restrictions on the establishment of a subsidiary by an overseas company. The major impetus for registration as either a subsidiary or an overseas company has already been noted: a foreign entity may not acquire an interest in land in Hong Kong without registration, and no organisation can carry on business in Hong Kong without registering.

Fees

The Eighth Schedule sets out the fees payable on registration of any company in Hong Kong. There is a flat fee of HK\$1,425, plus a further HK\$1 for every HK\$1,000 or part of HK\$1,000 of the nominal share capital of the company up to a fee of HK\$30,000. Accordingly, the registration fee will vary depending on the nominal capital specified. When a company increases its nominal capital, it will be required to pay a further fee of HK\$1 for every HK\$1,000 or part of HK\$1,000 of the increase up to a fee of HK\$30,000. A fee of HK\$295 is payable on the delivery of the memorandum and articles.

A company limited by guarantee will pay a flat registration fee of HK\$170 as long as the number of members as stated in the articles does not exceed 25. The registration fee rises to HK\$340 where the members number between 25 and 100 and then rises to HK\$1,025 where the number of members is unlimited. There is a HK\$20 fee for registration of any increase in the numbers. The maximum fee payable in relation to a company limited by guarantee is HK\$1,025, including the fee paid on the first registration of the company.

There is a further annual registration fee, of which the maximum amount is HK\$105, depending on the time of registration.

Nationality of board

There is no requirement under the *Companies Code* for any member of the board of directors to be a resident or a Hong Kong citizen. There must be at least two directors for every company.

If an article which is imported forms only part of a consignment of articles where an import licence has been issued, then the person to whom the licence was issued is required to present to the owner of the carrier vehicle an import licence endorsed by him to this effect and a written declaration signed by him stating that the article concerned (which is not covered by the import licence) forms only part of the consignment of articles. The owner may then release the article concerned if he is satisfied that he is not prohibited from so doing under the import licence or he would return the licence to the importer and deliver a written declaration to the Director-General of Trade and Industry regarding the article.

Under the IEO, a licence is required to be issued before goods are imported because they will not be released from the carrier vehicle until the licence is shown to the owner of the carrier vehicle. However, in practice, a temporary licence can be obtained within three business days from the Trade Department after the goods are imported into Hong Kong.

HKG ¶50-005 SPECIAL RESTRICTIONS RELATING TO FOREIGN CONTROL OF BUSINESS

There are no special restrictions relating to foreign control of business.

HKG ¶50-011 MAJOR OBJECTIVES OF HOST COUNTRY

The policy direction of Hong Kong's export trade is much influenced by economic conditions and commercial policies in major overseas markets.

Hong Kong possesses full autonomy in the conduct of its external commercial relations and the Trade and Industry Department plays an important role in formulating the local trade policy. Its work includes the conduct of trade negotiations and the implementation of textile agreements, as well as the collection and dissemination of information on developments which may affect Hong Kong's external trade, especially those relating to trade policies and measures adopted in Hong Kong's major markets.

The Trade and Industry Department implements trade policy and agreements and procedures for import and export licensing and origin certification. On matters of policy affecting trade, the Director-General of Trade and Industry takes advice from the Trade Advisory Board and the Textile Advisory Board.

Hong Kong has always pursued a free-enterprise, market-disciplined policy. This is reflected in the import and export control policy. The policy seeks to help Hong Kong meet its international obligations under the WTO, the Multi-Fibre Arrangement (MFA) and other treaties and policies of organisations to which Hong Kong is a member, to monitor import and export of goods which may affect the health and safety of the people of Hong Kong, to ensure that Hong Kong derives optimum benefits from the rights it has under bilateral agreements and to provide accurate and up-to-date information on the trading economy to Hong Kong and overseas importers and exporters.

There have been no important recent changes in the import and export control policies pursued by the Hong Kong government arising from the change-over in sovereignty from 1 July 1997.

HKG ¶50-012 RATES OF CUSTOMS DUTIES

Duty is assessed and payable under the *Dutiable Commodities Ordinance* on a limited list of dutiable goods which includes alcoholic liquors, tobacco, hydrocarbon oil and methyl alcohol concentrates.

The Legislative Council (LegCo) may from time to time, by resolution, publish in the *Gazette* amendments to the categories of, and rates payable on, dutiable goods.

