Michigan Journal of International Law

Volume 6 | Issue 1

1984

Investment Incentives and Guarantees in the Republic of China, the Republic of Korea, Thailand, and the People's Republic of China

Barbara J. Martin
University of Michigan Law School

Investment Incentives and Guarantees in the Republic of China, the Republic of Korea, Thailand, and the People's Republic of China

Barbara J. Martin*

In the past thirty years, a number of countries in Southeast Asia have adopted laws to attract foreign investment. These countries have a number of goals in common, including modernization of their economies, development of modern technology and self-sufficiency, correction of balance of payments problems, and achievement of higher standards of living. The attraction of foreign capital investment is viewed as one means to bring about realization of these goals.

Developing countries want to attract foreign capital, but are concerned that this capital be invested in industries that will further their national economic development. Foreign capital investment can be controlled in two ways. Potential investors can be required to apply for authorization to establish an enterprise in the country. Approval might depend upon the extent to which the proposed activity fits within the country's economic development plans. The government can also offer incentive programs to encourage investment in certain industries, sectors of the economy, or regions of the country. In these ways, investment can be encouraged in the areas where it is needed most.

This note will focus on direct investment in four countries in Southeast Asia: the Republic of China (ROC), the Republic of Korea (ROK or South Korea), Thailand, and the People's Republic of China (PRC). Despite similar goals, these four countries differ significantly in their treatment of foreign investors.

All four countries use the two methods of controlling foreign investment described above. Both the authorization processes and the incentive programs, however, differ from country to country. Authorization varies from simple registration in the ROC to a rigorous screening procedure in the PRC. Although the countries offer similar inducements, administration of the incentive programs assumes different forms in each country.

* Barbara J. Martin is a member of the class of 1985, University of Michigan Law School.

This note first examines the authorization processes in the four countries. Special attention is given to the criteria used to determine whether the proposed venture should be allowed. In the lesser developed countries, the PRC and Thailand, the criteria applied are less defined. The governments of these countries have retained a great deal of discretion to determine where and in which industries foreign investors may invest. This allows the governments maximum flexibility to direct capital into industries where it is needed most, but offers little guidance to potential investors. In the more developed countries, the ROC and the ROK, the criteria are better defined, and the authorizing agencies have less discretion to reject proposed enterprises. Investors, therefore, have a better idea of which industries are open to foreign investment.

The second part of this note examines the incentive programs offered by these four countries. Although the actual inducements are similar, governmental agencies in the lesser developed countries retain the discretion to determine which benefits each individual enterprise should receive. The more developed countries offer greater certainty to investors by establishing clear eligibility criteria. Because foreign investors are better able to determine how their enterprises will be treated in the ROC and the ROK, they are more apt to invest in those countries.

I. THE AUTHORIZATION PROCESS

Each of the four countries requires authorization of enterprises funded by foreign investment. The criteria that must be met by such enterprises vary a great deal. These criteria are examined below.

A. *The Republic of China (ROC)*

The authorization procedure in the ROC is well defined. Investment enterprises are not subject to any prohibitions except those structural limitations defined in the statutes. There are stricter requirements for receiving benefits, but they are also clearly defined. Because of its development experience, the ROC Government has been able to identify its needs specifically. It provides investors with guidelines describing the types of enterprises which will receive benefits. The authorizing agency has little discretion to prohibit investment or to deny benefits.

The ROC adopted laws applicable to foreign investors as early as July 14, 1954, when the Statute for Investment by Foreign Nationals was promulgated.[1] Subsequently this law has been supplemented by the Statute for Investment by Overseas Chinese, the Statute for Technical Cooperation, and most significantly, the Statute for Encouragement of Investment.[2]

1. Statute for Investment by Foreign Nationals, promulgated July 14, 1954 (ROC) (as amended May 9, 1980) [hereinafter cited as SIFN].

2. Wan, *A Comparative Study of Foreign Investment Laws in Taiwan and China*, 11 CAL. W. INT'L L.J. 236, 236 (1981) (discussing the Statute for Investment by Overseas Chinese); Statute for Technical Cooperation, promulgated Aug. 9, 1962 (ROC) (as amended May 29, 1964); Statute for Encouragement of Investment, promulgated Sept. 10, 1960 (ROC) (as amended July 26, 1982) [hereinafter cited as SEI].

Foreigners do not necessarily have to obtain government approval to invest in the ROC. Non-approved enterprises, however, must register with governmental officials and are subject to certain limitations which vary according to the structure of the enterprise.[3]

To be eligible for the incentives offered by the ROC, foreign investors must be approved by the Investment Screening Committee of the Ministry of Economic Affairs.[4] If an enterprise is not approved, or does not apply for approval, it cannot repatriate capital contributions or profits, or qualify for other preferential treatment under the statutes.[5] Most investors, therefore, apply for approval.

The ROC encourages five specific types of foreign investment: (1) investments in productive or manufacturing enterprises which are needed domestically; (2) investments in enterprises which have an export market; (3) investments in important industrial, mining, or communications enterprises; (4) investments in enterprises which are engaged in scientific and technical research and development; and (5) investments which facilitate the economic and social development of the ROC.[6]

An enterprise must meet the criteria set out in the Categories and Criteria of Productive Enterprises Eligible for Encouragement (Categories and Criteria) in order to qualify for special treatment.[7] A "productive enterprise" must be organized as a "company limited by shares."[8] The enterprise must produce goods or provide services in one of several specified fields, including manufacturing and agriculture.[9] Since the criteria to qualify as a "productive enterprise" are defined clearly in the Categories and Criteria, the discretion of the authorizing agency is limited.

Once an enterprise qualifies as a "productive enterprise" it is automatically entitled to most of the benefits offered by the ROC. Governmental agencies do not have much discretion in granting the benefits. The approval procedure is

3. For example, a "limited company without shares" must have a minimum capital contribution of NT$ 500,000 (NT$ 40 equal approximately U.S.$ 1), 50 percent of the capital must be owned by domiciled ROC nationals, the company must have between five and 21 stockholders of whom half must be domiciled ROC nationals, and the chairman of the board must be a domiciled ROC national. A "company limited by shares" requires a minimum capital contribution of NT$ 1,000,000, at least seven stockholders of whom half must be domiciled ROC nationals during the first year following formation of the company, and the chairman of the board of directors must be a domiciled ROC national. PEAT, MARWICK, MITCHELL & CO., INVESTMENT IN TAIWAN 7 (Sept. 1, 1983).

4. Enforcement Rules of the Statute for Encouragement of Investment, art. 2, promulgated Jan. 11, 1961 (ROC) (as amended Aug. 31, 1981) [hereinafter cited as Enforcement Rules]; SIFN, *supra* note 1, at arts. 7-8.

5. Enforcement Rules, *supra* note 4, at art. 2. For a discussion of repatriation of profits from the ROC, see *infra* notes 117-120 and accompanying text.

6. SIFN, *supra* note 1, at art. 5.

7. Categories and Criteria of Productive Enterprises Eligible for Encouragement, promulgated Jan. 7, 1982 (ROC) (pursuant to SEI, art. 3) [hereinafter cited as Categories and Criteria].

8. SEI, *supra* note 2, at art. 3. A company limited by shares is similar to a United States corporation. INDUS. DEV. AND INV. CENTER, MINISTRY OF ECON. AFF., LEGAL CONSIDERATIONS FOR INVESTMENT IN TAIWAN, REPUBLIC OF CHINA 1.

