# SOME LEGAL ISSUES OF INVESTING IN ASIA: AN AUSTRALIAN PERSPECTIVE

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## I. ASIA AND AUSTRALIA: GENERAL VIEWS

Asia is a hot topic in Australia, in part because of its economic dynamism and its sensitiveness in debates on race. Whether it is the Labour or the Coalition government, Australia has made some attempts to be accepted as a part of Asia. Asia can look to Australia as a model of development as its level of industrialization is relatively high comparing with most of Asian countries. However, among Asian governments there is some resistance to recognizing Australia as a part of Asia. But even without being accepted as a part of Asia, Australia can still increase its influence and consolidate its position in the region by offering its unique assistance, socially or economically, which is very valuable to Asia. Just as what was said by Former Prime Minister Malcolm Fraser on October 22, 1997 in Canberra in respect of the 'Asianness' of Australia, " ... We do not have to say we are Asian in the sense of race, although many good Australians are Asians. We are Australian and our future is irrevocably bound with the region and the lands to our north. There is no other future for us."[1]

Asia consists of about 40 countries all with widely varying social, economic and legal systems. From the developed countries such as Japan, South Korea and Singapore to the under-developed countries including Cambodia, Laos and Nepal, Asia offers a dynamic environment for international trade and investment. Since the 1950s, Asia has become a more important player in the world forum as a result of its economic development.

A common model for analyzing Asian countries is to group them into four tiers according to the stages of their economic development. In this model, Japan is at the top and leading position, followed by the economies of Hong Kong, Korea, Singapore and Taiwan, those of Indonesia, Malaysia, Thailand and China as the third tier and the newcomers such as the Philippines, Vietnam and India occupying the fourth tier. The pattern of Asian development has been described as "flying geese", in which, as one group of countries moves up the ladder of industrial development, another group replaces it at the bottom.[2] For the purpose of relevance and accuracy, in this paper, Asia is generally referred to North and South East Asia, not the other parts of Asia.

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1 Quoted by Hawke, Keating and Whitlam in their statement repudiating Hanson. *AAP Newsfeed*, November 7, 1997, Friday.

2 Chakwin N. and Hamid N., "Economic Environment in Asia for Investment" *Investing in Asia* Development Centre of OECD (1997) at 213.

## Trading with Asia

Is Asia important to Australia? Generally speaking, Asian countries, especially North and Southeast Asian countries have very close trade links with Australia. Some Asian countries or regions are important for both Australian exports and imports. With several of the most important trading partners located in the region, Asia has become very important to the Australian economy. Here are some facts and figures: Among the top 10 receivers of Australian exports, seven of them are located in Asia. These include Japan, Korea, China, Singapore, Taiwan, Hong Kong and Indonesia. Among the top 10 providers of Australian imports, five of them are located in Asia, including Japan, China, Singapore, Taiwan and Korea.[3] According to a recent statement given by three former prime ministers of Australia, more than 60 percent of Australian exports go to Asia.[4] Using South Korea as an example, during the financial year of 1996-1997, Australia's exports there reached a total of $7.1 billion with Australia's trade surplus reaching $4.6 billion, while South Korea also took $2.9 billion of Australia's total gold exports of about $5.5 billion.[5] In the education sector, about 85 percent of all international students in Australian educational institutions are Asian.[6] Hong Kong,[7] Malaysia,[8] Singapore, Taiwan, Indonesia, Thailand, Japan and South Korea are the major sources of overseas students for Australian higher education institutions. "Australia has become the third largest destination for Koreans studying abroad, after the United States and Japan."[9] Overall, income from the education of Asian students in Australia has become a significant factor in Australia's earnings of foreign exchange.[10] Apart from the education sector, Australia's tourism sector also heavily depends upon large source of inbound tourists from Asia. "Tourism is now Australia's largest export industry, and became so because the number of Asian tourists trebled to 2.1 million in seven years."[11] The majority of Asian tourists come from Japan, South Korea, Hong Kong and Taiwan. For example, in 1996, about 250,000 Korean tourists spent $1 billion on Australian holidays[12] and 187,891 Hong Kong tourists visited Australia.[13] Taiwan is a growing major source of tourism to Australia, with 150,000 visitors in 1995.[14] Currently, Asian tourists comprise more than 50 percent of the total overseas visitors to Australia. Just by looking at the education and tourism sectors, it is not too difficult to conclude that Asia is very important to Australia.

3 The *Annual Report of the Department of Foreign Affairs and Trade* 1995-1996 at 117-118.
4 "Hawke, Keating, Whitlam Repudiate Hanson" *AAP Newsfeed, Nationwide General News Section,* November 7, 1997, Friday.
5 Savva, N., Colebatch, T., Hudson, P. and Skelton, R., "Asia's $90b bailout call" *The Age* November 22, 1997 Staurday at 1.
6 Metcalf T., "Campaign to cement close links" *South China Morning Post* January 26, 1996 at 27.
7 In 1996, there were 14,085 Hong Kong students studying in Australia. See Trevor Marshallsea, "Australians warned to declare nationality in Hong Kong" *Asia Pulse (Section Nationwide Financial News)* June 30, 1997.
8 Malaysia is the second largest source of overseas students for Australian higher education institutions. See supra, n 3, at 56.
9 Supra, n 3, at 39.
10 Supra, n 4
11 Xinhua News Agency, "Asians, Africans hit hardest in migration cutbacks" Item No: 0529057 Canberra, May 29, 1997.
12 Savva, N., Colebatch, T., Hudson, P. and Skelton, R., Supra, n 5.
13 Marshallsea T., "Australians warned to declare nationality in Hong Kong" *Asia Pulse (Section· Nationwide Financial News)* June 30, 1997.
14 Supra, n 3, at 43.

