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A brave new world

Guest editor Garrett Hayes of Paul Hastings explores the key legal and practical considerations when doing deals in today’s changing FDI landscape

The OECD defines foreign direct investing (FDI) as ‘cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the direct investor on the management of the enterprise. Ownership of at least 10% of the voting power, representing the influence by the investor, is the basic criterion used.

Although stalled somewhat by the effects of the global economic crisis, the globalisation of the world economy continues against a backdrop of a world which, thanks in large part to the internet and other modern technology, is more connected than ever and presents real opportunities for dynamic businesses to expand internationally and exploit new markets.

Many believe that closer international economic integration is needed to improve the resilience of the global economy against future crises, support the global economic recovery by returning developed countries to growth, and drive the sustainable development of emerging economies.

Sovereign wealth funds are likely to become increasingly important FDI participants in coming years

The post-crisis recovery in FDI began in 2010 and continued into 2011, at which point FDI inflows were valued at $1.65 trillion. However, while GDP, trade and employment have all since continued to improve globally, the recovery of FDI stumbled last year, with inflows decreasing by 18% to $1.35 trillion. At the end of 2013, the outlook remains challenging and FDI inflows are forecast to rise only moderately over the next two years.

Latest trends

However, the global trend hides several major recent developments.

Developing economies have, for the first time ever, received more FDI than developed countries. In 2012, nine of the top 20 jurisdictions for inward FDI were developing countries, with inflows to developing Asia and Latin America at historically high levels. Overall, developing countries accounted for 52% of inward FDI. Developing countries also generated almost one third of global FDI outflows and the FDI outflows from the so-called BRICS countries [Brazil, Russia, India, China and South Africa] accounted for over 10% of total FDI in 2012.

FDI into and out of developed countries has plummeted. After a 32% decrease in FDI inflows between 2011 and 2012, the level of FDI into developed economies is now at levels last seen in the early 2000s. Although the UK and Japan witnessed increases in FDI inflows in 2012, year-on-year FDI into Europe and the US declined sharply during this period. Outflows from developed countries also declined significantly, and returned to 2009 levels.

State-owned enterprises and sovereign wealth funds are playing an increasingly important role in FDI. FDI flows associated with state-owned enterprises (SOEs) in 2012 totalled $145 billion – in excess of 10% of the total FDI during the year, with significant activity by SOEs from developing countries who are seeking to acquire strategic assets such as technology and know-how. FDI by sovereign wealth funds doubled between 2011 and 2012, and the cumulative FDI stock now held by sovereign wealth funds (SWFs) is estimated to exceed $125 billion with a particular focus on utilities, real estate, finance and infrastructure. The combined assets of SWFs globally are estimated to be $5.3 trillion and so they are likely to become increasingly important FDI participants in coming years.
Investment policies and legislation

Governments around the world are focused on fostering long-term growth, increasing employment, and improving the prosperity of their respective countries. With shifting wealth, increasing global competition, an ageing population in many countries (as life expectancy lengthens thanks to continued improvements in medical science), and intense competition for scarce natural resources, achieving these aims is increasingly challenging and pursuing FDI is to seem as an important tool for working towards these aims.

The attractiveness of a jurisdiction for FDI depends on a wide range of factors, including the size of the market, the level of integration with its neighbours, stability and certainty – both in the political and legal systems – and the availability of a workforce with relevant skills, education and experience. However, rules governing FDI, an attractive taxation regime, and incentives to invest and create employment in a jurisdiction are also critical to a jurisdiction’s attractiveness, and so governments and regulators have an important part to play in creating conditions which attract FDI to their jurisdiction and which create an environment in which the investment can succeed, thereby benefiting the investor and the host country.

Except in the most closed countries, public statements by governments are generally supportive of FDI. Indeed, the results of this FDI Report show that governments across the board ‘welcome’, ‘are fully/strongly supportive of’, and ‘are receptive to’ FDI, and are ‘even more open to foreign capital’.

However, this public support is not necessarily underpinned by the facts. First, in 2000, 94% of new laws and regulations affecting FDI globally related to the liberalisation of FDI regimes, and only six percent imposed additional restrictions on FDI. By last year, the percentage of new laws and regulations imposing additional restrictions on FDI had increased to 25%.