9. The SEI lists fourteen fields which are eligible for benefits: manufacturing, handicraft, mining, agriculture, forestry, fishery, animal husbandry, transportation, warehousing, public utility, public housing construction, technical services, hotels, and heavy machinery construction. SEI, *supra* note 2, at art. 3.

streamlined, and generally a decision is reached by the Investment Screening Committee in three to four weeks.[10]

B. The Republic of Korea (ROK or South Korea)

Although not as well developed as the approval process in the ROC, investment authorization in the ROK also offers some certainty to the foreign investor. The Foreign Capital Inducement Act (FCIA) lists general categories of enterprises which are closed to foreign investment,[11] and provides that the categories will be defined with more specificity in a presidential decree.[12] A potential investor, therefore, will be able to accurately predict whether his investment will be authorized.

The FCIA requires foreign nationals to obtain the approval of the Minister of Finance prior to investing in an enterprise in the ROK.[13] The FCIA provides that the Minister "shall approve a foreign investment without delay" unless it falls within the listed exceptions.[14] It is only with regard to these exceptions that investors face uncertainty. The exceptions include investments in which: (1) over 50 percent of the stock is foreign-owned, except where the enterprise exports a certain percentage of the goods produced;[15] (2) the amount of foreign-owned stock exceeds the amount prescribed by presidential decree; (3) tax benefits are desired; or (4) the enterprise is in a restricted category.[16] If an investment project falls within any of the exceptions, the Minister of Finance must determine whether or not approval shall be granted, after consultation with the competent Minister.[17]

The FCIA also lists projects in which foreign investment is prohibited. These projects include public projects to be carried out by the government or public

10. INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, *Marketing in Taiwan*, 81-28 OVERSEAS BUSINESS REPORTS 20 (Oct. 1981).

11. Law No. 3691, art. 9, para. 1 (1983) (ROK) (amending Law No. 2598 (1973)) (Foreign Capital Inducement Act) [hereinafter cited as FCIA]. The most recent amendments became effective July 1, 1984. FCIA, Addenda, art. 1. The new act is incomplete and should be supplemented by a presidential decree.

12. FCIA, *supra* note 11, at art. 9, para. 2.

13. *Id.* at art. 7, para. 1.

14. *Id.* at art. 7, para. 2.

15. *Id.* at art. 7, para. 2(1). The language of this subparagraph is not entirely clear. It reads:

> In the event that the ratio of stock subscribed for or owned shares is fifty (50) percent or more; provided, except where a foreign invested enterprise exports self-manufactured products of a percentage as prescribed by Presidential Decree, or more, or imports of the self-manufactured products, the tariff rate of which is not more than a rate as prescribed by Presidential Decree, is liberalized.

Id. The provision seems to refer to the percentage of the total goods produced, but might also refer to the percentage of value added to imported products. Hopefully this will be clarified in the forthcoming presidential decree.

16. *Id.* The Minister of Finance is required to give public notice of projects in which foreign investment is restricted. A presidential decree will establish the criteria to be used by the Minister of Finance to determine these restricted industries. *Id.*

17. *Id.* at art. 7, para. 3. Presumably this means he is to consult with the minister in charge of the sector of the economy in which the investment is being made.

organizations, projects which pose health or environmental hazards, projects which violate public policy, and any project prescribed by presidential decree.[18] The contents of each of these categories is to be established by presidential decree.[19]

The Minister of Finance can attach conditions to the approval of the foreign investment enterprise,[20] and most changes in an established enterprise must receive his approval.[21]

C. *Thailand*

Several factors make Thailand a less attractive place to invest than the ROC or the ROK. Enterprises defined as alien are restricted and foreign investment is forbidden in some activities. The complexity of the licensing and registration system acts as a deterrent to foreign investment. Despite Thailand's experience with investment incentive legislation,[22] it is still difficult to predict which foreign projects will be approved.

Uncertainty also prevails in determining which industries will receive investment promotion. Many of the privileges and permissions granted to companies are discretionary, and the criteria used by the Board of Investment are not clearly defined.

Alien businesses, as defined in Thailand's Alien Business Act, are prohibited from engaging in a variety of activities ranging from rice farming to the manufacture of pharmaceuticals.[23] The Act also lists activities that alien businesses may pursue.[24] The registration authorities, however, have adopted a policy of only issuing licenses to incoming businesses that conduct activities which could not be conducted by Thai firms.[25] Activities not listed in the Act are open to foreign investment. Although there is no limit on the permissible percentage of foreign-owned equity in activities not covered by the Act,[26] other laws, regulations, and practices, may place restrictions on such activities.[27]

Both domestic and foreign enterprises must register with governmental agen-

18. *Id.* at art. 9, para. 1.
19. *Id.* at art. 9, para. 2.
20. *Id.* at art. 7, para. 4.
21. *Id.* at art. 7, para. 5.
22. Thailand first promulgated investment promotion legislation in 1954. OFFICE OF THE BD. OF INV. ROYAL THAI GOV'T, INVESTORS GUIDE 1983, at 14 [hereinafter cited as THAI INVESTORS GUIDE].
23. INT'L LEGAL COUNSELLORS THAILAND LTD., THAILAND BUSINESS LEGAL HANDBOOK 13-16 (Aug. 1983) (summarizing the Alien Business Law) [hereinafter cited as THAILAND BUSINESS LEGAL HANDBOOK]. An alien business is defined as follows: (1) a juristic person with half or more than half of the capital belonging to aliens; (2) a juristic person with half or more than half of the number of shareholders, partners or members being aliens, regardless of the amount of capital invested; and (3) a limited partnership or registered ordinary partnership of which the managing partner or manager is an alien. *Id.* at 13. An alien means a natural or juristic person of other than Thai nationality. *Id.*
24. *Id.* at 16. These enterprises must obtain a license from the Alien Business Registration section of the Department of Commercial Registration in the Ministry of Commerce. *Id.* at 17.
25. *See id.* at 13.
26. *See* THAI INVESTORS GUIDE, *supra* note 22, at 14.
27. THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 13.

cies. Enterprises that are not incorporated in Thailand and that engage in certain activities must register with the Department of Commercial Registration of the Ministry of Commerce.[28] For example, businesses that conduct daily sales of Baht 20[29] or more or possess articles for sale with a total value of Baht 500 or more must register.[30] Most businesses must also apply for Business Tax Registration.[31]

A foreign investor must apply to Thailand's Board of Investment (BOI) for an investment promotion certificate in order to be eligible for incentives.[32] The BOI may impose restrictions and conditions in the certificate prescribing the activities in which the foreign investor may engage.[33] The BOI also has the power to withdraw the privileges granted in the certificate upon noncompliance with the conditions.[34]

In 1983, the BOI announced its criteria for the approval of the promotion of investment projects.[35] According to the announcement, the Board may approve the promotion of enterprises when it believes that the products produced by the enterprise are not available, are not produced in sufficient quantity in Thailand, or are not produced by modern processes; that the products are important, and beneficial to economic and social development and to the security of the country; that the investment projects are economically and technologically appropriate; and that they include measures that protect against environmental damage.[36]

The announcement sets forth the policy to be followed by the BOI in administering the program. Special consideration is to be given to projects which: (1) substantially strengthen the balance of payments position, especially by producing goods for export; (2) develop Thai resources; (3) substantially increase employment; (4) locate operations in the provinces; (5) conserve energy or replace imported energy supplies; (6) establish or develop basic industries; or (7) are considered important and necessary by the government.[37]

The criteria for project approval include market demand for the products produced, the cost of production, the value added unless the production is to be

28. *Id.* at 17.