## Investing in Asia

From the point of view of investment, Asia has become more and more important to Australia. As a developed country with very high labour costs, it is understood that many Australian labour-intensive sectors have been shifted or soon will be relocated to a less developed country with a large supply of cheap labour. Many developing Asian countries can provide investors with cheap labour. In addition, they can offer some other attractions such as a sound macro-economic policy and an open investment climate. As a result, Asia has become one of the favorite destinations for foreign direct investment (FDI) in the world. Because of Asia's geographic closeness to Australia, improved investment environment and attractive incentives, more and more Australian investors have turned their eyes to Asia for opportunities, instead of to those traditional Australian markets such as the UK and the United States. Australian investment in Asia has grown quickly, rising from 9 percent of total investment abroad in 1988 to 17 percent in 1996.[15] These investment opportunities for Australian investors will continue to improve especially with China's economic awakening since the early 1980s and subsequent economic growth in the region. China's "open door" policy has attracted another wave of capital flow into Asia, while the trend of economic development indicates that the region will be a dominant economy in the world in the next century.[16] Thus, the Australian government and people have a number of reasons to continually expand their links with Asia.

This paper will analyze the legal aspects of Asia's investment environment. Although it is not possible to discuss all the legal issues related to investment in Asia, this paper attempts to analyze the more important legal issues with a view to assessing whether Asia is or is not an ideal destination for Australian offshore investment. In particular, the paper will point out investment regimes, such as investment incentives and restrictions, in some Asian countries. As it is also not possible to discuss all Asian countries, the analysis will be generalized by using some Asian countries as discussion examples.

## II. INVESTMENT REGIME IN ASIA

The package of incentives and policies used to attract foreign investment is referred to as the country's investment regime. Asia has a sound investment regime due to its general stable political environment and open investment climate. In Asia, two types of investment regimes, namely the export-incentive regime and the mixed-incentive regime, are commonly used. The export-incentive regime generally is adopted by some smaller countries whose domestic market is of less importance. Thus, those countries adopt policies and incentives mainly to attract export-oriented foreign investment. The mixed-incentive regime usually is adopted by countries with a large population such as China, Indonesia and India. To foreign investors, larger countries' domestic markets are as attractive as their investment incentives. Thus, the mixed-incentive regime encourages

15 Van Leeuwen H., "Australia: Asian-born help change Australia" *Australian Financial Review* June 25, 1996 at 8.

16 The prediction was not doubted until recent currency crisis in Southeast and North Asia which has drawn back some Asian countries' economic development significantly. The countries which have been hit seriously are Thailand, Malaysia, Indonesia and South Korea.

foreign investment into both export-oriented and import-substitution industries of FDI receiving countries.

Regardless whether it is an export-incentive regime or a mixed-incentive regime, one common goal of Asian FDI receiving countries is to attract foreign capital for direct involvement in risk-sharing investment, thus reducing dependence on foreign loans and cutting down the high costs of foreign borrowing.[17] In addition, FDI can also help a receiving country increase domestic investment, provide more employment opportunities, relieve foreign exchange shortage and build up foreign exchange reserve. As a result, because Asian countries have been competing for limited sources of foreign investment, various incentives and preferential treatments have been adopted to attract foreign capital inflow. For example, in Indonesia, FDI can establish a foreign investment company or contribute capital in an existing local company. The government authority issues a negative list[18] to guide foreign investment in Indonesia. In Singapore, foreign investment is basically unrestricted.[19] There, special treatment has been granted to companies investing in Free Trade Zones, high-tech sectors, pioneer industries and multinational companies that set up their regional headquarters in Singapore. In Malaysia, Free Trade Zones provide quality infrastructure, minimum government interference, tax holidays and duty-free imports for raw materials and machinery.[20] In China, foreign investors can establish either joint ventures or wholly foreign-owned enterprises. The Chinese government provides various tax and non-tax incentives to foreign investment, especially foreign investment in encouraged sectors such as agriculture and infrastructure. In addition, domestic sales and foreign exchange controls have been relaxed recently. More and more sectors have been opened to foreign investment including the insurance and retail sectors.

China's achievement in attracting FDI has been significant while, at the same time, FDI has also had a great impact on China's economic and social development. For example, in 1995, China attracted about $38 billion in FDI, which placed China at the top of developing countries. At the same time, 50 percent of China's industrial output value is due to FDI. Foreign investment enterprises are earning about one-third of China's foreign exchange and employing about 17 million local workers.[21]

As with China, the foreign investment regime in Vietnam has also benefited from government involvement. For example, the government has passed various laws, set up special economic zones, improved the foreign investment environment, provided special incentives to encourage technology transfer, and started to reform its state-owned enterprises and

17 For further discussion of FDI and indirect investment, namely government loans or loans from financial institutions, see Fry, M. J., "Foreign Direct Investment in East Asia" December 12 (1994) *Work Paper of the University of Birmingham, The Birmingham Business School, International Finance Group*, at 1.