Second, the number of international investment agreements being concluded has steadily decreased from a rate of four per week in the mid-1990s to around one per week by 2011, and barely one per fortnight in 2012.

Third, in the last two years, more than 2,000 announced cross-border M&A transactions, with a total gross value of more than $1.8 trillion, were withdrawn. In most cases, the transaction did not proceed because the parties could not agree commercial terms. But proposed transactions were also withdrawn for regulatory reasons (common regulations that thwart the transferability of companies include foreign ownership ceilings and national benefit tests) and political reasons (the industry in which this is most likely to be cited as the reason that the transaction did not take place is mining and extraction).

These factors give rise to a concern that, despite all the supportive words encouraging FDI, and persistent calls to deregulate and relax rules restricting FDI, in difficult times the risk of governments taking (often populist) protectionist measures increases.

The OECD compiles an FDI Regulatory Restrictiveness Index which gauges the restrictiveness of a country’s FDI rules through four types of restrictions: foreign equity limitations; screening or approval mechanisms; restrictions on key foreign employment; and operational restrictions. The Index marks the restrictiveness on a scale of 0 (least restrictive) to 1 (most restrictive), with an average of 0.106. Nine of the countries featured in this Report are also included in the FDI Regulatory Restrictiveness Index. Their respective Index scores are:

- Ireland – 0.043
- UK – 0.061
- Poland – 0.072
- Brazil – 0.086
- US – 0.089
- Australia – 0.128
- Canada – 0.163
- Russia – 0.180
- China – 0.407

It is interesting to bear these scores in mind while reviewing the results of this FDI Report, to compare whether the key legal and practical considerations highlighted in our survey correlate to the outcome of the OECD survey.

In the last two years more than 2,000 announced cross-border M&A transactions, with a total gross value of more than $1.8 trillion, were withdrawn

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Garrett Hayes is a partner in the Corporate practice of the London office of Paul Hastings. Hayes’ experience covers a broad range of M&A, private equity, joint ventures and corporate advisory work across a range of sectors. Recent cross-border transactions include advising Shuanghui International Holdings on its $7.1 billion acquisition of Smithfield Foods – one of the most closely watched transactions of 2013 and the largest ever acquisition of a US company by a Chinese company; advising Corsair Communications on its acquisition of Simple Audio Limited; and advising Samsung Electronics on its $310 million acquisition of the wireless connectivity business of CSR and associated $35 million strategic investment into CSR.
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It’s been a time of change for the EU’s foreign direct investment (FDI) framework, with a number of landmark free trade agreements (FTA) being agreed or in the pipeline. Rupert Schlegelmilch, a director in the European Commission’s Directorate-General for Trade, speaks with IFLR on how FTAs can help the region’s return to growth, the role of financial services regulation in EU-US trade talks, and the today’s barriers to outbound investment into China.

In December 2009, FDI was brought under the EU’s exclusive jurisdiction. How has this improved the inbound FDI process and prospects for member states and the EU as a whole?

First of all, I have to point out that we are at a very early stage in incorporating investment protection into our FTAs. It is certainly too early to be able to quantify the positive impact of our new competence. But I think it is clear that by creating a level playing field – one set of rules for the entire EU, instead of many bilateral agreements with different rules – we improve the existing investment framework and thus the prospects to increase investment flows.

What are the European Commission’s top priorities when negotiating FTAs?

Our priorities are very straightforward: we negotiate FTAs to improve and facilitate the way European companies can do business with the rest of the world. By opening markets with our key partners, we increase the opportunities for Europeans to trade, thereby contributing to our overall objective of contributing to the creation of economic growth and jobs.

You’ve described the recently completed EU-Singapore FTA as one of the most comprehensive to-date. What makes this FTA stand out, and could it act as a template for future agreements?

Well, it is very comprehensive and advanced in nature. We have generally offered each other the best treatment made available to other comparable trading partners, but we have then gone beyond that in a number of areas of specific interest to both sides.