29. The exchange rate was Baht 22.995 per U.S.$ 1 on April 16, 1984.

30. THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 17.

31. *Id.*

32. Dempsey, *Foreign Investment Incentives in the Developing World: The Legislation of Greece, Egypt, Pakistan, Thailand and the Republic of China,* 11 CASE W. RES. J. INT'L L. 575, 599-600 (1979) (discussing Investment Promotion Act, ch. 2).

33. *Id.* at 600 n.133 (discussing Investment Promotion Act, § 20). In 1983, the BOI list of Activities Eligible for Investment Promotion included about one hundred product groups in the agriculture, livestock, fishing, mining, manufacturing, and service sectors. THAI INVESTORS GUIDE, *supra* note 22, at 14.

34. *Id.* at 600 n.133 (discussing Investment Promotion Act, § 54).

35. Announcement of the Board of Investment No. 1/1983 Re: Criteria in Approving Investment Promotion and Providing Tax Privileges, *reprinted in* THAI INVESTORS GUIDE, *supra* note 22, at 15 [hereinafter cited as Announcement].

36. *Id.* at art. 1. The BOI will consider projects in the agriculture, animal husbandry, fishery, mineral exploration and mining, manufacturing, and service sectors. *Id.*

37. *Id.* at art. 2.

exported, the ratio of debts to registered capital, and whether modern production processes and new machinery are employed.[38]

The announcement also lists industries which will not be considered for promotion. They include those in which existing, commercially viable firms operate without promotional privileges, those where the enterprise can operate with a reasonable rate of return and no longer needs promotion (determined by the BOI), and those where existing production capacity is adequate to serve the domestic market demand for two years.[39] Approval will not be granted if an enterprise uses entirely imported raw materials, if production is mainly for domestic distribution and the import duty for the product already exceeds 40 percent, if there is a BOI announcement to suspend the promotion of such activity, or if the BOI considers the project inappropriate for promotional privileges.[40]

D. *The People's Republic of China (PRC)*

In contrast with the ROC, the ROK and Thailand, the PRC gives foreign investors no indication of which industries are open to investment. The Ministry of Foreign Economic Relations and Trade determines on a case-by-case basis whether an enterprise should be approved. It is unclear what criteria are to be applied by the Ministry in making these decisions. The laws and regulations only articulate the PRC's broad purposes for attracting foreign investment. The uncertainty faced by foreign investors may well act as a disincentive to the establishment of enterprises in the PRC.

The PRC opened to foreign direct investment in 1979 with the promulgation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Joint Venture Law).[41] Since its promulgation, the law has been supplemented by regulations and a number of other laws, including income tax laws and exchange control regulations.[42]

A foreign enterprise must be authorized to establish an enterprise in the PRC. Investment is allowed only in the form of a joint venture.[43] Proposed joint

38. *Id.* at art. 3.

39. *Id.*

40. *Id.*

41. Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, promulgated July 1, 1979, *reprinted in* 18 I.L.M. 1163 (1979) (unofficial translation) [hereinafter cited as Joint Venture Law].

42. The most significant of these laws are the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, promulgated Aug. 26, 1980 [hereinafter cited as Joint Venture Tax Law]; Individual Income Tax Law of the People's Republic of China, promulgated Sept. 10, 1980; Provisional Regulations for Exchange Control of the People's Republic of China, promulgated Dec. 18, 1980 [hereinafter cited as Exchange Control Regulations]; Regulations on Special Economic Zones in Guangdong Province, promulgated Aug. 26, 1980; and Economic Contract Law, promulgated Dec. 13, 1981. These laws are reprinted in P. VERZARIU & D. STEIN, JOINT VENTURE AGREEMENTS IN THE PEOPLE'S REPUBLIC OF CHINA 24 (U.S. Dep't of Commerce, Int'l Trade Admin., Nov. 1982).

43. The foreign investor must contribute at least 25 percent of the capital, Joint Venture Law, *supra* note 41, at art. 4, para. 1, and no upper limit has been set. P. VERZARIU & D. STEIN, *supra* note 42, at 24.

ventures must be examined and approved by the Ministry of Foreign Economic Relations and Trade.[44] The Ministry is required to approve or disapprove the application within three months of receipt of the required documents.[45] If the application is approved and a certificate of approval issued, the agreement is submitted to a local administrative bureau of industry and commerce for registration.[46] Apparently this registration is automatic, provided that the joint venture has received a certificate of approval. When the registration or license is issued, the joint venture is ready to begin operation.

The Ministry of Foreign Economic Relations and Trade in the PRC has broad discretion to grant approval to a proposed joint venture. Some indication of the criteria to be applied by the Ministry can be found in the Joint Venture Law and Regulations. Article 1 of the Joint Venture Law suggests that joint ventures are allowed "[w]ith a view to expanding international economic cooperation and technological exchange."[47] Article 5 states that "[t]he technology or equipment contributed by any foreign participant as investment shall be truly advanced and appropriate to China's needs."[48] In Article 9, the law states that "[a] joint venture is encouraged to market its products outside China."[49]

The purposes of encouraging foreign investment are defined in Article 3 of the Joint Venture Regulations.[50] "Joint ventures . . . shall be able to promote the development of China's economy and the raising of scientific and technological levels for the benefit of socialist modernization."[51] The Article also lists categories in which foreigners are allowed to invest.[52]

The Joint Venture Regulations establish other general requirements that must

44. Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, art. 8, promulgated Sept. 20, 1983 [hereinafter cited as Joint Venture Regulations]. Article 3 of the Joint Venture Law required the application for authorization to be submitted to the Foreign Investment Control Commission (FICC). The FICC was absorbed by the Ministry of Economic Relations and Trade, and now, therefore, the review process goes through the Ministry. Telephone interview with Jeff Lee, Int'l Trade Admin., U.S. Dep't of Commerce (Nov. 16, 1983). The Joint Venture Regulations allow the Ministry of Foreign Economic Relations and Trade to entrust provincial, municipal or regional governments with the power to approve joint ventures that meet certain conditions. Joint Venture Regulations, *supra*, at art. 8, para. 2. Upon approval, the "entrusted office" is to report the joint venture to the Ministry. The Ministry will then issue a certificate of approval. *Id.* at art. 8, para. 3.

45. Joint Venture Regulations, *supra* note 44, at art. 10. Article 9 of the Joint Venture Regulations lists the documents that must be submitted. The Ministry can also demand amendments to the documents. *Id.* The State Economic Commission has veto power over any proposed agreement. Its decision can be appealed to the State Council. The process does not take place openly, however, so the foreign partner has no way of knowing at which stage his project is in the approval process. Telephone interview with Jeff Lee, Int'l Trade Admin., U.S. Dep't of Commerce (Nov. 16, 1983).

46. Registration takes place in the province, region or municipality where the joint venture will be located. Joint Venture Regulations, *supra* note 44, at art. 11. Article 3 of the Joint Venture Law required that the General Administration for Industry and Commerce provide registration. Apparently this is no longer the case.

47. Joint Venture Law, *supra* note 41, at art. 1.

48. *Id.* at art. 5.

49. *Id.* at art. 9.