18 The negative list will be explained further when we discuss FDI restrictions later. Currently, 34 business sectors in the negative list are closed to foreign investment. The general trend is that the number of the prohibited sectors in the negative list is reduced each year.

19 Davidson, P. J. and Ciambella, F., *Investment in Southeast Asia Laws and Policy* Butterworth-Heinemann Asia (1995) at 200-201.

20 Chakwin N. and Hamid N., supra, n 2, at 215. See also Davidson, P. J. and Ciambella, F., supra, n 19, at 117.

21 Zhang, X. Q., "Investment in China's Future" *Investing in Asia* Development Centre of OECD (1997) at 41.

planned economy in order to attract FDI. After promulgation of the foreign investment law in December 1987 and its subsequent amendments in June 1990, December 1992 and April 1993, Vietnam's investment environment has been further improved and its FDI has grown rapidly. At the moment, "Vietnam's investment incentive package is at least as favorable as those of ASEAN countries".[22]

Other Asian countries have also adopted policy and incentive packages to attract FDI inflow. Generally, however, the more developed countries provide fewer incentives to attract FDI unless the foreign investment is targeted for specific areas such as high-technology and pioneer industries. The less developed countries typically provide more incentives to create a favorable investment environment in order to compete for FDI inflow.

## III. PROTECTION OF FOREIGN INVESTMENT IN ASIA

Asian countries have successfully adopted various policy and incentive packages to attract FDI. Do they have adequate systems to protect FDI? When Australian manufacturers or other investors shift or expand their operations offshore, they are very much concerned with guaranteeing the safety and return of their investment in FDI-receiving countries. They would typically look into investment opportunities and, at the same time, consider the risks and safeguards available to their investment. Therefore, it is important to learn what are the legal issues an investor should be aware of before making an investment commitment in Asia. This is discussed in the following paragraphs.

When investing in Asian countries, Australian companies may face various legal issues, ranging from the requirements for setting up a joint venture to recruiting a local employee. The common legal issues include forms of investment, joint venture contracts, government requirements on approval, incentives and restrictions, capital contribution, profit distribution, local labour, taxation, profit repatriation, management structure, foreign exchange control, intellectual property, winding up, governing law and dispute resolution. In the sections below, I will briefly mention foreign investment laws, analyze incentives and restrictions and recommend methods for dispute resolution in Asia.

### *a. Foreign investment laws in Asia*

Some Asian countries have one set of laws governing domestic investors and another dealing with foreign investors. Other countries adopt the same legislation for both local and foreign investors. The former practice is taken up by Japan, Korea, China, Vietnam, Indonesia, Thailand and the Philippines. The latter practice is basically taken up by Malaysia, Singapore and Hong Kong. In the countries where foreign investors are subject to different laws, it is important to know what are these special restrictions or treatments. Commonly these include certain incentives available only to foreign investors. In the countries where both foreign and local investors are subject to the same laws, foreigners receive national treatment; therefore, government investment incentives or restrictions apply to both local and foreign investors.

22 *Strengthening Capacities in Trade, Investment and the Environment for the Comprehensive Development of Indo-China* ESCAP Studies in Trade and Investment - UN, New York (1995) at 19.

## Countries having the same set of laws for both foreign and local investors

It is relatively easier to invest in a country where foreigners are not subject to separate laws. As mentioned, Singapore, Malaysia and Hong Kong provide foreign investors with national treatment. Their legal system is based on the common law which is a big advantage for investors from Australia. For example, in Singapore, foreign investors may carry on business in the form of a sole proprietorship, partnership, incorporated company, registered branch or representative office, just like the locals. The Companies Act applies equally to all persons when incorporating a corporation, and the procedures for setting up a company are quite similar to those in other common law countries. In fact, some have argued that Singapore's company law is closer to Australian company law than it is to the UK law.[23]

Similar situations are observed in Malaysia and Hong Kong. In Malaysia, foreign investors can carry on business in the form of a sole proprietorship, partnership, incorporated company, branch of foreign company, as well as a representative office. However, current government policy encourages foreign companies that wish to engage in continuing operations in Malaysia to incorporate a local subsidiary rather than simply register a branch. This is reflected in some of the tax and other incentives given to incorporated subsidiaries.[24] In Hong Kong, the principal forms of carrying on business by a foreign or local investor are the same as those in Singapore and Malaysia. Hong Kong's company law requirements on the content and form of accounts are similar to those of the UK. In addition, there are no restrictions on foreigners forming companies in Hong Kong and no residency requirement for directors and shareholders.[25]

## Countries having two sets of laws for foreign and investors

Foreign investors will find it less comfortable when investing in a country which has a set of special rules for foreigners. In China, the government has adopted numerous pieces of legislation to govern foreign investment — these include regulations over foreign economic contracts to wholly foreign-owned enterprise. For example, the domestic economic contract law[26] and the foreign economic contract law[27] were passed separately by the National People's Congress. In many other areas related to foreign investment, foreign investors have to be aware of special requirements and restrictions applicable to them. While on one hand stricter requirements are imposed upon foreign investors, at the same time, additional incentives are provided to foreign investors which are not available to local Chinese investors.

