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Third Edition



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# **SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA**





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# **SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA**

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PREPARED BY MERITAS LAWYERS IN ASIA

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## SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the third revised edition of *Successful Strategies for Doing Business in Asia* which was first published in 2006. Prepared by lawyers from 12 leading Asian Meritas firms, this book offers practical insights and targets foreign investors and business people who want to pursue opportunities throughout Asia. Each chapter contains general information and guidelines, not legal advice. Do not rely on these materials without first consulting with legal advisors who are familiar with your particular areas of interest.

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The following currency notations are used throughout this book.

RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Dong
MYR	Malaysian Ringgit		

*Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.*

Five years have passed since the worst financial crisis in 70 years erupted. Today many countries and economic regions are still suffering, but there is one bright spot – Asia. Home to 3.8 billion people, Asia continues to take a leading role in driving the world economy back to healthier times. China rebounded quickly to high single-figure annual growth following the 2008-09 downturn, and in 2013-14 is expected to have a rise of 8% in GDP. India too is exhibiting signs of long-term growth potential, as are Singapore, Malaysia and others in Asia.

For 30 years I have worked closely with multinational companies as they explore investment and business opportunities throughout Asia. I have discovered that countries in the Asian region can at the same time appear similar yet be remarkably different. While specific legal systems and local government regulations will vary, there are universal issues in every country that foreign investors will face. This book was designed to provide practical and useful insights into the 12 most common questions that potential investors in Asia need to address:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business in a particular country without a local partner? If so, what corporate structure is most commonly used by foreign investors?
3. How do governments regulate commercial joint ventures between foreign investors and local companies?
4. What laws influence the relationship between local agents and distributors and foreign companies?
5. How does the government regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the country's intellectual property laws? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?

10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution for foreign investors?
11. What advice can you offer for how best to negotiate and conduct business in your country?
12. What other practical lessons can you share with those who want to do business in your country?

Leading law firms within the Meritas alliance in Asia have contributed to this book. These firms are comprised of local lawyers who possess extensive experience in advising international clients on how best to conduct business in their respective countries. The law firms were presented with these “Twelve Questions” and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, the book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are patiently waiting for Asia to become more predictable before pursuing business or investment opportunities, do not wait too long. Most non-Asian multinationals are already there. Those who delay will find themselves missing out on the greatest economic expansion in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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## 1. What role does the government of Taiwan play in approving and regulating foreign direct investment?

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Three types of Taiwan government approval requirements may be relevant to direct foreign investment in Taiwan:<sup>1</sup>

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

### FOREIGN INVESTMENT APPROVAL

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

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

Foreign direct investment in non-publicly listed companies in Taiwan requires an approval from the Investment Commission of the Ministry of Economic Affairs (MOEA), under the Statute for Investment by Foreign Nationals. Such approval is commonly referred to as an FIA. For capital investment in nonregulated industries of less than approximately USD40 million, FIA approval is *pro forma*, available within three to five days, and is given at a staff level without necessitating a formal committee meeting. Subsequent sale of shares acquired under the FIA regime requires a future *pro forma* FIA approval.

For investments in excess of USD40 million, or investments in regulated industries, (e.g., banks, insurance companies, telecommunications, etc.) and in connection with other circumstances such as investments involving or acquiring 10% or more of the shares of a publicly issued company,

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<sup>1</sup> For purposes of this chapter it shall be noted that Taiwan has special politically based rules regulating investment from Mainland China (which term, for purposes of this chapter, does not include Hong Kong and Macau). Thus, all references to foreign investment in this chapter shall be read to exclude Mainland China but to include Hong Kong and Macau.

approval via a formal committee meeting (the committee normally meets monthly) and required consultation with other relevant government bodies is required and can take up to several months.

Based on FIA approval, the investor is permitted to freely convert foreign currency to New Taiwan Dollars (TWD) for purposes of making the initial investment, and to convert New Taiwan Dollar proceeds from dividends and gains on sales of shares in such companies.

### **INDUSTRY APPROVAL**

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

### **COMPETITION APPROVAL**

Competition approvals are discussed in Question 5.<sup>2</sup>

### **OTHERS**

Intellectual property licenses entered into in connection with investments in Taiwan (e.g., where a foreign investor, in addition to the investment, licenses technology to the branch or subsidiary in exchange for royalty payments) do not require special approval.

### **PROCEDURES**

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

- 1) Name reservation
- 2) Corporate registration and capital injection
- 3) Obtaining the industry license (if any)

Steps (1) through (3) will normally require a total of four to six weeks. The time required to obtain the industry license (if required) will vary by industry.

<sup>2</sup> Portfolio investments in Taiwan securities are made through a separate structure from the FIA structure whereby foreign institutional investors (so called FINI) or individuals (so called FIDI) register with the Taiwan Stock Exchange and then may trade such securities without FIA approval. Direct investment in publicly listed companies, whether by negotiated purchase of a block of shares or public tender, may fall under both the FINI and FIA regimes.

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## REGULATION

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

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### 2. Can foreign investors conduct business in Taiwan without a local partner? If so, what corporate structure is most commonly used by foreign investors?

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

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

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### 3. How does the government of Taiwan regulate commercial joint ventures between foreign investors and local companies?

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



#### 4. What laws influence the relationship between local agents and distributors and foreign companies?

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

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#### 5. How does the government of Taiwan regulate proposed merger and acquisition activities by foreign investors? Are there any prohibited areas for foreign investors in the economy (e.g., natural resources, telecommunications or energy)?