50. Joint Venture Regulations, *supra* note 44, at art. 3.

51. *Id.*

52. *Id.*

be met by joint venture applicants.[53] Applicants should stress economic results, and enterprises must comply with one or more of the following requirements: (1) adopt advanced technical equipment and scientific management to increase variety, quality, and quantity of products, and to save energy and materials; (2) provide benefits in terms of technical renovation of enterprises, resulting in less investment, quicker returns, and greater profits; (3) expand products for export to increase foreign currency income; or (4) enable training of technical and management personnel.[54] Applicants will not be granted approval if the project: (1) is a detriment to the PRC's sovereignty; (2) violates Chinese law; (3) fails to conform to the requirements for development of the national economy; (4) causes environmental pollution; or (5) contains obvious inequalities in the agreements signed by the parties that impair the rights and interests of one party.[55]

E. *Comparison of the Approval Procedures*

The ROC, the ROK, Thailand, and the PRC differ significantly in their procedures for approval of foreign investment. The ROC and the ROK give greater guidance to investors as to which industries are open to foreign investment. Because the approval criteria are well defined, a foreign investor can accurately predict the government's treatment of his enterprise. He does not have to spend time and money to determine whether the enterprise will receive approval, and therefore, is more likely to invest in these countries.

In Thailand, foreign investors have less guidance as to whether their enterprise will be approved. Although many industries appear to be open to foreign investment, licenses are not always granted by the authorities, and many restrictions are applied.

The PRC offers the least amount of guidance to the foreign investor. Clearly, the PRC wants to retain as much flexibility as possible in the process of authorizing foreign investment. By determining eligibility on a case-by-case basis, the government is able to channel foreign capital toward sectors of the economy that it considers to be of immediate priority. The uncertainty that results from retaining this flexibility, however, may act as a disincentive to foreign investors and has the potential to counteract the benefits that are offered.

II. Incentives and Guarantees

The ROC, the ROK, Thailand, and the PRC all offer similar inducements and guarantees to foreign investors. These inducements range from tax exemptions to guarantees against expropriation. The countries differ, however, in how they determine which enterprises are eligible for the offered incentives. The most significant incentives are discussed below.

53. *Id.* at art. 4.
54. *Id.*
55. *Id.* at art. 5.

A. Tax Incentives

The four countries offer a variety of tax incentives to investors. The criteria for granting the benefits vary from country to country. In the ROC, the incentives are granted automatically upon approval of the enterprise. Under ROC law, an enterprise funded by foreign investment which qualifies as a "productive enterprise" is automatically entitled to elect either a five year income tax holiday from the date it begins marketing its products, or an accelerated depreciation of fixed assets.[56] Expansion programs of existing enterprises are also offered tax holidays or accelerated depreciation.[57] Certain capital-intensive or technology-intensive enterprises are eligible to defer the five year tax holiday for up to four years.[58] The Categories and Criteria identify those enterprises that qualify for this additional benefit.[59]

Productive enterprises are provided with an income tax ceiling rate. The maximum statutory income tax rate for businesses is 35 percent.[60] Income tax and surtaxes imposed on "productive enterprises," however, cannot exceed 25 percent of their annual income.[61]

Other tax incentives in the ROC include the allowance of deductions from annual income for research and development costs,[62] exemptions from or deferred payment plans for import duties,[63] and reductions in the Deed Tax[64] and the House Tax.[65] Those enterprises which contract with the government to produce weapons and other national defense products are exempted from the Business Tax and Stamp Tax.[66] Most significantly, raw materials used by export enterprises are

56. SEI, *supra* note 2, at art. 6, para. 1. If the service life is over ten years, depreciation may be accelerated to five years. If it is less than ten years, depreciation may be accelerated by half, or by one-third when the building and equipment is used for transportation or communication industries. *Id.*

57. *Id.* at art. 6, para. 2.

58. *Id.* at art. 7, para. 1. The enterprise itself is allowed to determine the commencement date of the exemption period. *Id.*

59. Categories and Criteria, *supra* note 7; *see* SEI, *supra* note 2, at art. 7, para. 2.

60. Wan, *supra* note 2, at 257 (discussing Statute of Income Tax Rate, art. 5); *see also* Peat, Marwick, Mitchell & Co., *supra* note 3, at 35.

61. SEI, *supra* note 2, at art. 15. Certain industries, particularly heavy machinery, petrochemical, and others designated by the Executive Yuan (government branch most analogous to the Executive Branch in the United States), have a ceiling of 22 percent. *Id.* To be eligible for this lower rate, the enterprises must meet the criteria established by the government. Wan, *supra* note 2, at 257 n.154 (discussing the Categories and Criteria for Special Encouragement of Important Productive Enterprises).

62. SEI, *supra* note 2, at art. 34.

63. *Id.* at art. 21. *See generally* Wan, *supra* note 2, at 258-60.

64. SEI, *supra* note 2, at arts. 22, 48. The Deed Tax is levied on the purchase of buildings for business or residential use. The tax rate is seven and one-half percent of the purchase price. Peat, Marwick, Mitchell & Co., *supra* note 3, at 34.

65. SEI, *supra* note 2, at art. 48; Wan, *supra* note 2, at 256 (discussing Statute for House Tax, art. 15, para. 2(2)). The House Tax is an annual tax levied on buildings owned for business purposes. Tax rates range from three to five percent of the current value. Peat, Marwick, Mitchell & Co., *supra* note 3, at 34.

66. SEI, *supra* note 2, at art. 11, para 1. The Business Tax (Gross Business Receipts Tax) is levied on sales of goods and services. Tax rates range from 0.75 percent to five percent. Peat, Marwick,

exempt from import duties under Custom Duty Law.[67] Export businesses are also exempt from the Business Tax,[68] and subject to a reduced Stamp Tax.[69]

Finally, the ROC has established certain areas as export processing zones.[70] In these areas, manufacturers can import machinery, equipment and raw materials free of import duties, commodity taxes, and business taxes.[71]

Foreign enterprises allowed to invest in the ROC must meet fairly well defined criteria to qualify for benefits. These benefits are determined at the same time the approval decision is made, so investors know the extent of their tax and other liabilities prior to beginning operations.

The Foreign Capital Inducement Act provides exemptions from income tax, corporate tax, acquisition tax and property tax for enterprises that: (1) provide a significant contribution to improvement of the ROK's balance of payments; (2) include advanced technology or large amounts of capital; (3) involve investments by non-resident Koreans under the Law Concerning Registration of Non-resident Korean Nationals; (4) are located in a Free Export Zone in accordance with the Free Export Zone Establishment Law; and, (5) are designated by presidential decree as essential to induce foreign investment.[72]

When a project meets these standards, it becomes eligible for either a five year exemption from income tax in proportion to the amount of the enterprise that is owned by foreign nationals, or a special depreciation plan for fixed assets.[73] Dividends,from stock also are exempt from income taxes for five years.[74] Investors that receive the five year exemption from tax on dividends or profits may choose to take the exemption in any five year period during the first ten years after registration of the enterprise.[75] Because an enterprise is less likely to have substantial income in the early years of production, the ability to postpone the exemption from income tax provides a significant benefit to foreign investors.

Properties held or acquired by the enterprise may also be exempted from acquisiton tax and property tax for five years. This exemption applies only in proportion to the amount of the enterprise that is foreign-owned.[76]

Customs duties, special consumption tax, and value-added tax on capital goods are reduced or exempted entirely for approved enterprises, subject to criteria to be laid out in a presidential decree.[77] Eligible capital goods include

MITCHELL & CO., *supra* note 3, at 33. The Stamp Tax is levied on the price of sales as determined by invoices. The tax rate is 0.4 percent of the invoiced price for domestic sales and 0.1 percent for export sales. *Id.* at 34.

67. Wan, *supra* note 2, at 260 (discussing the Custom Duty Law).

68. SEI, *supra* note 2, at art. 29.

69. *Id.* at art. 33; *see supra* note 66.

70. Wan, *supra* note 2, at 260-61 (discussing the Statute for the Establishment and the Management of the Export Processing Zone).

71. Wan, *supra* note 2, at 261.

72. FCIA, *supra* note 11, at art. 14, para. 1.

73. *Id.* at art. 14, para. 2.