23 Davidson, P. J. and Ciambella, F., supra n 19, at 191.
24 Ibid. at 101.
25 KPMG Peat Marwick, *Investment in Hong Kong* (1993) at 23.
26 *The Economic Contract Law of the People's Republic of China*, adopted at the 4th Session of the 5th National People's Congress on December 13, 1981 and amended on September 2, 1993 by the Standing Committee of the NPC.
27 *The Foreign Economic Contract Law of the People's Republic of China* was promulgated on March 21, 1985 by the NPC and became effective on July 1, 1985.

Among other Asian countries which have separate laws for foreign investors, Vietnam passed its first foreign investment law in 1987.[28] It was subsequently amended in June 1990 and December 1992 and finally repealed by the 1996 Law on Foreign Investment in Vietnam.[29] The implementing rules of the 1996 Law on Foreign Investment in Vietnam were promulgated by the Vietnamese government on February 18, 1997.

The Indonesian government passed the Foreign Capital Investment Law No.1/1967.[30] The Law was subsequently amended by Law No.11/1971. In addition, the President of Indonesia passed Government Regulation No.20/1994 on Investment.[31]

In Thailand, the government passed both the Investment Promotion Act 1977[32] and the Alien Business Law.[33] The former applies to both overseas and domestic investment sources. The latter is the single most important law governing foreign business in Thailand, applying to all legal entities qualifying as an "alien".[34] Under the Alien Business Law, an "alien" includes a foreign legal entity, a locally registered legal entity with 40 percent or more of the capital owned by foreigners, a partnership which has a foreigner as managing partner, as well as a foreign branch office which is registered in Thailand.

The Japanese government also passed a Foreign Investment Law in 1950. However, over the years, foreign investment companies have not been granted with much preferential treatment. The 1950 Law was replaced in 1980 by the Foreign Exchange and Foreign Trade Control Law. The Korean government passed the Foreign Capital Inducement Act in 1966 which was amended recently in 1994. In Taiwan, the government adopted the Decree of Investment by Foreigners in 1954. The Decree has subsequently been amended at least 7 times. The latest amendment was completed in 1989. The government of Philippines has passed the Foreign Investment Act of 1991[35] to promote foreign investments and deal with the procedures for registering enterprises doing business in the Philippines. In 1996, the government also passed the Implementing Rules and Regulations of Republic Act 7042.[36] Finally, a new investment law was passed by the Cambodian government, the National Assembly of Cambodia, in 1994. The new law is aimed at governing all investment projects in Cambodia.

28 *The Law on Foreign Investment in Vietnam* was passed by the Vietnamese government on December 29, 1987.

29 The current *Law on Foreign Investment in Vietnam* was passed by the National Assembly on November 12, 1996. The repeal was clearly stated in Article 67 of the Law on Foreign Investment in Vietnam.

30 The Law contains 31 Articles and was promulgated on January 10, 1967.

31 The Government Regulation No.20/1994 on Investment consists of 13 Articles and went into effect as from May 19, 1994. It was promulgated to develop the business climate which enhances stability and sustainability of foreign investment and to revise the provisioins of share ownership in companies established in the context of foreign investment as contained in Governmennt Regulation No.50/1993.

32 The 1977 Act was amended by the Investment Promotion Act (No.2) 1991.

33 The Alien Business Law is also known as the National Executive Council's Announcement 281 ("NEC 281").

34 KPMG Peat Marwick Suthee, *Investment in Thailand* (1994) at 39-40.

35 Also known as Republic Act No.7042. It was passed by the Senate and the House of Representatives and was finally signed into law by the President on June 13, 1991.

36 The Implementing Rules and Regulations of R. A. 7042 is also known as Republic Act 8179. It amended the Foreign Investment Act of 1991. Republic Act 8179 was approved on March 28, 1996 and became effective on April 15, 1996.

*b. FDI incentives and restrictions*

**FDI incentives**

FDI incentives can be classified as either tax incentives or non-tax incentives. Normally, foreign investors would first analyze an FDI receiving country's macro-economic policy and political stability, and then look into various other factors such as exchange rate, labour costs, national treatment and infrastructure. As a result, tax incentives are not the most important factor in attracting FDI inflow. Nevertheless, tax implications do influence FDI inflow.

i. Non-tax incentives – investment guarantee and others

In Asia, non-tax incentives can take up various forms. In order to attract FDI, most Asian countries announce investment guarantee measures and promise non-nationalization of foreign capital through domestic foreign investment legislation or bilateral investment guarantee agreements. In the case of state emergency where nationalization is taking place, compensation will be provided to foreign investors by FDI receiving governments. For example, Indonesia's Foreign Capital Investment Law 1967 states:

"The government may not undertake a total nationalization / revocation of ownership rights of foreign capital enterprises nor take steps to restrict the rights of control and / or management of the enterprise concerned, except when it shall be declared by law that the interest of the State requires such a step."[37]

