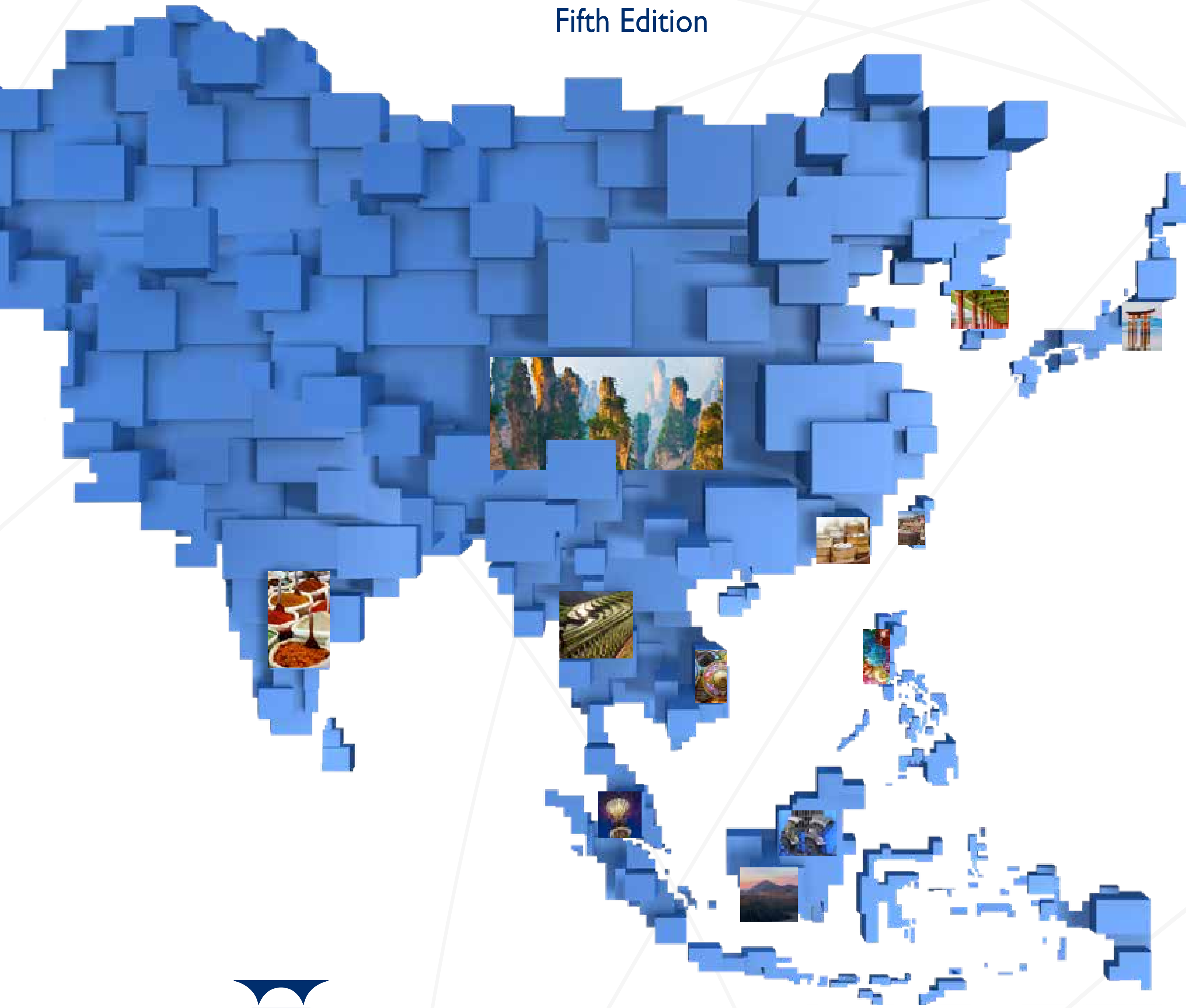
ASIA

A Legal Guide for Business Investment and Expansion

Fifth Edition



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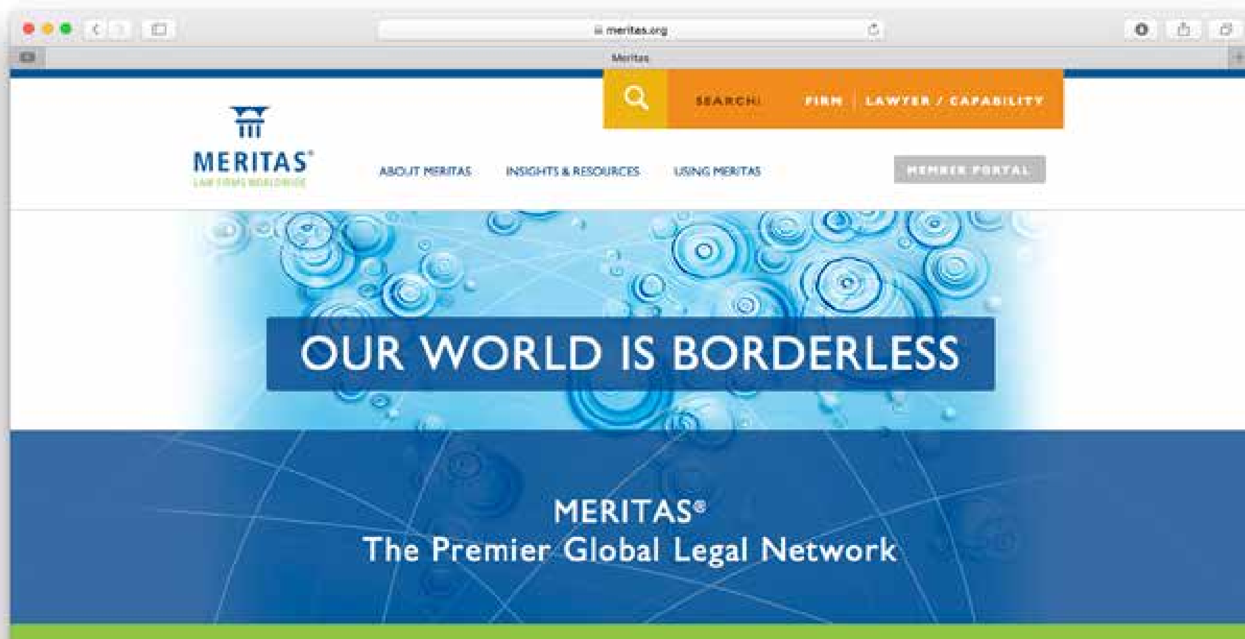

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1. What role will the government of Taiwan play in approving and regulating foreign and Mainland Chinese direct investment?

Three types of Taiwan government approval requirements may be relevant to direct foreign or Mainland Chinese[1] investment in Taiwan:

- Approvals that are required solely because the investor is foreign (Foreign Investment Approval) or Mainland Chinese (Mainland China Investment Approval);
- Approvals required under industry-specific regulations applicable to foreign, Mainland Chinese and local investors (Industry Approvals);
- Approvals required due to impact on competition in the market (Competition Approvals).

It should be particularly noted that Taiwan has special rules regulating investment from Mainland China (which, for purposes of such rules, does not include Hong Kong and Macau) and by entities outside Mainland China directly or indirectly controlled or more than 30% owned by persons or entities from Mainland China (as control and ownership are defined by relevant Taiwan regulations) (collectively, "Mainland China Investors"). Thus, all references to foreign investment in this chapter shall be read to exclude investments by Mainland China Investors.

Foreign Investment Approval

Foreign investment approval requirements depend on whether the vehicle for direct foreign investment in Taiwan is a branch of a foreign company (Branch) or a locally formed corporation (Subsidiary).

No foreign investment approval is required for the establishment of a Branch by a foreign investor.