For example, we have offered each other much better commitments on services and government procurement than under respective World Trade Organisation (WTO) commitments, and Singapore has offered European service suppliers better treatment than that offered to other countries bilaterally in many sectors. We have also aimed to create new opportunities for FDIs and ensure their high level of protection. At the same time we removed and prevented many technical barriers to trade, such as duplicative testing requirements and agreed on a high level of protection and enforcement of intellectual property rights (IPR). And we have included a chapter dedicated to stimulating green growth and sustainable development.

These are the necessary elements for the kind of deep and comprehensive FTAs we are interested in. This does not mean we will simply copy-and-paste what we have done with Singapore to other negotiations; the content, ambition and outcome always depend on our partners. But, alongside our agreement with Korea, the EU-Singapore FTA has the potential to serve as a reference point for what we would like to achieve in other FTAs.
What role do you see FTAs playing in increasing inbound FDI and assisting Europe’s return to growth?

I expect our FTAs to play a very positive role in bringing Europe back on track. First of all, EU agreements cover both market access and investment protection, and empirical evidence shows that such a combination boosts investment flows.

Second, EU agreements also address issues such as IPR, public procurement and trade in services that are important to investors. This enables our agreements to reflect the complexity of global value-added chains.

Third, EU agreements will bring clarity to controversial issues, such as indirect expropriation or transparency in dispute settlement proceedings, leading to greater legal certainty for investors.

We are determined to use our agreements to ensure investment plays its part in Europe’s economic recovery

Finally, the bilateral investment treaties in place today between member states and various countries will be replaced by single, comprehensive agreements at EU level. In addition to maintaining a high level of protection for investors, this creates a level playing field between them.

Overall, these elements will make the EU even more attractive for investors. And every investment in the EU can help our economy, for example, by creating jobs or expanding production capabilities. We are determined to use our agreements to ensure investment plays its part in Europe’s economic recovery and return to growth.

The prospective Transatlantic Trade and Investment Partnership has been described as more than a traditional trade agreement, in that it aims to make the EU and US regulatory systems more compatible. But does mutual recognition run the risk of lowering quality of goods and services offered in the EU?

Absolutely not. We should not confuse our intention to enhance regulatory compatibility across the Atlantic, which in some cases could be achieved through mutual recognition, with a race to the bottom. Both parties are committed to maintaining their high levels of protection and will continue to take measures necessary to achieve legitimate public policy objectives and guarantee the safety of consumers.

What we want to do is find out where we diverge unnecessarily, since the EU and US often choose different approaches to achieve the same goal. And where it makes sense to do so, we want to make regulations more compatible or recognise that differing regulations have the same effect. We can also look at ways to make our sophisticated regulatory systems work more smoothly together. The best approach is to prevent new barriers rather than fixing them later on. In industrial sectors such as automobiles, chemical, pharmaceutical and medical devices, there is clear scope for regulatory convergence.

Are you able to share the key pressure points in the EU-US TTIP negotiations?

It is clear that both the EU and US have a lot to gain from liberalising trade and investment. Both sides have entered the TTIP discussions with a high level of ambition and commitment to the negotiations. And we both see this agreement as having the potential to deliver something transformative for our economies in terms of market access, regulatory compatibility and rulemaking. As we already have very low tariff arrangements we expect that the most significant gains would be obtained by tackling regulatory, so-called behind the border issues. A key issue for the EU remains the inclusion of financial services regulatory matters in these discussions – an area where the US is still hesitating. But the EU and US represent around 70% of the world’s financial services market, and we have a unique chance to reduce the regulatory barriers that keep us from fully exploiting this comparative advantage.

Although regulatory issues will clearly be the main focus of the EU in these negotiations, improved market access for public procurement, services and investments are also high on our list of priorities. Finally, we also intend to work together on developing global rules and standards that will shape the future business environment of the world in the years to come.

Talk surrounding a prospective EU-China investment agreement continues. In your view, what are the key ingredients for such an agreement to encourage EU investment in China, which at present is relatively low?

It is true that today’s level of bilateral investment is not as high as could be expected from two of the most important economic blocs on the planet. But this also means that there is a lot of untapped potential, which we want to draw upon with our investment agreement.