74. *Id.* at art. 14, para. 3.

75. *Id.* at art. 14, para. 5.

76. *Id.* at art. 14, para. 4.

77. *Id.* at art. 15, para. 1.

those that are part of the original investment, those that are dividends from another foreign investment enterprise, or those that consist of foreign currency.[78]

Investors must apply for these tax benefits at the same time that they apply for approval.[79] Some of these taxes, however, may be applied retroactively if the requirements of the FCIA are not met.[80] For example, if the foreign investor has not paid for stocks or shares within the period allowed in the FCIA, a change in equity ownership has caused the percentage of foreign-owned stock or shares to drop below the percentage of tax exempted, the authorization or registration is cancelled, or the conditions of the authorization are not complied with, acquisition and property taxes may be applied retroactively.[81]

The ROK's Corporation Tax Act provides that corporations with their principal place of business outside of the ROK will be taxed only on their income derived from within the country.[82] Corporations with their principal place of business or central office within the ROK will be taxed on their global income.[83]

The Board of Investment (BOI) in Thailand has the authority to determine which enterprises should be granted tax benefits. The BOI grants the benefits to individual enterprises when it issues an enterprise's investment promotion certificate. The BOI has broad discretion to determine the extent of the benefits. The criteria it uses are not well defined. Thus, foreign investors are unable to determine in advance the costs of establishing an enterprise in Thailand.

The BOI may exempt promoted enterprises from the payment of the Companies Income Tax for periods of three to eight years.[84] The criteria used to determine whether to grant this benefit include the size of the investment and the number of employees.[85] The BOI may extend the period of exemption for enterprises engaging in activites that result in annual foreign exchange savings of more than U.S.$ 500,000 during the first three years of operation; use indigenous agricultural products as the main raw materials; use domestic supplies amounting to 50 percent of their production costs; locate in outlying areas; or are considered by the BOI to be of special importance.[86] In addition, the investor may be allowed to carry losses forward for up to five years.[87]

The Board of Investment may also exempt the investor from import duties and business taxes on imported machinery when comparable machinery is not avail-

78. *Id.*
79. *Id.* at art. 14, para. 6.
80. *Id.* at art. 17.
81. *Id.* at art. 17, para. 3.
82. Kim, *Legal Aspects of Private Foreign Investment in Korea*, in BUSINESS LAWS IN KOREA: INVESTMENT, TAXATION AND INDUSTRIAL PROPERTY 141, 177 (C.J. Kim ed. 1982) (discussing the Corporation Tax Act, art. 1).
83. *Id.*
84. Dempsey, *supra* note 32, at 603 (discussing Investment Promotion Act, § 31). The Companies Income Tax is a tax on net profits. The standard tax rate is 40 percent. Companies listed on the Securities Exchange of Thailand pay 30 percent of net profits. THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 19.
85. Announcement, *supra* note 35, at art. 6.
86. *Id.*
87. Dempsey, *supra* note 32, at 603 (discussing Investment Promotion Act, § 31); *see also* THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 19 ("Net losses may be carried forward for five consecutive years; there is no provision for the carry-back of losses." *Id.*).

able in the domestic market.[88] Factors that will be considered are whether the machinery can be assembled in Thailand, whether manual labor can be substituted economically, and whether the machinery is new and is to be used in the production process.[89] If the investor purchases domestically manufactured or assembled machinery, the BOI has the discretion to grant an exemption from the Business Tax.[90]

The BOI may also grant foreign investors up to a 90 percent reduction of duties and business taxes on imported raw materials for up to one year, provided that comparable domestic materials are not available.[91] Factors to be considered include rates of tax and duty for raw materials as compared with those for the finished product, the project's ability to compete with imports, the impact on other manufacturing industries and government revenue, and benefits to the national economy.[92]

The Board of Investment may also exempt raw and essential materials from import duties and business taxes if the materials are to be re-exported.[93] The investor may be allowed a five percent income tax deduction on taxable income resulting from exports,[94] and may also be excused from paying export duties and business taxes on commodities assembled or produced in Thailand.[95]

The Investment Promotion Act also contains a provision permitting the Board of Investment to order other governmental entities to take remedial action "where the structure, rates, or procedure for the collection of taxes and duties, service charges or fees are found to be an obstacle to the promotable or promoted activities."[96] This gives the BOI the flexibility to grant additional benefits to enterprises that it believes are particularly important to economic development.

Many of the incentives offered by the PRC are not granted automatically upon approval of the joint venture. The Ministry of Finance, the tax authorities, and local governments all have some discretion to determine which enterprises are eligible for benefits, and the extent to which the benefits should be granted. The

88. Dempsey, *supra* note 32, at 603 (discussing Investment Promotion Act, § 28); THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 2.

89. Announcement, *supra* note 35, at art. 7. Projects located in Bangkok and Samut Prakan will not be granted these exemptions unless 80 percent of their annual production is for export, or the project is to expand an existing operation. *Id.* If the project is to expand an existing operation, the taxes are reduced by 50 percent. *Id.*

90. Dempsey, *supra* note 32, at 603 & n.150 (discussing Investment Promotion Act, §§ 28-29). The Business Tax is levied on the gross receipts of various categories of business listed in the Business Tax Schedule of the Revenue Code. There is also a municipal surtax of ten percent of the Business Tax. THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 20.

91. Dempsey, *supra* note 32, at 603 (discussing Investment Promotion Act, § 30).

92. Announcement, *supra* note 35, at art. 8. The BOI will consider projects on a case-by-case basis, and will grant an "appropriate reduction" of the taxes and duties. *Id.*

93. Dempsey, *supra* note 32, at 604 (discussing Investment Promotion Act, § 36(1)-(2); *see also* Announcement, *supra* note 35, at art. 10(1) (establishing guidelines for the approval of tax and duty exemptions or reductions).

94. Dempsey, *supra* note 32, at 604 (discussing Investment Promotion Act, § 36(4)).

95. *Id.* (discussing Investment Promotion Act, § 36(3)); *see also* Announcement, *supra* note 35, at art. 10(3). The BOI will consider whether to grant this benefit on a case-by-case basis. *Id.*

96. Dempsey, *supra* note 32, at 603-04 (discussing Investment Promotion Act, § 52).

PRC requires approved industries to apply to the tax authorities to receive tax benefits. As in Thailand, the criteria to be applied are not well defined.

Profits made by a joint venture are subject to a 33 percent tax.[97] This consists of a flat 30 percent national tax plus ten percent of that amount in local surtax.[98] The tax may be reduced, however, by up to the full amount of the local surtax. The government of the province, municipality, or region where the joint venture is located may reduce the surtax in whole or in part in "special circumstances."[99] The term special circumstances is not defined, leaving the local authorities with discretion to determine the amount of tax to collect.

Enterprises scheduled to last more than ten years may apply to the tax authorities for approval of tax reductions.[100] These reductions may amount to a tax holiday for the first profit-making year, and a 50 percent tax reduction for the second and third profit-making years.[101] It is unclear whether the tax authorities grant such reductions to all enterprises that are deemed to meet the ten-year duration test or whether they apply further criteria.

Enterprises using technology which is "up-to-date by world standards" may apply for an exemption or reduction in income tax for the first two or three profit-making years.[102] It is not clear who decides whether the technology is up-to-date by world standards, nor how the determination is made.[103] Whoever makes the decision appears to have the discretion to decide whether the tax should be reduced or eliminated entirely.