Foreign direct investment in non-publicly listed companies[2] in Taiwan requires an approval from the Investment Commission of the Ministry of Economic Affairs (MOEA) under the Statute for Investment by Foreign Nationals. Such approval is commonly referred to as an FIA. For capital investment in non-publicly issued companies in nonregulated industries of less than approximately usd50 million, FIA approval is pro forma, available within three to five days, and given at a staff level without necessitating a formal committee meeting. Subsequent sale of shares acquired under the FIA regime requires a future pro forma FIA approval.

For investments in non-publicly issued companies in excess of usd50 million or investments in regulated industries (e.g., banks, insurance companies, telecommunications, etc.), and in connection with other circumstances such as investments involving or acquiring 10% or more of the shares of a publicly issued company, approval via a formal committee meeting (which committee normally meets monthly) and consultation with other relevant government bodies will generally be required and can take up to several months.

Based on FIA approval, the foreign investor is permitted to freely convert foreign currency into New Taiwan Dollars (twd) for purposes of making the investment and to convert the New Taiwan Dollar proceeds from dividends on, or sales of, shares in such companies into other currencies for repatriation.

Mainland China Investment Approval

All investments (including establishment of Branches) by Mainland China investors in non-publicly issued companies[3] require Investment Commission approval and such approvals are only available for investments in industries which appear on a "positive list" published by the Investment Commission (the positive list can be found at https://www.moeaic.gov.tw/businessPub.view?lang=ch&op_id_one=3), Mainland China Investors are not permitted to invest in industries not on such positive list at all (the "Mainland China Restrictions").

Investment Commission approvals of investments by Mainland China Investors are not pro forma and, in addition to legal and regulatory requirements, may also be impacted by both public policy and political considerations. Subsequent sale of shares acquired by Mainland China investors also require approval.

Based on the above approval, a Mainland China Investor is permitted to freely convert foreign currency (or renminbi) into New Taiwan Dollars to make the investment and to convert the New Taiwan Dollar proceeds from dividends or sales of shares in such companies into other currencies for repatriation.

Industry Approval

For regulated industries, this is a two-step process. As a first step, approval from the relevant industry regulator is required as a prerequisite to vehicle formation or acquisition, the timing of which will vary from several days to several months. As a second step, after vehicle acquisition or formation (see below), unless, in the case of acquisition, the license is already held, a second application typically must be made for the actual "license" (Industry License).

Competition Approval

Competition approvals are discussed in Question 5.

Others

Intellectual property licenses entered into in connection with investments in Taiwan (e.g., where a foreign investor, in addition to the investment, licenses technology to the branch or subsidiary in exchange for royalty payments) do not require special approval. However, licensing of technology from Mainland China Investors in the agriculture, industrial, mining, construction or technology services sectors requires prior Investment Commission approval.

Procedures

In addition to the above approvals, the establishment of a branch or subsidiary involves the following primary administrative steps:

1) Name reservation

2) Corporate registration and capital injection

3) Obtaining the industry license (if any)

Steps (1) through (3) will normally require a total of four to six weeks.

The time required to obtain the industry license (if required) will vary by industry.

Regulation

Once investments are made, branches and foreign and Mainland China Investor-owned companies are generally regulated in the same manner as their local counterparts.

2. Is it possible for foreign or Mainland China investors to conduct business in Taiwan without a local partner? What corporate structure is most commonly used and best for foreign or Mainland China investors?

As a general rule, subject to the Mainland China Restrictions and to the foreign ownership limits described in Question 5, a foreign investor or Mainland China Investor does not require a local partner to conduct business in Taiwan. Similarly, with certain industry-specific exceptions, there is no restriction on a foreign investor or Mainland China Investor holding a majority of the seats on the board of directors of a Taiwan company in which it invests[4]. Thus, having or not having a local partner is, in most cases, a commercial rather than legal decision.

Where there is a local partner, the most common form of vehicle is a locally incorporated company limited by shares in which each partner holds the agreed percentage of shares, and where the parties enter into a joint-venture agreement or shareholders agreement setting out their respective rights and obligations with respect to the management and operation of the company.