The rates of customs duties on the import of dutiable goods are provided in the Schedule to the *Dutiable Commodities Ordinance*.

There are various exemptions to duties payable where the Chief Executive-in-Council may prescribe, for instance, exemptions from or refunds of duty as to immunities and privileges of a diplomatic, consular or of a similar nature, refund of duty on duty-paid goods used in the manufacture of dutiable goods, on duty-paid goods destroyed in Hong Kong, on duty-paid goods exported from Hong Kong with the consent of the Commissioner for Customs and Excise, and so forth.

HKG ¶50-013 TAXES

The taxes, as duties on exports and imports, are chiefly provided under the *Dutiable Commodities Ordinance*.

HKG ¶50-014 TARIFF AGREEMENTS

Hong Kong is a founding member of the WTO which was established in 1995 under the Uruguay Round of the General Agreement on Tariffs and Trade negotiations. Hong Kong is a member of the MFA which is aimed at the orderly development and expansion of international trade and textiles.

Hong Kong also worked closely with exporters of textiles and garments under the International Textile and Clothing Bureau to press for bringing world trade in textiles and clothing back under the disciplines of the WTO and the MFA.

Bilateral agreements negotiated by the MFA govern Hong Kong's textiles exports to Austria, Canada, the EEC, Finland, Norway, Sweden and the United States.

Within the context of free trade policy, Hong Kong's commercial relations are designed to ensure that Hong Kong's trading rights in overseas markets are protected and that its international obligations are fulfilled.

Since 1 July 1997, future membership of international organisations has come within the policy directives of the People's Republic of China.

HKG ¶60-033 WORK PERMITS OR VISAS FOR FOREIGN WORKERS, EXECUTIVES AND MANAGEMENT

The entry of foreign workers to Hong Kong is controlled by the Immigration Department as an immigration issue. In addition to normal immigration requirements relating to health and age, foreigners with special skills or experience will be treated favourably, as will those who may be able to contribute substantially to the economic well-being of Hong Kong, such as bankers and entrepreneurs. Special rules also apply to the entry of foreign domestic helpers, a major industry in Hong Kong. There are in excess of 160,000 foreign domestic helpers presently employed in Hong Kong and the basic important qualification is that the employer be a *bona fide* resident of Hong Kong who will guarantee the worker and promise to repatriate the worker to the country of origin at the end of the employment. The Labour Department supervises employment contracts for foreign domestic helpers. The *Immigration Ordinance* requires all employees to produce proof of identity for inspection and all employers to maintain up-to-date records on the employment of all foreign workers.

HKG ¶60-034 REQUIRED BALANCE OF RACE OR NATIONALITY

A foreign investor is not required to maintain any balance of race or nationality at any level of employment.

HKG ¶60-035 INTERNATIONAL LABOUR ORGANISATION CONVENTIONS

Prior to 30 June 1997, the United Kingdom has ratified the International Labour Organisation (ILO) Conventions and Recommendations on Hong Kong's behalf, after consultation with the former Colony.

Since 1 July 1997, the foreign affairs of the Hong Kong Special Administrative Region have been within the responsibilities of the Central People's Government of the People's Republic of China, although the *Basic Law* does permit Hong Kong to conduct certain matters. From 1 July 1997, the ILO Conventions, numbering 40, to which Hong Kong had been a party, continue to remain in force.

Intellectual Property

HKG ¶65-001 INTERNATIONAL AGREEMENTS

Hong Kong was a founding member of WTO and the Trade-Related Aspects of Intellectual Property Rights (TRIPs), and pursuant to obligations under TRIPs enacted amendments to the *Trade Marks Ordinance* (Cap 43). This Ordinance has now been repealed and replaced by the *Trade Marks Ordinance* (Cap 559) with effect from 4 April 2003 which has removed certain restrictions in the old ordinance and added new provisions.

HKG ¶65-002 DOMESTIC LEGISLATION

The law relating to intellectual property is found in the *Copyright Ordinance* (Cap 528), the *Patents Ordinance* (Cap 514), the *Prevention of Copyright Piracy Ordinance* (Cap 544), the *Registered Designs Ordinance* (Cap 522), the *Layout-Design (Topography) of Integrated Circuits Ordinance* (Cap 445), the *Plant Varieties Protection Ordinance* (Cap 490), and the *Trade Marks Ordinance* (now Cap 559, but in the earlier form Cap 43).