For the agreement to be successful, we will first need to reduce barriers to investing in China and address market access issues such as mandatory joint ventures, which are inhibiting investment flows. But also, to make investing in China a more attractive option for Europeans, we must improve the protection of European investments and legal certainty for our investors in China. We are looking forward to starting talks on an agreement soon, as the Foreign Affairs Council gave its green light on October 18 for the European Commission to begin negotiations.

About the author

Rupert Schlegelmilch studied law and political science in Freiburg im Breisgau and Berlin, Germany. After a few years with the German Foreign Ministry, he joined the Directorate-General for External Relations of the European Commission in Brussels in 1993 as an OECD (investment) and later WTO negotiator. From 1998 to 2003 Schlegelmilch worked on WTO matters in the European Commission’s office in Geneva. He then worked extensively on trade and sustainable development, and managed DG Trade’s relations with Civil Society in Brussels. Between 2002 and 2006 Schlegelmilch was responsible for the EU’s bilateral trade relations with Greater China. This was followed by a period as head of the unit responsible for trade relations with the Americas (2006 – 2009) before taking up his assignment as head of the unit for trade relations with South Asia, Korea and Asian. From 1 April to 31 December 2011 he was the Director for Directorate E, responsible for public procurement and intellectual property, and bilateral trade relations with CIS countries, the Balkans, the candidate states and EFTA members. As of 1 January 2012, Schlegelmilch is the director for Directorate B, responsible for services and investment, intellectual property and public procurement.
investment promotion agencies (IPAs) play a vital role in attracting and supporting inbound investment. Executive director of the World Association of Investment Promotion Agencies (Waipa), Carlos Bronzatto, spoke with *IFLR* about how IPAs around the world are helping foreign entities navigate local regimes, fostering more accurate understandings of local risks, and encouraging a healthier global investment environment.

What are the key roles performed by IPAs, and how can investors and their advisers best avail themselves of these services?

You could say that there are four core functions performed by IPAs: facilitation of inward investment; country image and nation branding; advocacy and policy reform; and, perhaps the most core function together with facilitation, is investment promotion *per se*. In this sense, investment promotion means proactively seeking out the industries and activities abroad that match what the IPA’s country has to offer, and also match the country’s aspirations in terms of internal policy.

These four core functions also determine the activities of Waipa to support its membership worldwide. There are, for example, some IPAs that engage in policy reform and nation branding to only a limited extent. Most IPAs, however, engage in investment promotion in targeted ways, and all of them facilitate investment.

Regarding how investors can avail themselves of an IPA’s services, they can seek out the Agency’s assistance to facilitate their establishment in that country. It’s notable that IPAs provide pre-establishment and post-establishment facilitation, the latter often being referred to as after-care.

They also hold all sorts of information on different industries and national players, and what sorts of licences are needed for different investments. They can help guide investors through the red tape, and sometimes they can expedite certain investment processes. All in all, many are a type of one-stop-shop for foreign investors, although some of them obviously do that better than others.

In your view, which IPAs have set the benchmark for best practice in attracting and supporting inbound foreign investment?

I’d say those that have proactively sought to be more thoroughly informed of worldwide industry trends and firm-specific events held abroad, and followed the corporations they feel they must attract investment from. Also, those that have efficiently gathered information, based on which they have proactively reached out to prospective foreign investors. These IPAs tend to be the ones that are more successful.

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To what extent does IPA best practice change depending on the level of advancement of the country’s economic and legal frameworks?
The gap between IPA practices between ‘developing’ and ‘developed’ countries has narrowed significantly. You increasingly see middle-income countries in particular demonstrate very sophisticated ways of tackling the four functions that I mentioned earlier. The playing field has certainly leveled significantly.

Some have noted governments’ more interventionist approach in their FDI policies and participation in deal approvals. Have you also noticed this trend, and how do you see it impacting the work of IPAs?
FDI has moved to the top of the national agenda in many countries – from emerging to mature markets. This, in and by itself, implies more government involvement, and hence, this enhances and creates more challenges for the work of IPAs to be the interface between businesses and their governments.

This trend is really consistent with the gap being narrowed between mature and maturing markets, as it has moved up the agenda in many developed nations as well.