In Vietnam, the government protects the ownership of invested capital and other legal rights of foreign investors.[38] "During the course of investment in Vietnam, capital and other lawful assets of foreign investors shall not be requisitioned or expropriated by administrative measures, and enterprises with foreign owned capital shall not be nationalized."[39] Both Indonesian and Vietnamese governments, as well as governments of Malaysia, the Philippines and Thailand, have entered various investment guarantee agreements with foreign countries in order to provide foreign investors with protection against expropriation and nationalization, as well as ensuring prompt and adequate compensation against nationalization or expropriation. In addition, in those investment guarantee agreements, the governments have agreed to take their investment disputes to the International Center for the Settlement of Investment Disputes.[40] The Center provides facilities for international conciliation or arbitration in settling investment disputes.

Both investment guarantee agreements and domestic investment law are kinds of non-tax incentives used by the Asian governments to attract FDI. In addition, special economic zones, free trade zones, bonded zones, special industrial parks, preferential tariffs and other assistance schemes have been used commonly as non-tax incentives to attract FDI inflow into Asia.

37 Article 21 of *Foreign Capital Investment Law 1967*.
38 Article 1 of the *Law on Foreign Investment in Vietnam*, November 12, 1996.
39 Article 21 of the *Law on Foreign Investment in Vietnam*, November 12, 1996.
40 The Centre was created under the Convention on the Settlement of Investment Disputes between States and nationals of other States. The Centre is located at the principal office of the International Bank for Reconstruction and Development (World Bank) in Washington.

ii. Tax incentives

As part of the incentive packages, the Asian governments have provided various tax incentives to attract certain technically advanced and export-oriented FDI projects to their own regions. Common tax incentives include tax holidays, low income tax rates, reduction in income tax, tax refund, investment allowance, accelerated depreciation, as well as subsidies on factory buildings and land development to reduce investment costs.

Every Asian country's tax incentives are different. In some cases, those tax incentives may only apply to foreign investors, but not to local enterprises. In others, preferential tax rates only apply to certain foreign investors, not to all foreign investors. For example, some countries have region-based tax incentives. In these countries, all foreign investors in particular areas, namely special economic zones or export processing zones, will receive preferential tax treatment. Other countries may have industry-based tax incentives whereby all foreign investors in particular industries will receive preferential tax treatments regardless of whether or not the investment projects are located in designated areas.

As a country's tax incentive packages are designed to attract foreign investment and, at the same time, serve and channel FDI to maximize its contribution to a local economy, the packages are used to encourage certain foreign investment, while restricting others. Usually, tax incentives are granted to investment accompanying technology transfer, but not to labour-intensive projects. Often, export-oriented investment, although labour-intensive, will enjoy preferential tax treatment, while investment aimed at the local market will have no such incentives. For example, the Chinese government has granted a special exemption of withholding tax (20 percent) on royalties paid for the use of advanced technology and tax reduction royalties received for the supply of technical know-how in science research, exploitation of energy resources, development of the communication industries or agricultural, forestry and animal husbandry production.[41] The exemption does not apply to royalties received via other means. Therefore, before making an investment commitment, foreign investors should find out that tax incentive packages are available, how tax incentives are applied and how to obtain any preferential tax treatments that are available in a country.

It should be noted that the effectiveness of tax incentives is diminishing. The current trend amongst Asian countries is to move away from special tax incentives and replace them with a general lowering of income tax rates and better infrastructure in order to attract foreign investment. Most countries have recognized the importance of having a generally attractive commercial environment and the availability of adequate infrastructure that are of concern to foreign investors.

41 Article 19 (4) of the *Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises* [*the Foreign Enterprises' Income Tax Law*]. The Law was passed by the 4th Session of the 7th National People's Congress on April 9, 1991.

*FDI restrictions*

i. FDI approval and controlling systems

The Asian countries have generally adopted some controlling measures to impose certain restrictions on foreign investment. First of all, there are various approval procedures to examine foreign investment projects. Most countries have set up an FDI approval authority, however, the methods controlling and approval criteria may or may not be the same in each country. Generally, examination and approval procedures cover the scope of foreign investment and nature of foreign capital. The measures are taken to ensure that transfer of technology is part of the FDI process.

Some Asian countries have set up a one-stop approval center for all FDI projects flowing into the country. The Capital Investment Coordinating Board (the BKPM) in Indonesia, the Ministry of Planning and Investment (the MPI)[42] in Vietnam and the Council for the Development of Cambodia are examples of such one-stop approval centers. Other Asian countries have set up approval authorities at different levels or for different projects. For example, China's central FDI approval authority is the Ministry of Foreign Trade and Economic Cooperation (the MOFTEC). It also delegates approval power to its regional offices at provincial or municipal levels for the purpose of granting FDI licenses in their respective regions. Depending upon an FDI's nature and size, the State Planning Commission (the SPC), the State Economic and Trade Commission (the SETC) or even the State Council may involve itself in the approval process.[43]