HKG ¶65-003 COPYRIGHT

The *Copyright Ordinance* (Cap 528) provides protection for recognised categories of copyrights without the need to register. These categories include literature, music, photographs, films and computer software. This protection is given in Hong Kong, and in most other countries and territories through Hong Kong's participation in international conventions such as the Paris Convention for the Protection of Industrial Property and the Universal Copyright Convention. Protection can also be achieved by the imposition of criminal sanctions where copyright is infringed. There are also criminal sanctions on those who manufacture and sell technology that hacks the technological copyright protection system. There are also extensive criminal sanctions on piracy (including the importation of pirated articles), the production of infringing articles on a commercial scale or the possession of infringing articles for trade or business. The owner of the copyright may take action to protect his copyright by civil action. The rights of the owner usually extend to the copying and distribution of the work to the public. The *Intellectual Property (Miscellaneous Amendments) Ordinance*, with effect from 1 April 2001, was enacted to extend protection against the possession of infringing copyright material by any person in the course of or connected with purposes of that person's trade or business. However, due to drafting defects which did not adequately provide for enforcement, most of the terms of the Ordinance have been suspended pending amendment to the Ordinance. The suspension has now been extended up to 31 July 2003: LN 129 of 2002, and LN 130 of 2002.

HKG ¶65-004 TRADEMARKS

Unlike patents, trademarks do have a primary register operating in Hong Kong, and the procedure must be followed even if the mark is already registered in another country.

The registry is managed by the registry of the Director of Intellectual Property. The governing Ordinance, the *Trade Marks Ordinance* (Cap 559) enacted in 2000 came into force on 4 April 2003. It provides for many changes to the earlier ordinance (Cap 43).

Under the old ordinance (Cap 43), marks were registered either as Part A or Part B marks. Part A marks were those in the usual form, such as the name of a company, a signature (other than in Chinese characters) and invented words. Part B marks were those which distinguish the goods or services of one trader from other traders. The timing for protection differed for these marks, as a Part A mark was validated after seven years registration, while a Part B mark was still open to challenge after that time. The interests of users of registered marks was also able to be registered.

The EPA should finish its comments within 60 days of receiving the report from the regulatory authority.

The EIA Law is backed by the possibility of a suspension order on the process of the proposed development, fines of up to NT\$1.5 million (US\$56,600) and/or three years' imprisonment. Environmental impact assessments will also be required for development of parks, scenic areas, slopeland, power plants, waste disposal sites, public roads and mass rapid transit systems.

TWN ¶25-204 POLLUTION STANDARDS

The controls on pollution of air, land and water are based on general health and safety standards according to area, population and utilisation purposes of the resource. Discharges are allowed within certain quantitative and qualitative limits.

Air pollution

Significant amendments were made to the *Air Pollution Control Act* on 20 January 1999, in broad terms providing for:

- varied levels of air quality control regions to be set aside in Taiwan and acts causing air pollution in these regions to be prohibited or restricted;
- the polluter pays principle — one example is a charge imposed at gas stations on owners of cars and motorcycles;
- sufficiently large buffer zones for new industrial areas with high pollution industries and adequate air quality monitoring equipment;
- specific manufacturer obligations, eg on motor vehicle manufacturers to install catalytic converters exhaust gas recalculation, oxygen sensor, particulate filter, and other devices prescribed in EPA rules under the *Air Pollution Control Act*;
- special approval to be obtained from the authorities prior to establishment, alteration or operation of some fix designated polluting sources;
- powers to be given to the authorities to take emergency actions against dangerous deterioration of air quality due to unusual or unexpected conditions, including power to require factories to cease operations and to prohibit the use of transportation vehicles;
- if the proposed land use is within a wildlife protection area, special air pollution requirements must be met as issued by the EPA; and
- increased penalties for breach, up to a maximum of NT\$3 million (US\$120,000) and imprisonment of seven years.

Land pollution

The *Soil and Groundwater Pollution Remediation Act*, effective as of February 2000, contains standards and limits for soil pollution (see TWN ¶25-213).