How important is a sector’s first inbound deal in opening the market to future investors?
It’s very important from the standpoint of testimonials, and a recent Waipa survey revealed that the core marketing strategy for most IPAs is based on testimonials. And a sector’s first inbound deal, depending on how important the incoming investment is, is a major endorsement, so to speak, of that country.

And depending on the sector, the first deal can also signal to other corporations what the government’s stance is on foreign investments in that area. This differs substantially, however, from sector to sector. Certain sectors such as defence are extremely sensitive even in mature markets. Natural resource sectors are also somewhat sensitive.

So the first deal in a sensitive sector is not, in itself, likely to open that sector to other foreign investors as compared to the first deal in a less sensitive sector.

Last year marked the first time FDI into emerging markets exceeded volumes into developed markets. Which countries, and sectors, do you see as the markets to watch?
Again, this is consistent with my previous comments regarding how the gaps between markets are narrowing. In addition to the statistics you mention, it seems that this year’s outflows from emerging markets have also exceeded the volumes the outflows from developed markets. So another barrier has been broken regarding dealflow.

I think that naturally, the BRIC [Brazil, Russia, India and China] countries and other emerging nations such as Turkey, Mexico, and Indonesia will increasingly be at the forefront of deal activity. But I expect, going forward, there will be a bit of a rebalancing regarding where inflows and outflows, which means there will be more competition as well as possibly a fairer distribution worldwide of long-term productive investment.

An example of this rebalancing is the incipient trend of some corporates in areas such as manufacturing choosing to re-localise back to their original mature markets as labour costs in some emerging nations rise.

What is your top piece of advice to investors considering a foreign investment in an emerging market?
They must remember that the international media does not always reflect the actual local conditions in emerging markets – these are often more positive than portrayed by the international business press.

Also, the perception of risk, after 2008, has substantially changed. So rather than looking at ratings investors should do their own diligence, engage with local governments, and speak to longer-established investors to help them make their own assessments of return on investment based on the experience of those that are already operating in the country.

What are Waipa’s priorities for the coming 12 months?
Waipa is engaging a new strategic plan, pursuant to which our research capacity will expand by further building the intelligence and research unit. We will also enhance our advocacy activities regarding the role of IPAs before their own governments, and try to actually guide governments and businesses into looking at the right investment metrics and signals in an unbiased way.
In the space of a decade, Africa transformed itself from a region plagued by political risks and negative growth, to the world’s most promising investment destination. Integration of 19 of its countries to form the Common Market for Eastern and Southern Africa – or COMESA – have contributed to the region’s improved investment framework and ease of doing business.

But Heba Salama, director of the COMESA Regional Investment Agency (RIA), explains that for foreign investors to capitalise on the continent’s potential they must overcome some common misconceptions, compete with growing intra-Africa dealflow, and most importantly, act quickly.

Which countries and sectors show the greatest prospects regarding inbound FDI over the coming years?

Investment opportunities in all sectors abound throughout the COMESA region, at both national and regional levels. While COMESA regional projects are more concerned with the infrastructure needed to facilitate investment and trade across various member states, national projects can be found in sectors such as energy, mining, ICT (information communications technology), real estate, agriculture and agro-processing industries, fisheries, and livestock, tourism, manufacturing, logistics, hospitality, and trade.

What are the greatest impediments to FDI into the region today, and what is RIA and investment promotion agencies (IPA) doing to overcome these?

While some would argue that the infrastructure and institutional, legal and regulatory environment deficits are the greatest challenges to both investment and trade flows across the region, it is important to highlight that doing business in the COMESA region, and in Africa in general, is much easier than it used to be.

Just thirteen years ago, the Economist described Africa as ‘the hopeless continent’. In December 2011, the magazine’s cover headline was ‘Africa rising: the hopeful continent’, reflecting not just a change in reality but a complete change in perception.

COMESA member states’ IPAs, although different from one another, share the missions of promoting and facilitating investment, providing services to investors, and working as advocacy agents to improve the business and investment climates.

RIA’s main mission is to promote the COMESA region and member states as attractive investment destinations, and improve the business and investment climate, namely through capacity-building programmes targeting IPAs.