3. How does the government of Taiwan regulate commercial joint ventures composed of foreign investors or Mainland China investors and local companies or individuals?

Taiwan does not directly regulate commercial joint ventures. Participants should note, however, if the joint venture investment necessitates the creation of a legal vehicle (which is virtually always the case), then such investment is subject to Investment Commission approval as described in Question 1. In addition, the formation of the joint venture may require Competition Approval under Taiwan's Fair Trade Law (see Question 5).

4. What specific laws will influence the commercial relationship between local agents/distributors and foreign or Mainland China companies?

Unlike many countries, Taiwan has not adopted agency or distributor protection laws. Thus, as a general rule, the relationship between local agents and distributors and foreign or Mainland China companies is purely a matter of contract between the relevant parties. However, there are some exceptions. In regulated industries where the import of the relevant product (e.g., medical equipment or pharmaceuticals) is regulated, the local agents and distributors may need to register the products in advance with the relevant regulator and obtain an import approval to import the relevant goods into Taiwan. In this regard, the foreign or Mainland China company needs be aware that such product registrations and import approvals are owned by the local importer/distributor, not by the foreign or Mainland China company. These registrations are generally not transferable to a new importer/distributor upon termination of the current importer/distributor without the cooperation of the terminated importer/distributor.

Separately, it should also be noted that there are restrictions on import of certain products from Mainland China which restrictions would not apply to imports of the same goods from other countries.

5. In what manner does the government of Taiwan regulate proposed merger and acquisition activities by foreign investors or Mainland China investors ? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors or Mainland China investors?

There are five government control mechanisms for mergers and acquisitions by foreign and Mainland China investors:

- Specific restrictions/limitations on non-Taiwan ownership of certain key sectors;
- The Mainland China Restrictions discussed above;
- Ownership concentration restrictions without regard to nationalit;y
- The Investment Commission approval process described in Question 1;
- The Fair Trade Law.

Foreign Ownership Restrictions

The industries in which foreign ownership is restricted are:

- General aviation and civil air transport (less than 50% total foreign ownership, and not more than 25% individual foreign ownership);
- Airport ground handling and flight kitchen businesses (less than 50% total foreign ownership, and not more than 25% individual foreign ownership);
- Shipping (Taiwan registered ship) (not more than 50% ownership)
- High-speed railways (not more than 49% ownership);
- Forest lands, fisheries, hunting grounds, salt fields, lands with mineral deposit, sources of water and lands lying within fortified and military areas and lands adjacent to the national frontiers (absolute prohibition);
- Radio and television (absolute prohibition);
- Cable radio/television (less than 20% direct ownership, and less than 60% direct and indirect ownership);
- Private utilities (less than 50% ownership, and foreigners are prohibited from being founders, directors or supervisors of gas businesses);
- Satellite broadcasting (not more than 50% ownership).

Mainland China Restrictions

See Question 1, above. There are, in fact, a large number of industries in which Mainland China investors are not permitted to invest at all including, inter alia, transportation and shipping, energy and utilities, telecommunications and certain financial services.

Concentration Restrictions

By way of an example of ownership concentration restrictions, without regard to nationality, an investment by any one investor (including related parties) which would cause such investor (and related parties) to own more than 10%, 25% or 50% of the shares with voting rights of a financial holding company, bank or insurance company would require prior Financial Supervisory Commission approval.

Investment Commission Approval Process

For significant foreign investments and for most Mainland China investments, the Investment Commission approval process described in Question 1 above is expanded to include consultation with other regulatory bodies and that the application be reviewed at a commission meeting. When investments are made by certain Mainland China investors or in sensitive industries (e.g., telecommunications) or by methods (e.g., public tenders by hedge funds/private equity investors) which raise public policy concerns, the review process can be used to extract voluntary "concessions" from the investors, to obtain additional information from the investor (such as the identity of ultimate beneficial owners) or to impose one-off conditions on the approval to address particular concerns.