Water pollution

The *Water Pollution Control Act* provides that, prior to establishment or renovation, a business must first submit to the EPA a water pollution control plan endorsed by a licensed environmental engineer. A business whose plan is accepted will be issued with a licence of discharge, which lasts for a period of five years and is renewable.

The penalties are up to a maximum of NT\$600,000 (US\$240,000) and imprisonment for up to seven years for responsible officers. A company which causes serious pollution and repeatedly fails to rectify the polluted condition, may face an order of suspension or even closure.

TWN ¶25-205 INCENTIVES FOR NON-POLLUTING PLANTS

The *Statute for Upgrading Industries*, as of 27 December 2000, allows a deduction of 5% to 20% of corporate income tax for investments in projects utilising energy efficient and environmental friendly technologies as prescribed by the relevant authority.

TWN ¶25-211 NATURE OF CONTROLS

The environmental controls are primarily punitive in effect, operating after the establishment of a business venture. In various instances, prior environmental approval has been required and this is becoming more prevalent.

Water pollution control

The industries which are within the categories announced by EPA are required to submit water pollution control plans to EPA before its establishment.

Some 30 industries are covered by the directive including dyeing, paper pulp, petrochemical, chemical, medicine, metal, rubber, concrete, gravel, textile, motor service, etc.

Application for establishment or amendment of a factory may only be made to other government departments after obtaining the EPA's approval for the water pollution control plan.

Air pollution control

The *Air Pollution Control Act* divides air pollution control zones into three classes:

- class 1 — national parks, protected areas and conservation areas;
- class 2 — areas outside class 1 which meet with the air quality standards; and
- class 3 — areas outside class 1 which do not meet with the air quality standards.

To prevent deterioration of air quality in areas of the first two classes, the EPA will prescribe permitted maximum levels of pollution density in the areas. A levy will be imposed on air pollution, even though the level of pollution does not exceed the maximum level under the law. The levy will be used in environmental protection programs.

Imported goods

The importation of goods is subject to business tax and paid by the importer.

Invoice value of goods

In general, there is no control over the invoice value of goods in transactions between related companies or commercial organisations. However, there are certain controls over the invoice value of imported goods.

Transfer pricing issues, though theoretically relevant, have not in practice been an area of major focus by the Ministry of Finance. As a result, there is sparse administrative guidance and judicial development relevant to this topic in Taiwan. There is no apparent policy stated by the Ministry of Finance with respect to the OECD guidelines on transfer pricing.

Due to Taiwan's current unique diplomatic status, it is in practice difficult for Taiwan's National Tax Administration to obtain any cross-border transfer pricing information on its taxpayers. However, as Taiwan recently became a member of the WTO in early 2002, there may be a change in the level of co-operation at the government level in the foreseeable future.

The Executive Yuan has, in the past few years, been studying the possibility of amending the income tax regime from a partially territorial basis to a worldwide basis and the enactment of provisions similar to the controlled foreign corporation rules of the United States. Assuming that such amendment is made, it is possible that the level of cross-border transfer pricing scrutiny will also increase.

TWN ¶35-105 TAXATION OF EXECUTIVES

The rate of individual income tax (income tax) is on a progressive scale for all Taiwan-sourced income derived within one tax year, less reductions, exemptions and deductions. This ranges from 6% to 40%.

The progressive tax table is as follows:

Portion of Income (NT\$)	Applicable Tax Rate (%)	Progressive Difference (NT\$)
Up to NT\$370,000	6	None
NT\$370,001 to NT\$990,000	13	NT\$25,900
NT\$990,001 to NT\$1,980,000	21	NT\$105,100
NT\$1,980,001 to NT\$3,720,000	30	NT\$283,000
Over NT\$3,720,001	40	NT\$655,300

Basis of assessment

Every person, resident or non-resident, who receives Taiwan-sourced income is subject to individual income tax on a calendar year basis, whether such income is paid inside or outside of Taiwan. For a non-resident physically present in Taiwan for 90 days or less in a calendar year, compensation paid outside of Taiwan by a foreign employer is not considered Taiwan-sourced income. An individual who is present in Taiwan for 183 days or more in a calendar year is treated as a resident for tax purposes.