Over the past few years, which COMESA countries have made the greatest improvements to their regulatory frameworks, policies, business climate and IPA support mechanisms to attract FDI?

From what I have witnessed, most COMESA governments have been making bold political and economic reforms aimed at further liberalising their FDI regimes and improving their business and investment climates.
COMESA and other African countries consistently figure among the World Bank’s Most Improved in Doing Business Top 10 Lists. In fact, the Doing Business Report 2012 evaluated that up to 78% of African countries undertook meaningful governmental regulatory reform as a means of improving the business climate and encouraging investment.

Most COMESA governments have been making bold political and economic reforms aimed at further liberalising their FDI regimes

Further, according to the Financial Times’ African Countries of the Future, 10 COMESA member states are among the top 10 in 13 different classifications including best economic potential, best infrastructure, best business friendliness, best for quality of life, best FDI strategy, best human resources, best cost effectiveness, most inward FDI projects, internet users per capita, labour force, total tax rate per percentage of profit, and companies in high-tech manufacturing.

Statistics show that FDI into consumer industries in sub-Saharan Africa has risen over the last decade. Could these industries rival the traditional dominance of natural resource sectors? Indeed, Africa is now witnessing a commodity-boom that is driven by diversifying economies, a growing middle class of over 313 million consumers, and consumer spending breaking through the one trillion dollar mark. Investors in Africa are now increasingly market-seeking. That said, I do not believe we can speak of a sector dominating another. I prefer to refer to the diversification of African and COMESA economies. While opportunities in the natural resource sectors remain huge, new opportunities in all other sectors are emerging.

What common pitfalls and misconceptions do you see foreign investors encountering either when making an initial investment or operating locally? Many do not realise that times have changed in COMESA and Africa in general. Africa has seven out of the 10 fastest growing economies in the world, consumer spending projected to hit $1.4 trillion by 2020, and a market of 1 billion people which is surpassed only by China and India. The continent has 600 million mobile phone users – more than in Europe or America – and productivity growth of nearly three percent per year (compared to 2.3% in the US) reflecting an improvement in the skills of Africans.

Along the same lines, according to the UNCTAD World Investment Report global FDI fell by 18% last year compared to 2011 levels. Over the same period, African FDI increased by five percent and COMESA FDI by 66% (taking into account Egypt’s recovery in FDI levels). Also noteworthy are FDI inward stock 2012 figures, which grew by 424% compared to 2011 levels, and COMESA member states’ FDI outflows figures which grew by 225% for the same period.

At the same time, investors must realise that when operating in a new place, they have to understand the culture and adapt to it, and not the opposite. Investing in Africa is not like investing in South America, Europe or Asia – the way to do business is necessarily different. The rate of return on investment on the continent has averaged 29% since the 1990s, compared to only 10% in the EU. This is the bottom-line. Foreign investors must seize the chance and adapt, or others will move in. In fact, three of the top five fastest growing investors in the continent’s new projects are African, and intra-African investment has more than doubled. Many do not realise that African corporate giants are now the ones setting the pace for everyone else.

Apart from the general business culture, another common misconception is the perceived lack of guarantee mechanisms. Governments are keen to welcome investors and are putting in place the necessary measures, and investors have to do their homework and use these excellent mechanisms that are available in the region.

COMESA’s ultimate goal is to achieve a fully integrated economic community. What are the recently completed and next steps towards integration into a single market? Following the Preferential Trade Area, which traces its origins as far as the 1960s, the treaty establishing the Common Market for Eastern and Southern Africa was ratified in 1994, and the Free Trade Area, now comprising 15 of the 19 member states, commenced in 2000. Continuing on the road to regional integration, the COMESA Customs Union was launched in 2009, and a COMESA Common Market and Monetary Union have been established as future milestones.

Not investing in Africa at this time is like missing out on Japan and Germany in the 1950s and Southeast Asia in the ‘80s

Further, a Tripartite Free Trade Area is also being negotiated between COMESA, the Southern African Development Community (SADC) and the East African Community (EAC), bringing the total number of states to 26 and creating a market of close to 600 million inhabitants.