Firms that reinvest their profits in the PRC for a minimum of five years may apply to the tax authorities for a 40 percent rebate of taxes paid on that income.[104] This reinvestment can be in the existing joint venture or in another approved enterprise in the PRC.[105] It is not clear whether the tax authorities merely verify that firms have reinvested profits or use some other criteria to determine whether the rebate should be granted.

Certain joint ventures, such as those engaged in low-profit operations like farming or forestry, or those located in economically under-developed areas, may be allowed a reduction in tax of between 15 to 30 percent for ten years following

97. *See* Joint Venture Tax Law, *supra* note 42, at art. 3. This 33 percent does not include the tax on profits that are repatriated. *Id.* at art. 4. The Joint Venture Tax Law provides for a foreign tax credit which reduces assessed PRC taxes for income taxes paid to other countries by the joint venture. *Id.* at art. 16. Other double taxation agreements will supersede this article. *Id. See generally* 22 HARV. INT'L L.J. 234 (1981).

98. Joint Venture Tax Law, *supra* note 42, at art. 3.

99. Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, art. 3, promulgated Dec. 14, 1980, *reprinted in* P. VERZARIU & D. STEIN, *supra* note 42, at 42 [hereinafter cited as Tax Regulations].

100. Joint Venture Tax Law, *supra* note 42, at art. 5.

101. *Id.*

102. Joint Venture Law, *supra* note 41, at art. 7, para. 2. This provision has not been carried over to the Joint Venture Tax Law, so it is unclear whether the benefit is still being offered.

103. Presumably, one would apply to the Ministry of Foreign Economic Relations and Trade, or to the taxing authorities.

104. Joint Venture Tax Law, *supra* note 42, at art 6.

105. Tax Regulations, *supra* note 99, at art. 6.

any other period of exemption or reduction.[106] Again, it is not clear how eligibility for this benefit is determined.

In order to weigh the costs of establishing an enterprise, an investor needs to know the extent of his tax liabilities. In the ROK and the ROC he will be able to determine those liabilities based upon the criteria set out in the statutes and decrees. Although the laws in Thailand and the PRC appear to give some guidance, the actual decisions about such benefits are discretionary, and there is no reliable way for an investor to predict what his tax liabilities will be. This uncertainty might well deter a foreign investor from investing in Thailand and the PRC.

B. Guarantees Against Nationalization

A major concern of foreign investors is the possibility of nationalization of their enterprise by the host country. To allay this fear, all four countries provide some guarantee that foreign investment will not be nationalized without compensation. The guarantees vary in the amount of reassurance that they provide.

Under the Statute for Investment by Foreign Nationals in the ROC, the government guarantees that it will not expropriate an enterprise for 20 years, as long as the percentage of foreign investment is 45 percent of the total investment in the venture.[107] For enterprises which have less than 45 percent foreign investment, the government may expropriate, but only with reasonable compensation and only for national defense reasons.[108]

In the ROK, foreign investors are not given specific assurances against nationalization of their enterprises. The Constitution, however, provides that the status of aliens is guaranteed in accordance with international law and treaties.[109] In addition, the Constitution provides that generally-recognized rules of international law shall have the same effect as domestic law.[110] Therefore, investors should be assured that the international law of just compensation will be recognized in the ROK.

In Thailand, the Investment Promotion Act specifically guarantees that an enterprise which is awarded an investment promotion certificate by the Board of Investment will not be nationalized.[111] There is no similar guarantee for those enterprises that do not apply or are not qualified for promotion.

106. Joint Venture Tax Law, *supra* note 42, at art. 5.

107. SIFN, *supra* note 1, at art. 16.

108. *Id.* at art. 15, para. 1.

109. Kim, *supra* note 82, at 179 (discussing the Constitution of the Republic of Korea, art. 5, para. 2).

110. Kim, *supra* note 82, at 179 (discussing the Constitution of the Republic of Korea, art. 5, para. 1). See also the FCIA, *supra* note 11, at art. 6, which provides that the property right of a foreign investor "shall be guaranteed in accordance with the provisions of the laws." *Id.*

111. Dempsey, *supra* note 32, at 600 (discussing Investment Promotion Act, §§ 43–46). Thailand also provides other guarantees: the government will not compete with the enterprise, and will not monopolize the sale of or impose price controls on the commodities involved. *Id.* Government agencies are prohibited from importing tax-exempt commodities which are the same as those produced or assembled domestically by the promoted enterprise. *Id.* (discussing Investment Promotion Act, § 48).

The PRC's Joint Venture Law states that the "Chinese Government protects, by the legislation in force, the resources invested by a foreign participant in a joint venture and the profits due him pursuant to the agreements, contracts and articles of association authorized by the Chinese Government as well as his other lawful rights and interests."[112] The length of the joint venture is determined by the participants, based upon the type of enterprise involved,[113] and losses due to breach of contract shall be born by the breaching party.[114] Presumably, premature termination of a joint venture agreement by nationalization of the investment would constitute breach of the contract, and the Chinese would be liable for the losses sustained.

In addition to these guarantees, all four countries have signed agreements with the United States permitting insurance of private investment through the Overseas Private Investment Corporation (OPIC).[115] A U.S. investor can thereby obtain investment insurance which will protect him against losses caused by inconvertibility of currency, expropriation, or war.[116]

C. *Repatriation of Earnings*

Since each of the four countries has balance of payments problems, serious difficulties might result if foreign investors were allowed to freely remove profits. In order to induce foreigners to invest, however, some repatriation rights must be guaranteed.

In the ROC, only foreign investments approved by the Investment Screening Committee of the Ministry of Economic Affairs are eligible for the privilege of repatriating net profits.[117] Once approval is granted, the privilege is unlimited,

112. Joint Venture Law, *supra* note 41, at art. 2.

113. *Id.* at art. 12.

114. *Id.* at art. 13. If *force majeure* or heavy losses cause a party to fail to fulfill its obligations under the agreement, the agreement may be terminated by assent of both parties, with the approval of the Foreign Investment Control Commission. *Id.*

115. *See* Agreement on Investment Guaranties, Oct. 7, 1980, United States-People's Republic of China, T.I.A.S. No. 9924 (entered into force Oct. 30, 1980); Agreement on Investment Guaranties, Feb. 19, 1960, United States-Republic of Korea, 11 U.S.T. 202, T.I.A.S. No. 4431, amended April 16, 1965, 16 U.S.T. 655, T.I.A.S. No. 5790; Agreement on Guaranty of Private Investments, Sept. 1, 1954, United States-Thailand, 5 U.S.T. 2258, T.I.A.S. No. 3086, amended Dec. 22, 1965, 16 U.S.T. 2041, T.I.A.S. No. 5940; Agreement on Economic Cooperation, June 25, 1952, United States-Republic of China, 3 U.S.T. 4846, T.I.A.S. No. 2657, amended Dec. 30, 1963, 14 U.S.T. 2222, T.I.A.S. No. 5509. The United States no longer recognizes the Republic of China. The Taiwan Relations Act, 22 U.S.C.A. § 3303(c) (West Supp. 1984), provides that treaties and international agreements between the U.S. and the ROC in existence on Jan. 1, 1979 will remain in force until terminated in accordance with law. The Agreement on Economic Cooperation has not been terminated.

116. 22 U.S.C.A. § 2194(a)(1) (West 1976).