A resident is required to prepare and submit an annual income tax return. Taxes are collected from the non-resident by withholding them at the source. However, a non-resident is not required to file a tax return if all of his Taiwan-sourced income has been subjected to withholding.

Allowable deductions

In addition to an exempt amount of NT\$74,000, taxpayers may elect to itemise their deductions or to use the standard deduction as follows:

- itemised deductions (contributions, personal insurance premiums, medical and child birth expenses, calamity losses not covered by insurance and interest for property loan); and
- standard deductions: NT\$44,000 (for singles) or NT\$67,000 (for couples).

In addition, the following further items are deductible from gross income:

- losses from property transactions — the amount may not exceed gains from the property transactions in the same tax year;
- salary deductions — NT\$75,000 per person or the total amount of salary or wage if it does not exceed NT\$75,000;
- interest and saving investment deductions — effective from 2 February 1999, the first NT\$270,000 of interest earned from all sources and dividends from listed stocks and shares and saving investment are deductible;
- disability deductions — NT\$74,000 can be deducted by an individual who is disabled to the extent as stipulated in Art 3 of the *Disability Benefit Act*;
- charitable gift — 20% of total income;
- life, health, accident and old age insurance — NT\$24,000;
- medical fees — total expense deductible;
- accident and loss — total expense deductible;
- loan on purchase of house for self-residence — NT\$300,000;
- political donation — candidate NT\$20,000, political party NT\$200,000;
- rental expense — NT\$120,000; and
- tertiary education fee — NT\$25,000.

Exemptions will no longer be decided annually by law-makers. Instead, they will be kept in line with the Consumer Price Index, subject to review every three years.

Extra-territoriality

In theory, the FTC has authority over contracts entered into or performed outside of Taiwan, but which have an effect in Taiwan. However, in practice, there has been rare FTC activity in this area.

Passing off

The FTL prohibits identical or similar use of another company's name, trademarks or popularly known packaging which may cause confusion with the other goods depicted by those particulars. Using identical or similar unregistered well-known foreign trademarks on identical goods or the same class of goods is also prohibited.

Misleading advertising

The new FTL regulates advertising or promotional statements in addition to the *Broadcast and Television Act*, the *Food and Sanitary Act* and the *Medical Treatment Act*. Businesses are not allowed, either on their goods or in their advertisements, to display false or misleading information with regard to price, quality, quantity, date of manufacture, expiry date or other details. Advertising agents who knowingly or recklessly produce or design misleading advertisements, and the advertising media, if it knowingly or recklessly communicates or publishes advertisements that are likely to mislead the public, will be liable jointly with the principals for any consequential damages.

Business reputation

Businesses are prohibited from making or publicising false statements likely to cause damage to the reputation of other businesses.

Pyramid sales schemes

Multi-level sales are prohibited if the participants derive revenue mainly from introducing others to join the scheme rather than from the marketing or provision of the goods or services promoted and sold. In addition to the FTL, multi-level sales must also comply with the Multi-level Distribution Control Regulations.

Remedies and penalties

In the case of an intentional prohibited act, an aggrieved party may claim compensation up to a limit of three times the amount of proven damages. Proceedings must be commenced within two years of the date the claimant has knowledge of the unlawful act and 10 years of the date on which the offence was committed. Penalties vary depending on the type of offence.

TWN ¶45-304 LICENCES UNDER STATUTORY MONOPOLIES

Licences under statutory monopolies are recognised as exceptions. This recognition extends to licence agreements of technical know-how unless the right owner abuses its rights and acts improperly.

TWN ¶45-304

Import and Export Controls**TWN ¶45-305 SPECIAL PROVISIONS RELATING TO BUSINESS ACTIVITIES OF NON-RESIDENTS**

There are some restrictions listed in Taiwan *Company Law*, the *Land Act* and in other miscellaneous laws.

TWN ¶45-306 LAWS GOVERNING ADVERTISING AND PROMOTION OF PRODUCTS

Advertising or promotional statements are regulated by the CPL, the FTL and by laws such as the *Medical Treatment Law*, the *Broadcasting and Television Law* and the *Food and Hygiene Management Law*, depending on the context.

TWN ¶45-307 REVIEW OF "UNFAIR" CONTRACTS

In the event that the general provisions stated at TWN ¶45-303 apply, a court can intervene upon request by an interested party.