Today, how does a foreign investor in a COMESA country benefit from the region’s economic integration? COMESA is Africa’s largest regional economic community. Its most obvious benefit to investors is the fully functional free trade area offering duty-free access to 15 of its 19 member states, which are located on strategic world trade routes and in close proximity to global markets including Europe, the Gulf, Asia, and the rest of Africa. COMESA therefore provides a larger market space for businesses to operate in, where procedures and policies are being further simplified and harmonised.
Other advantages are the various institutions and schemes which support investor operations. I’ve already mentioned the African Trade Insurance Agency. Others include: the PTA Bank, a COMESA institution responsible for providing a large array of trade financing facilities to businesses operating in the region; ZEP-RE, another COMESA institution charged with the task of promoting trade, development and integration within the region through the trade of insurance and reinsurance business; and the COMESA Court of Justice, the judicial organ of COMESA which has jurisdiction to adjudicate upon all matters pursuant to the COMESA Treaty.

Another is the COMESA Clearing House which allows businesses to invoice their exports in national currencies. The region’s central banks, in turn, offset these transactions on a daily basis through the Clearing House and to settle net debtor balances in hard currencies every two months.

If you could offer one piece of advice to foreign investors looking at COMESA, what would it be? Many have already said it: not investing in Africa at this time is like missing out on Japan and Germany in the 1950s and Southeast Asia in the ’80s. Do not wait, as you will be left behind.

What are COMESA RIA’s top priorities for the coming 12 months to support FDI into the region? To continue working on promoting the COMESA region as an attractive investment destination and in supporting member states’ efforts to do the same. As such, we are keen to continue playing our role as an information hub for investors and other stakeholders, organising promotional events, and working with IPAs.

About the contributor
Heba Salama is an expert on business and investment promotion and cooperation, with a specialised focus on African countries and regional economic communities. With over 20 years experience working in the region, she launched and now heads the COMESA Regional Investment Agency’s operations. Her role sees her promote the COMESA region as a single market and as an attractive investment destination, and she manages initiatives aiming to further improve the business and investment climates of COMESA member states.

Salama has provided leadership for various initiatives and promoted increased cooperation in the field of investment promotion and capacity building for investment promotion agencies in cooperation with various development partners. In 2012 she was appointed as the Trade and Investment Representative of the Republic of Seychelles in Egypt and is a steering committee member of the Africa Investment Promotion Agencies Network. She has spent most of her life in Zambia where she set-up, managed and owned various businesses.
The Transatlantic Trade and Investment Partnership (TTIP) negotiations were launched in mid-2013 amid great fanfare and optimism that the US and EU could reach the largest free trade agreement (FTA) in history. If concluded, the agreement would replace the North American Free Trade Agreement (Nafta) as the world’s largest free trade area, with a combined GDP of over $30 trillion, or more than a third of global economic output. The combination would be even more significant with respect to investment, where each side accounts for over half of the foreign direct investment in the other.

In the ensuing months since the talks were launched, the parties have begun work. Although the first substantive negotiating round was postponed by the shutdown of the US government in early October, most observers continue to express optimism that a comprehensive deal can be reached within the next two years.

It may not be immediately apparent what the US and EU stand to gain from a free trade agreement. The two sides already have the most open trade and investment regimes in the world, and the level of trade and investment between them is already significant.

But a successful agreement could have a tremendous impact on transatlantic investment, by further liberalising potential regulatory barriers, such as conditions for initial investment, and disciplining government measures that diminish the value of an investment. An agreement could also incorporate an investor-state dispute settlement mechanism that would uniformly provide legal protections for investments within the bloc, in contrast to the patchwork of protections that exist today. Thus, there are strong incentives for the US and the EU to reach a comprehensive investment agreement.

As the TTIP negotiations get underway, it is useful to review the existing status of US and EU policies regarding foreign investment. As discussed below, US and EU investment policies overlap in many critical respects, which suggests that an investment agreement acceptable to both sides is within reach. An important unknown at this time is the extent to which the EU’s recently concluded Comprehensive Economic and Trade Agreement (Ceta) with Canada will impact negotiations with the US.