Competition Approval

The Fair Trade Commission's (FTC) approval is required (whether or not the investor is a foreign investor or a Mainland China investor) if the relevant acquisition constitutes a "combination" as defined in the Fair Trade Law and any one of three specified market share or business revenue thresholds are met. A combination is defined as one party acquiring one-third or more of the shares of another party or otherwise acquiring direct or indirect control over the business operation or the appointment or discharge of personnel of such other party. The relevant thresholds are:

- Either party's current share of the relevant Taiwan market exceeds 25%;
- The post-combination combined Taiwan market share exceeds 33%;
- The total Taiwan-related revenue of one party to the combination for the prior fiscal year exceeds twd2 billion (approximately usd67 million) and such revenue of the other party exceeds twd15 billion (approximately usd500 million).[5]

We also note that Taiwan has enacted a mergers and acquisitions law and a specific financial institutions mergers and acquisitions law. These laws impose specific process requirements on mergers and acquisitions which are intended to address various issues as creditors rights and employee rights, and which apply to mergers and acquisitions meeting certain specified criteria.

6. How do local labor statutes regulate the treatment of employees and expatriate workers?

The Labor Standards Law (LSL) governs employment in Taiwan. With limited exceptions (e.g., retirement benefits and use of fixed term contracts), the LSL applies to both local employees and expatriate workers. The LSL regulates matters such as working hours, vacation, termination and severance, working conditions, and retirement benefits. In 2005, Taiwan enacted a defined contribution retirement scheme under which companies must, and employees may, contribute on a regular basis funds that employees may draw on upon reaching retirement age. Employers are also required to contribute to mandatory labor insurance, which protects employees against, inter alia, work-related injuries, and national health insurance.

There are no restrictions on hiring local employees. With respect to foreign employees, there are two regimes:

- Rules applicable to foreign or Mainland Chinese executives and professionals (the rules applicable to employment of Mainland Chinese nationals are more restrictive than those applicable to foreigners generally); and
- Rules applicable to foreign "blue collar workers," for which there are industry-specific limits and quotas.

Work permits are required to employ all foreigners and Mainland Chinese; there are limits on the types of positions for which permits are available and, in certain circumstances, the number of non Taiwan employees employees (high numbers must be justified). The employer must also meet certain paid-in capital requirements in order to obtain and maintain work permits for foreign or Mainland China employees.

Under the LSL, employees may not be terminated at will. Terminations must be made for cause or for specific non-cause reasons (e.g., downsizing of the business) as prescribed in the LSL.

The Taiwan Government has recently enacted the "Act for the Recruitment and Employment of Foreign Professionals" (Foreign Professionals Act) for the purpose of encouraging highly skilled foreign professionals to live and work in Taiwan, inter alia, by offering tax incentives.

7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

Taiwan employs foreign exchange controls, which regulate both inbound and outbound conversions between New Taiwan Dollars and foreign currency. Such controls apply equally to both domestic companies and branches or subsidiaries of foreign or Mainland China companies. For purposes of currency controls, Taiwan divides conversions into two categories: trade-related (i.e., the purchase price for sale of goods and services) conversions, and non-trade-related (e.g., financial payments) conversions.

Trade-related conversions are not restricted. Under the current foreign exchange control regulations (the FX Regulations), each Taiwan resident (whether an individual or an entity) is permitted to purchase non-Taiwan currencies with New Taiwan Dollars (twd) and to remit the same out of Taiwan up to an aggregate of usd5 million (for individuals) and up to usd50 million (for corporate entities) per year, for "non-trade" purposes, without being required to obtain approval from the Central Bank of the Republic of China (Taiwan) (Central Bank) (the Conversion Allowance).

Non-trade conversions (except where other laws or regulations specifically permit conversions) in excess of the Conversion Allowance require case-by-case approval of the Central Bank, which approvals may or may not be available depending on the circumstances.

Taiwan companies, including branches and subsidiaries of foreign or Mainland China companies, may receive, hold and utilize foreign currency without being obligated to convert it into New Taiwan Dollars. Thus, if a Taiwan entity has a foreign currency revenue stream (i.e., export proceeds), it can, without Central Bank approval, make payment from such revenue regardless of amount.