Import and Export Controls**TWN ¶50-001 RESTRICTIONS ON IMPORT OF GOODS**

Imported commodities are grouped into three categories with varying degrees of restrictions:

- Permissible commodities can be imported under import permit by trading companies and manufacturers. However, the Board of Foreign Trade (BOFT) may impose restrictions on the procurement areas of imports and the qualifications of applicants;
- Controlled commodities are those for which no trading company may apply to import. However, under special circumstances as provided in relevant regulations, factories and manufacturers may apply to import such commodities; and
- Prohibited goods are barred mostly for reasons of security, sanitation or economy. No such goods may be imported by trading companies or manufacturers.

Relaxed import control

A relaxed import control regime exists pursuant to free trade principles established under the *Trade Law* proclaimed in February 1993.

The *Trade Law* provides that goods are deemed to be permitted imports or exports unless specifically restricted in accordance with international treaties or trade agreements, or based on the needs of national security, law and order, culture, health or environmental protection.

TWN ¶65-003 COPYRIGHT

Copyright Act

Subject to certain exceptions, Art 87 of the *Copyright Act*, as last amended on 12 November 2001, prohibits import of unauthorised reproductions and/or originals without the consent of the copyright owner. In other words, it bans parallel imports.

Protection of foreign works

Protection of foreign works is afforded when the work is:

- first published in Taiwan;
- for a foreign work first published outside Taiwan, if then published in Taiwan within 30 days; or
- first published in a foreign country which offers reciprocal copyright protection to Taiwan nationals. In the past, countries which offered reciprocal treatment included the U.S., United Kingdom, Hong Kong, Switzerland, New Zealand, and in some cases South Korean and Spanish nationals are protected.

Following Taiwan's accession to the WTO, WTO members are regarded to have reciprocal relationships with Taiwan in respect of copyright protection, and nationals of WTO members are entitled to enjoy the copyright upon completion of the work unless such work has already been in the public domain in the home country of the national. Works originated from countries other than WTO members still do not enjoy copyright protection in Taiwan unless either of the above first two requirements are met.

A two-year grace period exists for those persons who are using works authored from member countries of WTO whose works were previously unprotected.

Protection for literature, arts, computer programs, etc

The Act covers literature, music, drama, dance, fine arts, photography, graphic design, architectural design, video, audio and computer programs.

Translation of foreign works

The approval of the copyright owner (to whom the Act applies) must be obtained before a translation of his work can be made.

Use of copyright material

Reasonable use of copyright material covers citation in court, research, study, teaching and news reports. Foreign works can be translated without authorisation if intended for personal use only and not for publication.

Copies of books and computer programs

In practice, not more than half the content of books or magazines can be photocopied. Lawful computer programs can be copied for personal use.

Period of protection

To keep in line with international standards, the period of protection normally spans the lifetime of the author and 50 years after death, including for computer programs. Economic rights for photographic works, audiovisual works, sound recordings and performances enjoy 50 years of protection after their public release.

Ownership of works in the course of employment

The employer will own the economic rights to the employee's work unless otherwise agreed. The employee will own the moral rights to the created work unless otherwise agreed.

Assignment and authorisation

A copyright owner may freely assign any economic rights and may authorise anyone else to use the work. The scope of any such assignment or authorisation can be defined by an agreement between the parties. Ambiguous assignments (or portions thereof) will be construed in favour of the assignor. Where a copyright owner licenses his rights non-exclusively, the non-exclusive licensee cannot, unless with the prior written consent of the copyright owner, sublicense or authorise any of the rights in question. An exclusive licensee however may replace the copyright owner as the economic rights holder.

Damages, claims and penalties

Article 84 of the Act provides that a copyright owner may demand an injunction of an infringement and may request the prevention of an infringement that is likely to occur. In addition, the owner may request the destruction or disposal of the infringing articles or items used solely to facilitate the infringement.

Damages for intentional or negligent infringement are between NT\$10,000 and NT\$500,000 to be decided by the court if the actual loss is not easily ascertained. The damages limit for infringement by deliberation or infringement of a serious nature can be as much as NT\$1 million. In addition, the injured party may request the infringer to pay for the publishing of the contents of the judgment in newspapers or magazines.