117. Article 13 of the SIFN provides that an "investor may apply for exchange settlement against the yearly income of net profit or interest accruing from his investment." Article 2 defines investors as foreign nationals investing in the ROC in accordance with the SIFN. Article 8 requires such foreign nationals to submit investment applications for approval. *See also* PEAT, MARWICK, MITCHELL & CO., *supra* note 3, at 8.

with no currency restrictions on the amount of net profits or interest from the investment that can be remitted from the ROC.[118]

Repatriation of capital is allowed in only two situations in the ROC. First, beginning one year after the commencement of operations, foreign investors may withdraw 15 percent of the total investment capital annually.[119] Second, a foreign investor can repatriate capital when he transfers equity to local nationals. This right to repatriate is limited to a single transaction.[120] Therefore, if an investor removes a portion of his capital, he loses the right to transfer the remainder. Subject to these limitations, the foreign investor can withdraw his investment from the ROC.

In the ROK, the government's attitude toward repatriation of profits is quite liberal. The government assures investors that profits and dividends may be repatriated.[121] The government also allows repatriation of equity investment. A foreign investor may sell his investment to another investor but must obtain permission from the Minister of Finance prior to the sale.[122] This process appears to be a formality since the Foreign Capital Inducement Act guarantees that such sales proceeds may be remitted overseas.[123]

The ROK has also entered into the General Repatriation Agreement with the International Finance Corporation (IFC).[124] Foreign investors who invest through the IFC are free to sell their stock outside of the ROK, and are entitled to other privileges.[125]

In Thailand, the Investment Promotion Act allows a foreign investor to repatriate foreign currency which represents his invested capital brought into Thailand from abroad, and his returns on that capital.[126] This remittance of foreign currency, however, can be restricted by the Bank of Thailand during any period when Thailand's balance of payments position requires preservation of foreign currency.[127] In addition, Thailand's Exchange Control Act permits the control, restriction, or prohibition of exchanges involving foreign currency, including the exportation of such currency.[128]

118. *See, e.g.*, SIFN, *supra* note 1, at art. 13; *see* PEAT, MARWICK, MITCHELL & CO., *supra* note 3, at 11 ("Foreign investors may apply for unrestricted foreign exchange settlement to remit dividends and interest from their investment." *Id.*).

119. SIFN, *supra* note 1, at art. 13, para. 2. This percentage can be raised with the special permission of the Executive Yuan. *Id.* at art. 13, para. 3.

120. *Id.* at art. 13, para. 4.

121. FCIA, *supra* note 11, at art. 4. Under the 1973 version of the FCIA, foreign investors had to apply to the Minister of Finance for permission to remit profits. The Minister was obliged to give permission unless the application was in violation of the conditions of the authorization or the law. Law No. 2598, art. 11, para. 1 (1973) (ROK), *amended by* Law No. 3691 (1983). It is unclear whether such permission is still required.

122. FCIA, *supra* note 11, at art. 13, para. 1.

123. *Id.* at art. 4.

124. Kim, *supra* note 82, at 181 (discussing the General Repatriation Agreement with the International Finance Corporation).

125. Kim, *supra* note 82, at 181.

126. Dempsey, *supra* note 32, at 601 (discussing Investment Promotion Act, § 37).

127. *Id.* at 601 n.141 (discussing Investment Promotion Act, § 37).

128. *Id.* (discussing Exchange Control Act, § 4). At least as far as U.S. investors are concerned, however, such limitations are rarely imposed. The Treaty of Amity and Economic Relations, May 28,

The freedom of repatriation in Thailand is also affected by the imposition of a tax on net profits remitted abroad. This tax is in addition to the Companies Income Tax, and amounts to 25 percent of net profits.[129]

In the PRC, net profit may be "remitted abroad through the Bank of China in accordance with the foreign exchange regulations."[130] The earnings and funds which can be remitted out of the PRC are: (1) the foreigner's net profit after fulfilling all obligations under the agreement and the pertinent laws; (2) the funds received at the termination of the joint venture; (3) other funds (presumably the investor's capital contribution to the joint venture); and (4) wages, salaries, or other legitimate income earned by a foreign worker after personal income tax is paid.[131] The PRC's foreign exchange regulations are not yet fully developed, but the Provisional Regulations for Foreign Exchange Control do set some limits on the amounts that may be repatriated.[132] The tax laws also have affected the freedom of repatriation by subjecting profits remitted abroad to an additional ten percent in income tax.[133]

The Joint Venture Law provides that earnings of a joint venture participant may be repatriated only in the same currency as that in the joint venture agreement.[134] The foreign exchange regulations provide that foreign investors may repatriate their profits only by debitting their foreign exchange account with the Bank of China.[135] The regulations are not clear, however, as to what foreign participants can do if their foreign exchange account lacks sufficient foreign currency.[136] Apparently, requiring repatriation from the foreign exchange accounts is intended to encourage joint ventures to export their products, since substantial export would ensure that the joint venture had a supply of foreign currency to repatriate.

D. *Other Benefits*

The ROC, the ROK, Thailand, and the PRC have tried to make their investment climate attractive to foreign investors in other ways. Methods for improving the climate include the establishment of dispute settlement procedures and the conclusion of bilateral treaties defining the status of foreign investors.

Since foreign investors are concerned with the procedures for the resolution of

---

1966, United States-Thailand, art. VII(1), 19 U.S.T. 5843, 5851-52, T.I.A.S. No. 6540 (entered into force June 8, 1968) [hereinafter cited as U.S.-Thailand Treaty of Amity], prohibits the imposition of restrictions on the transfer of capital except to the extent necessary to preserve foreign currency for payments for goods essential to the health and welfare of its people or to comply with restrictions requested or approved by the International Monetary Fund.

129. THAILAND BUSINESS LEGAL HANDBOOK, *supra* note 23, at 21. Dividends remitted abroad are taxed at a rate of 20 percent. *Id.*

130. Joint Venture Law, *supra* note 41, at art. 10.

131. *Id.* at arts. 10–11.

132. *See, e.g.*, Exchange Control Regulations, *supra* note 42, at art. 25 (limiting earnings remitted from the PRC to 50 percent of net wages); *see* Klingenberg & Pattison, *Joint Ventures in the People's Republic of China: The New Legal Environment*, 19 VA. J. INT'L L. 807, 822 (1979).

133. Joint Venture Tax Law, *supra* note 42, at art. 4.

134. Joint Venture Law, *supra* note 41, at art. 10.

135. Exchange Control Regulations, *supra* note 42, at art. 24.

136. Wan, *supra* note 2, at 277.

contract and other disputes, the countries have tried to reassure investors that disputes will be settled fairly. For example, the Joint Venture Law of the PRC provides that disputes that are not settled by consultation between members of the Board of Directors may be settled through conciliation or arbitration by an arbitral panel agreed upon by the parties.[137] Since matters such as choice of arbitrators, choice of rules, location, judgment standards, the character of award, and notice procedures are determined by the joint venture agreement, they should be negotiated and included in the agreement.[138] This allows every venture to set its own terms, but also lengthens the negotiation process.

The ROK has an Arbitration Act which specifically regulates commercial arbitration.[139] The Act allows the parties to appoint their own arbitral panel, but states that the Ministry of Commerce and Industry shall appoint the Commercial Arbitration Association if the parties cannot reach an agreement.[140] In addition, foreign investors have access to the courts of the ROK.[141]

The ROK is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[142] Foreign investors from member states can bring disputes with the ROK Government to the International Centre for the Settlement of Investment Disputes (ICSID) which has facilities for conciliation and arbitration of disputes between investor and host country.[143]

All four countries have been granted most-favored nation status by the United States.[144] This designation is beneficial to enterprises seeking to distribute goods

137. Joint Venture Law, *supra* note 41, at art. 14. If the parties do not agree upon a panel, the conciliation or arbitration will probably be conducted by the Foreign Economic and Trade Arbitration Committee. *See* Shen, *China's New Law on Joint Ventures Using Chinese and Foreign Investment*, 34 Sw. L.J. 1183, 1189-90 (1981). In conciliation, the panel will propose a settlement for voluntary adoption. If conciliation fails, the dispute will be settled by binding arbitration. *Id.* If the PRC's procedures are utilized, each party chooses an arbitrator from the arbitration committee. These two arbitrators will then choose a third member. Klingenberg & Pattison, *supra* note 132, at 831.