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There are four government control mechanisms for mergers and acquisitions by foreign investors:

- Specific restrictions/limitations on foreign ownership of certain key sectors
- Ownership concentration restrictions without regard to nationality
- The FIA approval process described in Question 1
- The Fair Trade Law

#### **FOREIGN OWNERSHIP RESTRICTIONS<sup>3</sup>**

The industries in which foreign ownership is restricted are:

- General aviation and civil air transport (less than 50% total foreign ownership, and not more than 25% individual foreign ownership)

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<sup>3</sup> However, see footnote 1 and Question 12.

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

## **CONCENTRATION RESTRICTIONS**

The primary example of ownership concentration restrictions is the banking industry. Without regard to nationality, except for shares owned by financial institution holding companies, the government and with the bank regulator approved in connection with managing financially troubled institutions, the amount of a bank's shares held by the same person or the same related party should not exceed 25% of the total amount of the bank's shares issued with voting rights.

## **FIA APPROVAL**

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

## COMPETITION APPROVAL

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

- Either party's current share of the relevant Taiwan market exceeds 25%
- The post-combination combined Taiwan market share exceeds 33%
- The total Taiwan-related revenue of one party to the combination for the prior fiscal year exceeds TWD1 billion (approximately USD34 million) and such revenue of the other party exceeds TWD10 billion (approximately USD340 million)<sup>4</sup>

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

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

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

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<sup>4</sup> This threshold is TWD1 billion and TWD20 billion in the case of banks or other financial institutions.

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

- Rules applicable to executives and professionals
- Rules applicable to “blue collar workers,” for which there are industry-specific limits and quotas

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

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

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## **7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?**

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Taiwan employs foreign exchange controls, which regulate both inbound and outbound conversions between New Taiwan Dollars and foreign currency.<sup>5</sup> Such controls apply equally to both domestic companies and branches or subsidiaries of foreign companies. For purposes of currency controls, Taiwan divides conversions into two categories: trade-related (i.e., the purchase price for sale of goods and services) conversions and non-trade-related (e.g., financial payments) conversions. Trade-related conversions are not restricted. Under the current foreign exchange control regulations (the FX Regulations), each Taiwan resident (whether an individual or an entity) is permitted to purchase foreign currencies with New Taiwan Dollars (TWD) and to remit the same out of Taiwan up to an aggregate of USD5 million (for individuals) and up to USD50 million (for corporate entities) per year, for “non-trade” purposes, without being required to obtain approval from the Central Bank of the Republic of China (Taiwan) (Central Bank) (the Conversion Allowance). Non-trade conversions (except where other laws or regulations specifically permit

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<sup>5</sup> Additional or different rules may apply when the relevant currency is Renminbi. Thus, references to foreign currency in this chapter should not necessarily be read as including Renminbi.

conversions) in excess of the Conversion Allowance require case-by-case approval of the Central Bank, which approvals may or may not be available depending on the circumstances.

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

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

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

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

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

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<sup>6</sup> There is no tax treaty with the United States. There are tax treaties with Australia, Belgium, Denmark, France, Gambia, Germany, Hungary, India, Indonesia, Israel, Macedonia, Malaysia, the Netherlands, New Zealand, Paraguay, Senegal, Singapore, Slovakia, South Africa, Swaziland, Sweden, Switzerland, Thailand, the United Kingdom, and Vietnam.

Expatriates employed by the branch or subsidiary are also subject to personal income tax. Expatriates employed in Taiwan for fewer than 183 days in the relevant tax year are taxed at a flat rate of 20% on gross compensation paid (i.e., without exclusions or deductions). Expatriates employed in Taiwan for 183 days or more in the relevant tax year are taxed on net income (i.e., gross income less permitted exclusions and deductions) at graduated rates up to 40%.

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

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## **9. How comprehensive are the intellectual property laws of Taiwan? Do local courts and tribunals enforce IP laws uniformly regardless of the nationality of the parties?**

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

Local courts generally enforce such rights, although concerns remain regarding look-alike labels and/or trademarks, counterfeit pharmaceuticals and agro-chemicals, internet-based music, and movie and software piracy, and it has been suggested by some observers that Taiwan's judiciary has failed to impose sufficiently severe punishments to deter such activities.

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## **10. If a commercial dispute arises, do local courts or international arbitration offer a more beneficial forum for dispute resolution to foreign investors?**

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

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

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

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

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## **12. What other practical lessons can you share with those who want to do business in Taiwan?**

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The most significant recent change in Taiwan's regulation of cross-border business is the opening up of dealings between Taiwan and Mainland China,<sup>7</sup> most notably the opening of various industries in Taiwan to investment from Mainland China. It is important to note, however, that such investments are separately regulated under a parallel (but distinct) regime intended to create regulatory transparency (i.e., prevent investment from Mainland China being disguised as foreign investment) and allow monitoring and control of such investments separate from other foreign investments. In this regard, any entity incorporated in Mainland China that is controlled or more than 30% owned by Mainland China interests is treated as an investor from Mainland China and not as a foreign investor.

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<sup>7</sup> See footnote 1.

Foreign invested entities incorporated in Mainland China create unique issues, as such entities can sometimes fall outside both the Taiwan regulations governing foreign investment and the Taiwan regulations governing investment from Mainland China.

Thus, it is generally not advisable for foreign investors to use their Mainland China subsidiaries or joint ventures as a conduit for investing in Taiwan.



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