To initiate a criminal action, the right-holder must generally file a complaint. However, public prosecution without a complaint is available for certain violations under Art 100 of the *Copyright Act*. This complaint must be filed within six months from the day a person entitled to complain becomes aware of the identity and activity of the offender.

The criminal penalty for copyright infringement by unauthorised reproduction is imprisonment for not less than six months but not more than three years and a possible fine of not more than NT\$200,000. If copyright infringement by unauthorised reproduction is made with the intention of either selling or renting it, the penalty is imprisonment for not less than six months but not more than five years, plus a possible fine of up to NT\$300,000. Infringement of another's economic rights by public recitation, public broadcast, public presentation, public performance, exhibition, adaptation, renting, or by other means is punishable by imprisonment for up to three years and a possible fine of up to NT\$150,000.

Any person who promotes or sells a registered new variety without the consent of the owner of the new variety right shall be punished with imprisonment not exceeding two years or detention or in lieu thereof or in addition thereto a fine not exceeding NT\$60,000. Any person who uses a registered new variety without the consent of the owner of the new variety right shall be punished with imprisonment not exceeding six months, detention or in lieu thereof or in addition thereto a fine not exceeding NT\$15,000. However, it is the owner of the registered variety who must bring suit in such cases.

TWN ¶65-015 UNFAIR COMPETITION

There are laws containing provisions relating to unfair competition and passing off. The main legislation dealing specifically with these matters is the *Fair Trade Law* which prohibits the use of identical or similar trademarks and packaging which may confuse the general public and result in a benefit to the offender.

TWN ¶65-021 REGISTRATION PROCEDURES

Application for registration of trademarks and patents is made to the Intellectual Property Office of the Ministry of Economic Affairs (MOEA); the relevant procedures and supporting documents required are prescribed by the authority. Copyrights are protected upon completion of the works. No registration of copyright is available. Trademarks and patents require registration to obtain protection. In limited circumstances, an owner of intellectual property outside the country may challenge a person who has registered that intellectual property without authorisation.

TWN ¶65-022 TRANSFERS AND LICENSING AGREEMENTS

It is necessary to register patent/trademark transfers, and patent/trademark licensing and know-how agreements with the government. Trade imposing illegitimate restrictions is prohibited under the *Fair Trade Law*. Trademark licensing arrangements that tie the use of the marks to other unrelated sales may amount to illegitimate trade restrictions. A violation of this prohibition may be subject to an administrative sanction by the Fair Trade Commission (FTC). Failure to rectify the situation in the time set by the FTC may result in criminal penalties.

Businesses must not engage in activities that may misleadingly or unfairly interfere with the order of trade under the *Fair Trade Law*. Licensing arrangements, therefore, must not distort the normal operation of the market mechanism. A violation of this prohibition may also be subject to an administrative sanction by the FTC.

TWN ¶65-023 COMPULSORY LICENSES

Copyright

Where a sound recording of a musical work recorded for purposes of selling has been published for six months, a person who intends to exploit the aforementioned musical work to record and produce other sound recordings for sale may apply to the competent copyright authority for a compulsory license, and after paying compensation, may exploit such musical work and record and produce other sound recordings under Art 69 of the *Copyright Act*.

Regulations governing the procedures and compensation payment of the compulsory license as provided for in the preceding paragraph are prescribed by the competent authority.

Copies of sound recordings which exploit musical works pursuant to Art 69 of the *Copyright Act* must not be sold outside of Taiwan.

The competent authority shall revoke the approval for a compulsory license obtained in any of the following circumstances:

- the work is not exploited in the manner approved by the competent authority; and
- subsequent to approval of the compulsory license, misrepresentations are discovered to have been made in the application.

Patent

The Patent Authority may, upon application, grant a compulsory license to the applicant for putting the patented invention into practice when one of the following conditions is met:

- the requirement of a national emergency;
- non-commercial use for the promotion of public well-being;
- where the petitioner, after considerable effort, has been unable to obtain a license from the patentee on the basis of the reasonable commercial terms offered; or
- where the patentee is found by the court or the FTC as having engaged in unfair trade practices.