With Investment Commission approval or FINI status or branch registration (which constitutes an example of the specific permission for permitted conversions discussed above), inbound equity capital invested and repatriation of capital, earnings and capital gains is available without regulatory approval. Note that trade transactions (the purchase and sale of goods and services as a business) are not subject to controls. However, there are other conversions (including conversions for making royalty payments on licensed technology and, with limited exceptions, for paying principal and interest on intercompany loans) which are subject to the above restrictions.

8. What types of taxes, duties, and levies should a foreign investor expect to encounter in negotiating an inbound investment in Taiwan?

Both a branch and a subsidiary are subject to value added tax at the rate of 5% on revenue, and income tax at the rate of 17% on profits. However, after-tax branch profits may be remitted to the foreign head office without further taxation, while dividends paid by a subsidiary to its foreign shareholder are subject to a withholding tax of 20%, assuming no tax treaty. There is no tax treaty between Taiwan and the United States.

Other payments by the branch or subsidiary (excluding payment of the purchase price for imported goods) to its head office, parent, or affiliates, such as interest payments on inter-company loans and royalty payments on intellectual property licenses, are considered Taiwan source income of the relevant head office, parent or affiliate, and are subject to a withholding tax of 20% flat on the gross amount paid assuming no tax treaty exists with the jurisdiction in which the head office, parent or affiliate is located.[6]

With limited exemptions under the Foreign Professionals Act, foreigners or Mainland Chinese employed by a branch or subsidiary are also subject to personal income tax. Expatriates employed in Taiwan for fewer than 183 days in the relevant tax year are taxed at a flat rate of 20% on gross compensation paid (i.e., without exclusions or deductions). Expatriates employed in Taiwan for 183 days or more in the relevant tax year are taxed on net income (i.e., gross income less permitted exclusions and deductions) at graduated rates up to 45%.

The import of goods is subject to a customs duty regime. Taiwan is a member of the World Trade Organization (WTO) and Taiwan's duty levels are generally consistent with WTO standards[7]. Also, for investment in key industries, duty exemptions or duty deferrals may be available.

9. Do comprehensive intellectual property laws exist in Taiwan and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?

The intellectual property rights regime in Taiwan (both in terms of protection provided and the registration process) is similar in most respects to those found in other industrialized countries. Taiwan has laws protecting patents, trademarks, and copyrights, and these laws are generally considered to be up to international standards (with limited exceptions). Local courts generally enforce such rights, and enforcement mechanisms have improved over the years.

10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?

Taiwan has a transparent and independent court system. Taiwan courts generally interpret and enforce the contract as written. The court system consists of a trial court and two levels of appeals courts. Judges hear cases and there are no juries. Use of Taiwan courts is often advantageous when doing business with a Taiwan entity because any potential legal proceeding will be closer to that entity's assets, facilitating an easier enforcement of the judgment.

For reasons related to diplomatic recognition, Taiwan is not a signatory of the New York Convention. In addition, because Taiwan courts are relatively time/cost efficient, there are no juries in Taiwan, and pre-trial discovery and motions are relatively limited, some of the benefits that might be expected from arbitration in other jurisdictions do not apply to the same extent in Taiwan.

11. What recommendations can you offer for how best to negotiate and conduct business in Taiwan?

Taiwan is a developed modern economy in which business is generally conducted in a similar manner to other similar economies. That said, there are local nuances, and business success in Taiwan is often driven more by developing balanced relationships and mutual trust through willingness to compromise and work with business partners than by acquiring and insisting on legal rights. Thus, going slowly, getting to know your business counterparts and letting them get to know you is an important factor.

12. What practical advice can you share with investors who decide to do business in Taiwan?

As can be seen from the above, a significant point to note regarding Taiwan's regulation of cross-border business is the fact of Taiwan's unique relationship with Mainland China and the impact thereof on investments from, and commercial dealings with, Mainland China. Although Taiwan has opened some industries to investment from Mainland China, such investments are separately regulated under a parallel (but distinct) regime intended to create regulatory transparency (i.e., prevent investment from Mainland China being disguised as foreign investment) and allow monitoring and control of such investments separate from foreign investments.