138. Klingenberg & Pattison, *supra* note 132, at 831.

139. Liew, *Commercial Arbitration in Korea with Special Reference to the UNCITRAL Rules*, in BUSINESS LAWS IN KOREA: INVESTMENT, TAXATION AND INDUSTRIAL PROPERTY 775, 775 (C.J. Kim ed. 1982) (discussing the Arbitration Act).

140. *Id.* at 781 (discussing Arbitration Act, art. 4, para. 3).

141. *Id.* at 777.

142. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159, *opened for signature* Mar. 18, 1965, *reprinted in* 4 I.L.M. 532 (1965) [hereinafter cited as ICSID Convention]. The ROK ratified the ICSID Convention on Feb. 21, 1967. INT'L CENTRE FOR THE SETTLEMENT OF INV. DISPUTES, 1984 ANNUAL REPORT 19 (Sept. 3, 1984). The Republic of China also was a party to the ICSID Convention until Oct. 2, 1980. At that time, the Administrative Council of ICSID removed the ROC from the list of Contracting States because of the possibility that the PRC would join. *Id.* at 18 n.1. As of June 30, 1984, the PRC has not become a party to the Convention. *Id.* at 18-19.

143. ICSID Convention, *supra* note 142, at art. 1(2).

144. *See* Agreement on Trade Relations, July 7, 1979, United States-People's Republic of China, art. II, 31 U.S.T. 4651, T.I.A.S. No. 9630 (entered into force Feb. 1, 1980); Friendship, Commerce and Navigation Treaty, Nov. 28, 1956, United States-Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 [hereinafter cited as Republic of Korea Friendship Treaty]; U.S.-Thailand Treaty of Amity, *supra* note 128, at art. VIII; Friendship, Commerce and Navigation Treaty, Nov. 4, 1946, United States-Republic of China, art. XVI, para. 1, 63 Stat. 1299, T.I.A.S. No. 1871 (entered into force Nov. 30, 1948) [hereinafter cited as the Republic of China Friendship Treaty]. The Republic of China

to U.S. markets since those goods will be subject to favorable tariff rates. In addition, various treaties have established that U.S. investments in the countries may be insured by OPIC[145] and U.S. investors can apply to the Export-Import Bank for credit and loan guarantees to finance purchases from the United States.[146] These treaties provide additional reassurance that a foreign investor's project will be successful.

The ROC, Thailand, and the ROK have treaties with the United States that guarantee national treatment to foreign investors,[147] and the ROK has a similar treaty with the Federal Republic of Germany (West Germany).[148] This status assures the foreign investor that he will have the rights and privileges of a national. The PRC has been granted most-favored nation status by Japan[149] and the European Economic Community.[150] These and other treaties help make the investment climate in each country attractive to foreigners.

III. Conclusion

In their efforts to foster economic development, the ROC, the ROK, Thailand and the PRC have all attempted to channel foreign investment into priority industries. The governments have instituted authorization processes to determine whether to allow the establishment of a proposed venture. They also have tried to provide incentives to establish enterprises in needed industries.

Despite common goals, the authorization processes in the four countries are very different. All the countries require authorization or registration of foreign projects. In the ROK and the ROC the processes are well defined. Investors are given guidance as to which industries are open to foreign investment. The few restrictions that exist are clearly defined in the statutes and governmental agencies have little discretion to reject proposed investment projects.

Friendship Treaty remains in force pursuant to the Taiwan Relations Act, 22 U.S.C.A. § 3301. *See supra* note 115.

145. *See supra* note 115.

146. *See* 12 U.S.C.A. § 635 (West Supp. 1984)

147. *See* Republic of China Friendship Treaty, *supra* note 144, at art. III(3) (granting national treatment to associations to carry on business); Republic of Korea Friendship Treaty, *supra* note 144, at art. 7, para. 1 (granting national treatment to foreign associations to carry on business); U.S.-Thailand Treaty of Amity, *supra* note 128, at art. IV(1) (granting national treatment regarding establishment of enterprises).

148. Vertrag zwischen der Bundesrepublik Deutschland und der Republik Korea über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Feb. 4, 1964, Federal Republic of Germany-Republic of Korea, art. 1(2), 1966 Bundesgesetzblatt [BGB1] II 841 (Treaty Concerning the Promotion and Reciprocal Protection of Investments) (granting national treatment to foreign investors). The treaty also provides that investments will not be expropriated except for the public benefit and with compensation. *Id.* at art. 3(2).

149. Trade Agreement, Jan. 5, 1974, Japan-People's Republic of China, art. 1, 1002 U.N.T.S. 110 (entered into force June 22, 1974) (granting most-favored nation status regarding the import and export of goods).

150. Trade Agreement, April 3, 1978, European Economic Community-People's Republic of China, art. 2(1), *reprinted in* 17 I.L.M. 1459 (1978) (granting most-favored nation status regarding the import and export of goods).

In Thailand, the authorization process is less defined. Although the Board of Investment maintains a list of industries that are open to investment, it determines whether a particular enterprise should be approved on a case-by-case basis. The criteria for approval are fairly general, and do not provide much guidance to a potential investor. The authorization process in the PRC is even more vague. The criteria used for approval are not defined, and investors have only the PRC's broad statements of purpose as guidance.

The four counties have all adopted complicated incentive programs to attract foreign investment. Although differing somewhat in particulars, the programs all offer tax incentives, guarantees against nationalization, and a procedure for repatriation of profits and equity investment. Despite these similarities, the administration of the programs differs from country to country.

The lesser developed countries, Thailand and the PRC have not defined the criteria used to determine whether an enterprise is eligible for investment incentives. In Thailand, the BOI has established some guidelines, but they are fairly broad, and allow the BOI the flexibility to determine which enterprises will receive benefits and the extent of those benefits. In the PRC, the criteria also are not defined. The tax authorities and local governments have the discretion to grant exemptions and reductions in taxes. No indication is given as to how how such decisions are to be made. Thus, while the government retains a great deal of flexibility, it fails to give any guidance to a foreign investor. Without some sense of whether he will be eligible for benefits, an investor cannot adequately determine whether it is worthwhile to establish an enterprise in the country.

In the more developed countries, the ROC and the ROK, the eligibility criteria for incentives are clearly established. The program in the ROC is particularly well developed. The Categories and Criteria of Productive Enterprises Eligible for Encouragement provide potential investors with a good indication of which industries are eligible for benefits and the extent of those benefits. In the ROK, the investor also is given an indication of the kinds of enterprises that will be eligible for benefits. The benefits are determined at the same time approval is granted, enabling an investor to determine his liabilities prior to the actual establishment of the enterprise.

Since foreign investors know which industries the governments in the more developed countries are most interested in developing, they are able to plan their activities to take advantage of the offered incentives. Foreign investors know with some certainty how they will be treated in the ROC and the ROK, and therefore, are more likely to invest in those countries.

The lesser developed countries badly need investment capital. In their attempt to retain flexibility, and to determine benefits on a case-by-case basis, they fail to offer the definite benefits that will attract foreign investment. Thailand and the PRC have retained flexibility in their processes for the authorization and encouragement of foreign investment. The cost of retaining that flexibility, however, is greater than they might think.