TWN ¶65-024 TABLE OF FEES

Apart from any legal proceedings required, the main expense of obtaining and maintaining protection is the government fees on registration. The cost is listed as follows:

- *Trademark registration*
NT\$4,000 for an application to register a principal trademark, associated mark or defensive mark for no more than 20 items of goods.
The fee is NT\$4,000 for an application to register a service mark, certification mark or collective mark.

commercial comprehensive, etc). However, there are few insurance products available in Taiwan to cover "commercial multiple perils" and/or "all industrial risks". For personal insurance, the available range of insurance in Taiwan includes life insurance, accident insurance, health insurance and annuities.

TWN ¶85-004 INSURANCE REQUIRED FOR FINANCING ARRANGEMENTS

Lenders routinely require insurance to be taken out as a minimum protection against fire, earthquakes, typhoons and floods.

TWN ¶85-011 COMPULSORY INSURANCE

Insurance against the following risks is compulsory:

- automobile third party liability;
- civil air transportation enterprises third party liability;
- nuclear facility enterprises third party liability;
- labour insurance for injury, life disablement and retirement; and
- national health insurance.

TWN ¶85-012 INSURANCE OF LOCAL EMPLOYEES

It is compulsory for an employer (who employs over five persons) to provide insurance for employees against death or disablement under the *Labour Insurance Act*. Enterprises are required by law to insure employees collectively against loss of life, injury or disablement sustained in the hours of employment. Enterprises are also required to utilise the government's national health insurance program. If an employer is subject to the application of the *Labour Standards Law*, it shall also set up a retirement plan for all its employees.

TWN ¶85-013 LEGISLATION AFFECTING CHOICE OF INSURANCE COMPANY

The premium rates and terms are subject to the approval of MOF except for those which are special and international in their nature. Non-admitted foreign insurance companies are not allowed to solicit or promote business in Taiwan. Non-solicited local enterprises or individuals who voluntarily purchase insurance from foreign non-admitted insurers, however, are not prohibited by law. Operations of foreign insurance companies are governed by the *Insurance Act*.

TWN ¶85-004

TWN ¶85-014 APPLICATION FOR INSURANCE PAYMENTS

There are no special procedures for the application of payments. The remittance of the proceeds of insurance claims is subject to the exchange control of the Central Bank of the Republic of China. Generally speaking, the Central Bank will permit such remittances.

TWN ¶85-015 INVESTMENT BY INSURERS

Insurers are now allowed to invest in overseas finance and securities markets.

Insurers may invest up to a total of 5% (and if specially approved by MOF, up to 35%) of their fund in foreign securities, foreign currency deposits and foreign insurance companies or holding companies of foreign insurance companies. Foreign securities include the following (except for those issued by governments and corporations in the PRC):

- government bonds, treasury bills and saving bonds issued by foreign governments;
- bonds, negotiable time deposit certificates and floating rate notes;
- securities and corporate bonds traded in centralised trading markets or over-the-counter markets of foreign securities;
- beneficiary certificates for investment trust funds of foreign securities; and
- other marketable securities approved by the competent authority.

The aggregate amount of the stocks or corporate bonds in any one company (whether a local company or a foreign company) invested by the insurer must not exceed 5% of insurer's fund, or 10% of the issued capital of the company issuing the stocks or bonds. The respective amount of stocks, bonds or trust fund beneficiary certificates purchased in foreign companies cannot be more than 40% of the allowed overseas investment amount (ie 35% of the insurer's fund). A similar restriction applies to loans. Current regulations exclude foreign loans from being items which insurers are allowed to invest in. An insurer's foreign currency deposits in any one bank may not be more than 3% of the insurer's fund. However, if such foreign currency deposits are for the needs of the insurance business instead of for investment purposes, the deposits in any one bank may increase to 10% of the insurer's fund or a higher amount approved by the competent authority. An insurer's deposits in any one bank may not exceed 10% of the insurer's fund, except as approved by the competent authority. Investment in each foreign trust fund beneficiary certificates are limited to 5% of the insurer's fund or 10% of the issued certificates.

TWN ¶85-021 PRODUCT LIABILITY INSURANCE

Product liability insurance is available though not so common in practice.

The range of insured products is quite limited when judged by international standards. However, some products such as medicine, cosmetics, chemical products, electronic instruments, automobiles and aircraft are commonly insured.

Investment in Greater China

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