In Malaysia, the Foreign Investment Committee (the FIC) is entrusted with approval authority for FDI projects. Generally, some equity conditions will be imposed upon foreign investors by the FIC in order to maintain a balance of ownership between a Malaysian and a foreign investor. Besides the FIC, the Malaysian Industrial Development Authority (the MIDA) and the Ministry of International Trade and Industry (the MITI) are involved in foreign investment approval. The former is the government's principal agency for the promotion and co-ordination of industrial development.[44] The latter is mainly responsible for implementing the National Development Policy[45] including assessing whether applications relating to equity and employment conditions are in line with government policies, as well as reviewing applications for the restructuring of companies, amendments and postponements of compliance with equity conditions and allocation of *bumiputra* shares.[46]

42 The MPI was recently changed from the State Committee for Cooperation and Investment (the SCCI).

43 Xu, X., and Chew, C., "Foreign investment enterprises in China: a comprehensive guide to approval issues (Part I: approval hierarchy, approval procedures and related problems)" vol.17, no.11 *East Asian Executive Reports* November 15 (1995) at 9-13.

44 For a detailed summary of the functions of the MIDA, see Davidson, P. J. and Ciambella, F., supra, n 19, at 104.

45 The National Development Policy (the NDP) was announced by the Malaysian government on January 1, 1991, as the basis of Malaysia's economic policy. It has replaced the New Economic Policy (the NEP) which was promulgated in 1971.

46 For a summary of the NDP and the MITI, see Khoo, E., "Legal Aspects of Investing in Malaysia" vol.69 *The Australian Law Journal* January (1995) at 69-70.

ii. Negative list — closed sectors to FDI

Apart from examination and approval procedures, FDI restrictions are imposed upon foreign investors when a country has certain sectors closed to foreign investment. Some Asian countries publish a negative or positive list to guide FDI inflow. Others may not publish a list, but simply close certain sectors to foreign investment in order to protect a national industry or because of the sensitivity of the national economy.[47] Countries such as Indonesia, the Philippines and South Korea have implemented a negative list to guide FDI inflow. In Indonesia, the negative list was introduced in 1989 to replace a "priority list". Foreign investment in the listed sectors may or may not receive approval from the President through the BKPM. As mentioned previously, 34 sectors are currently listed in the negative list. Because the negative list is continuously being reviewed and revised, foreign investors in Indonesia should consult the BKPM for the latest list.

In South Korea, a positive list for guiding FDIs in the country was implemented until 1994. The positive list contained all the sectors which were open to foreign investment. The Foreign Capital Inducement Act 1994 has since replaced this by incorporating a negative list. Currently, there are 108 prohibited sectors and 42 restricted sectors in the negative list. If an FDI project is in one of the prohibited or restricted areas in the negative list, an application for approval needs to be lodged with the Ministry of Finance and Economy in South Korea.

In the Philippines, a negative list[48] consists of List A and List B. List A contains sectors in which foreign ownership is limited by mandate of the Constitution and specific laws. That is, in some sectors, no foreign equity is allowed; in some other sectors, up to 25 percent, 30 percent or 40 percent foreign equity is allowed. About 23 sectors are listed in List A. List B contains sectors in which foreign ownership is limited for reasons of security, defense, risk to health and morals and protection of small and medium-scale enterprises. Up to 40 percent foreign equity is allowed in those sectors. Currently, there are about seven sectors listed in List B. In addition, every year, the Board of Investments also publishes the Investment Priorities Plan (the IPP) to guide investment from both foreign and domestic sources in the Philippines. The 1997 IPP was approved and published in April 1997. There are 32 types of economic activities listed in the 1997 IPP.[49] According the Chairman of the Board of Investments, the goals for the 1997 IPP are:

- to further enhance global competitiveness of Philippine industrial products;
- to increase exports;
- to support small and medium enterprises;
- to increase agricultural productivity;
- to set up and upgrade infrastructure and support facilities;
- to ensure efficient environmental management;
- to disperse industry in the countryside; and
- to alleviate poverty.[50]

47 For example, the Malaysian government closes the sectors of postal services, railway transport and some other public utilities to foreign investment.

48 The full title of the negative list is called the Second Regular Investment Negative List. It was promulgated pursuant to Executive Order No.362 and became effective on October 24, 1996.

49 35 areas of activities were listed in the 1996 IPP.

50 See Foreword of the 1997 IPP. Given by C. B. Bautista, Chairman of the Board of Investments and Secretary of the Department of Trade and Industry.

iii. Other restrictions

In addition to approval systems and restricted sectors, foreign investors may face various other restrictions in specific countries. For instance, China and Vietnam have maintained foreign exchange control. Indonesia has imposed special requirements on foreign investment in forestry, mining, oil and gas industries. In Malaysia, the Industrial Coordination Act 1975 requires persons engaged in any manufacturing activity, existing or new, to obtain a license in respect of such manufacturing activity from the Secretary-General of the MITI. In the Philippines, foreigners cannot own land other than through hereditary succession.[51] In Singapore, stricter approval tests are applied to foreign investment in newspaper publishing companies and property ownership. The Thai government has passed the Alien Business Law to restrict alien business activities and property ownership. The Vietnamese government prohibits foreigners to own land in Vietnam and has passed various labour regulations to impose obligations on foreign employers. In summary, every Asian country has adopted certain restrictions on foreign investment. Foreign investors need to take these restrictions into consideration when investing in Asia.