In this context, foreign entities with Mainland China investors (albeit below the ownership and control thresholds for being treated as a Mainland Chinese investor) are more heavily scrutinized when applying for Investment Commission approval and can find their applications delayed or even rejected based on public policy or political objections to such Mainland interests even though such Mainland interests are within regulatory limits.

Also, entities incorporated in Mainland China but owned by non-Mainland shareholders create unique issues, as such entities can sometimes fall outside both the Taiwan regulations governing foreign investment and the Taiwan regulations governing investment from Mainland China. Thus, it is generally not advisable for foreign investors to use their Mainland China subsidiaries or joint ventures as a conduit for investing in Taiwan.

13. Does Taiwan currently have any data privacy laws or regulations? How do they affect business activities?

Taiwan has enacted a Personal Data Protection Law (PDPL). The PDPL defines personal data and regulates the collection, processing and use thereof by all business entities in Taiwan by (i) limiting the purposes for which such data may be collected, processed and used; (ii) imposing restrictions on the collection, processing and use of sensitive personal data; (iii) requiring regulated users to give notice to protected

parties when collecting personal data (where the regulated users collect personal data directly from the protected party) or before the processing or use of personal data (where the regulated users collect personal data from a person other than the protected party); (iv) requiring regulated users to implement security measures to protect against improper disclosure; (v) granting specified regulatory bodies the authority to restrict cross-border transmission of personal data;
(vi) granting to protected parties (i.e. data subjects) the right to inspect, copy, supplement and, in certain circumstances, request deletion and/or termination of collection, processing or use of personal data; (vii) imposing civil remedies as well as both civil and criminal sanctions for violations; and (viii) allowing class actions on behalf of data subjects. With respect to item (v), except for telecomm companies which are prohibited from transferring personal data to Mainland China, the Taiwan authorities have not yet restricted cross-border transfer of personal data.

14. Are there any recently passed laws or regulations in Taiwan that are expected to affect the activities of foreign investors and Mainland China investment in the future?

There are no recently passed laws or regulations in Taiwan that would materially affect the activities of foreign investors or Mainland China investors in Taiwan.

Footnotes

[1]/ Please see Question 12 below for the background on the distinction between foreign investors and Mainland China Investors.

[2]/ Portfolio investments by foreign investors in Taiwan securities are made through a separate structure from the FIA structure whereby foreign institutional investors (so called FINI) or individuals (so called FIDI) register with the Taiwan Stock Exchange and then may trade such securities without FIA approval. However, direct investment in publicly listed companies resulting in ownership of 10% or more of the shares of the listed company whether by negotiated purchase of a block of shares or public tender falls under the FIA regime.

[3]/ Portfolio investments by Mainland China investors in publicly issued companies are subject to the Mainland China Restrictions but are also separately regulated and permitted to be made by only a handful of large Mainland China institutional investors.

[4]/ However, it should be noted that, except when such directors represent a Mainland China investor in connection with an Investment Commission approved investment by such Mainland Chinainvestor, Mainland Chinese nationals are not permitted to serve as directors of Taiwan companies.

[5]/ This threshold is twd2 billion and twd30 billion in the case of banks or other financial institutions.

[6]/ There is no tax treaty with the United States. There are tax treaties with Australia, Austria, Belgium, Denmark, France, Gambia, Germany, Hungary, India, Indonesia, Israel, Italy, Kiribati, Japan, Macedonia, Luxembourg, Malaysia, the Netherlands, New Zealand, Paraguay, Poland, Senegal, Singapore, Slovakia, South Africa, Swaziland, Sweden, Switzerland, Thailand, the United Kingdom, and Vietnam.

[7]/ Please note, however, that certain goods which may be imported from other countries are not permitted to be imported from Mainland China.

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