*c. Dispute resolution in Asia*

When investing in an Asian country, as anywhere, there are risks of getting into disputes. Therefore, it is important to know how to avoid conflicts and where to resolve disputes when they occur. When doing business in Asia, western investors have noted that Asian countries and people have some unique ways of handling and resolving differences and problems because of its unique culture, history, political and legal systems. Over the years, Asian approaches to settling conflicts have been realized and accepted gradually by western investors — the Asian "soft approach" is proved to have certain advantages over the western "conventional approach" in today's international commercial activities.[52] As a result, arbitration as a method of resolving disputes has become more popular than litigation in international commercial dispute resolution. Another reason that arbitration has replaced litigation in the international commercial world is that an arbitral award is much easier to enforce internationally than a court judgment. This uniformity is due to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which has been ratified by more than 125 countries worldwide. Under the New York Convention, member states have agreed to recognize and enforce arbitral awards among signatories. This is in contrast to litigation as only a small number of countries have committed themselves to provide judicial assistance and enforce court orders issued by courts of other jurisdictions.

**Arbitration Institutions**

Many Asian countries have established arbitration centers as an alternative dispute resolution mechanism to handle commercial disputes. For example, the Singaporean government set up the Singapore International Arbitration Center (the SIAC) to handle trade, investment

51 Davidson, P. J. and Ciambella, F., supra, n 19, at 155.
52 Soh, F., "Call to emulate Asian approach to problem-solving", *The Straits Times (Singapore)* January 20, 1996 at 4.

and maritime disputes. The SIAC was established in July 1991 and it has adopted the rules of the International Chamber of Commerce as its own rules in arbitration procedure.[53] In Indonesia, the arbitration institution is the Indonesian National Board of Arbitration (the BANI). The BANI was established on December 3, 1977 and handles both national and international cases submitted to it for arbitration in accordance with its own rules, the Rules of Arbitration of the BANI. The BANI is independent (autonomous) and intervention by any other body or authority is not allowed.[54] In Thailand, arbitration can be divided into arbitration in court and extra-judicial arbitration.[55] The 1987 Arbitration Act, BE 2530, was passed to govern out of court arbitration and foreign arbitration. Parties to a dispute can take their case to the Thai Commercial Arbitration Committee for arbitration. In Malaysia, the arbitration system is well established and the Regional Center for Arbitration in Kuala Lumpur (the RCAKL) is the main venue for arbitration. The RCAKL handles both domestic and international cases submitted to it for arbitration. When a dispute is between Malaysians, the RCAKL arbitration is governed by the Arbitration Act 1952. When a dispute involves in foreigners, the RCAKL arbitration is normally governed by the UNCITRAL[56] Arbitration Rules 1976. Foreign lawyers can act on behalf of their clients in the RCAKL arbitration proceedings. In Vietnam, under Decision No.204/TTg of the Prime Minister, the Vietnam International Arbitration Center (VIAC) was created as part of the Chamber of Commerce and Industry on April 28, 1993. The jurisdiction of the VIAC covers disputes arising from international economic contracts, such as foreign trade contracts, investment, tourism, transport, insurance, technology transfer, and international credit and payment.[57] In China, the arbitration system has developed significantly in recent years. The China International Economic and Trade Arbitration Commission (the CIETAC) is the busiest arbitration center in the world.[58] The Arbitration Law of the PRC was passed by the Standing Committee of the NPC on August 31, 1994 and became effective on September 1, 1995. All the countries mentioned above are signatories to the 1958 New York Convention.

## Approaches of dispute settlement

Analyzing the methods and approaches of resolving disputes in Asian countries, reveals that "most parties regard arbitration as a more acceptable form of dispute resolution than court proceedings."[59] In China, "the recent surge in foreign investment in China has resulted in the explosive growth in arbitration. Many investors perceive litigation as slow, expensive and risky, ...".[60] Similarly in Vietnam, dispute resolution concerning foreign

53 Singapore's own Arbitration Act (Revised Edition 1985, Cap 10) is applicable to domestic arbitration, and provides rules which govern when the parties have not agreed to the terms of their arbitration.
54 Davidson, P. J. and Ciambella, F., supra, n 19, at 95.
55 Ibid. at 281-283.
56 The United Nations Committee on International Trade Law.
57 Davidson, P. J. and Ciambella, F., supra n, 19, at 320.
58 According to Reuters World Service (March 19, 1996), the CIETAC handled 902 disputes involving 45 countries in 1995.
59 Zinger, S. G., "Arbitration at the crossroads in Hong Kong" vol.16, no.6 *International Financial Law Review* July 1997 at 25.
60 Rao, K., "Day of judgement dawns" vol.33, no.3 *Asian Business* March 1997 at 12.

investment is characterized by its adherence to negotiation, conciliation and arbitration, rather than court procedures. This is in part due to the court system in Vietnam not being "fully developed, lack of trained personnel and enforcement procedures."[61] Thus, arbitration is preferred as a means of resolving disputes involving foreigners.[62] Foreign investors can also choose to resolve their disputes in an overseas arbitration institution and, most likely it will be accepted by their Vietnamese counter-part.

There are also complaints from foreign investors about the Indonesian court system. As noted by Samuels and Smith, "foreign clients find the Indonesian system long and confusing. They don't like litigating here and judgments are never satisfactory."[63] It takes about three years after the first hearing to complete a commercial case through the Indonesian courts. However, it only takes six months to one year for the BANI to hand down an arbitral award. Because arbitration involves in a shorter and less expensive proceeding, foreign business people turn to choose arbitration instead of litigation in Indonesia.

Foreign investors can face a worse situation if they become involved in disputes with their local partners in Thailand. Thai judges have been accused of not taking the commercial implications of a case into consideration. This problem is made worse by the fact that judges in Thailand cannot ask questions in the courtroom. Evidence placed before them must be accepted.[64] Generally, it takes about eight months to two years to hand down a decision by judges in Thailand. In order to promote using alternative dispute resolution, even the courts in Thailand encourage litigation cases to be mediated instead. Nowadays, Thai judges always ask if parties prefer to mediate their claims before commencing litigation.

A recent report has indicated that in Malaysia more disputes are resolved by way of arbitration rather than litigation. Almost all contracts are drawn up with arbitration clauses as a routine precedent. Officials from the RCAKL have noted that arbitration helps settle disputes without the hassle, time consumption and expenses of court proceedings, away from the glare of publicity and in a way which enabled the parties to resume business relations amicably.[65]

The views on litigation and alternative dispute resolution in the developed Asian countries such as Singapore, Japan and Korea are very similar to those of other Asian countries. Singaporean judges will always ask parties if they have tried, or want to try, alternative dispute resolution at the pre-trial conference. In Korea, litigation is slow and costly. Arbitration, as well as conciliation and mediation are preferred methods in dispute settlement. In Japan, commercial litigation can last as long as three to six years, and even longer if an appeal is involved. The general feeling among foreign business people is to avoid litigation altogether because it is something one can never get out of:

"As a result of the length of time involved in litigation, many foreigners do not have the patience to wait it out. Many commercial cases do not make it to judgment. If you press

61 Davidson, P. J. and Ciambella, F., supra, n 19, at 318-319.
62 Cavet, S., "Choice of Law in Vietnam and the New Civil Code: Is Choice of Law Available for Your Type of Contract?" vol.18, no.9 *East Asian Executive Reports* September 15, 1996 at 13.
63 Samuels, D. and Smith, N. M., "Inside Asia's Court" no.18 *International Commercial Litigation* April 1997 at 25.
64 Ibid. at 26.
65 Petaling, J., "More trade disputes being settled through arbitration" *New Straits Times (Malaysia). National Section*, June 16, 1997 at 16.

very hard, you may get a decision in five to six years. But there will be continual pressure from the judge to settle instead."[66]

## IV. CONCLUSION

We come back to the main issue of whether Asia is a good place for Australian FDI outflow? As it has been presented, Asia is one of the powerhouses of the world economy. Its economic fluctuation affects world markets, in particular those countries depending upon the Asian market. As Australia is expanding and creating more links with Asia, its economy will be more integrated with the region. Just like what John Howard, Australian Prime Minister said in Singapore during his Asian tour on March 27 to April 2, 1997, the political and economic destiny of Australia is very much tied up with this country successfully being a full-time player in the Asia-Pacific region.[67] Therefore, maintaining a stable and growing economy in Asia is crucial to the Australian economy.

After analyzing foreign investment laws and legal systems in Asia, it is concluded that there are proper legal systems to protect foreign investment. However, many developing Asian countries do not have adequate mechanism to enforce these laws, therefore, protecting foreign investment can be inadequate in practice. Nevertheless, this should not be a barrier to stop foreign investors moving into the Asian market and making the most out of it. Foreigners should learn the uniqueness of Asia, its culture and approach and Asian ways of doing business. In this way, they can avoid unnecessary disputes or choose adequate means to resolve disputes when they occur. Asia provides many opportunities for Australian investment. But Asia is not an easy market. Investors need to be aware of the problems and should enlist local or foreign experts to help them. By doing so, many conflicts should be avoided.

When taking FDI projects offshore, Australian investors should also consider what types of investment should be taken overseas and what kinds of industries should be maintained in Australia. Australia should transfer offshore its industries in which Australia is losing its comparative advantages, such as textiles, clothing and other labour-intensive sectors. At the same time, Australia should keep those industries ranking in the top, namely the high-tech sectors within Australia. Otherwise, Australia might face some future problems with balance of payment difficulties and higher rates of unemployment, as have been experienced by the U.S. in its FDI outflow.[68]

Opportunities are there in Asia. The question is whether one can get them and how to get them. A lot of issues need to be considered, many voices need to be heard and plenty of lessons need to be learnt. Here is a wish: be careful and good luck!

66 Samuels, D. and Smith, N. M., supra, n 63, at 22.
67 Johnson, C., "Australia's future in Asia, Howard says" *Reuters World Service*, March 27, 1997.
68 Kojima, K., "A Macroeconomic Approach to Foreign Direct Investment" *Trade, Investment and Pacific Economic Integration* (Japan: Bunshindo Publishing Co. 1996) at 97-98.

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