US trade policy has long included investment provisions in FTAs, recognising the strong relationship between trade, investment, and economic growth. The TTIP negotiation’s inclusion of investment provisions within its mandate is based on a long line of precedent, beginning with Nafta in 1994. Since then, the US has included investment chapters in all of its FTAs.

The US has bilateral investment treaties, or BITs, with only a few EU member states, mainly countries in Eastern Europe that concluded BITs with the US before joining the EU. An investment chapter in the TTIP would provide US investors with uniform, BIT-like protections throughout the EU, and it would likewise provide those same protections in the US to investors from all 28 EU member states.
On the European side, EU member states are party to approximately 1,200 BITs with countries throughout the world. As a result, EU countries have significant experience with investment treaties. But the EU’s experience is not a collective experience, because the EU did not have the authority to negotiate investment rules on behalf of its member states until conclusion of the Lisbon Treaty in 2009. Thus, the Ceta being negotiated between the EU and Canada, which was originally limited to trade, and which was later expanded to include investment, is the first EU-wide effort to conclude a comprehensive investment treaty. As a result, the Ceta is likely to be an important precedent for the EU’s negotiations with the US.

Since it negotiated Nafisa, the US has changed its model BIT twice, in 2004 and 2012. The 2004 changes were motivated by the concern that investment protections in Nafisa had been drafted too broadly, and that foreign investors might receive greater protections than US investors. Accordingly, the 2004 model BIT narrowed the protections afforded to foreign investors. The US business community opposed changes that would weaken investor protections in the US, because it was simultaneously advocating increased investor protections in foreign countries.

A successful agreement could have a tremendous impact on transatlantic investment

Shortly after President Obama took office in 2009, the new Administration initiated a review of the US model BIT to ensure that it was consistent with the public interest and the Administration’s overall economic agenda. The Administration sought and received extensive input from Congress, the business community, labour groups, environmental and other non-governmental organisations, and academics. The Administration released a new model BIT in 2012. It retains language from the 2004 model BIT, but it also made changes to improve protections for American firms, promote transparency, and strengthen the protection of labour rights and the environment. The 2012 model BIT reflects the US position on investment treaties entering negotiation with the EU.

The likely outlines of the investment negotiations between the US and EU are foreshadowed in the Statement of the European Union and the United States on Shared Principles for International Investment, which the parties announced on April 10 2012. The Shared Principles articulate measures that ‘governments can fully implement . . . while still preserving the authority to adopt and maintain the measures necessary to regulate in the public interest to pursue certain public policies’.

The Shared Principles are:

• open and non-discriminatory investment climates;
• a level playing field;
• strong protection for investors and investments;
• fair and binding dispute settlement;
• robust transparency and public participation rules;
• responsible business conduct;
• narrowly tailored reviews of national security considerations.

Examination of the Shared Principles reveals a strong correlation with the US 2012 model BIT. Moreover, the EU appears to have incorporated many of these general principles in the investment provisions of the Ceta. On October 18 2013, Canada and the EU announced the conclusion of the Ceta negotiations and the achievement of an agreement in principle. Although the text of the Ceta will not be finalised for several months, a negotiating draft of the investment chapter and other internal documents have been leaked to the public and provide some insight on the direction of the negotiations and the EU’s negotiating positions.

In previewing some of the likely issues that may emerge during the TTIP negotiations, the Shared Principles provide a useful framework for comparing approaches taken in the US model BIT and the Ceta, to the extent that such positions are known or ascertainable through leaked texts and published reports.

Open and non-discriminatory investment climates

The principle of non-discrimination, including during the pre-establishment phase, is a hallmark of the US model BIT. A leaked Ceta negotiating draft suggests that Canada and the EU have agreed to provide national and most-favoured-nation treatment as well as pre-establishment commitments to investors. A leaked memo from the EU side, however, reportedly indicates that pre-establishment commitments will not be subject to investor-state dispute settlement under the Ceta. The EU’s negotiating mandate for TTIP is consistent with this position. Thus, the US appears to be departing from the Shared Principles and adopting a position that is inconsistent with the US model BIT. It has also been reported that the EU has agreed in the Ceta not to subject commitments nor to impose performance requirements such as local content rules to investor-state dispute settlement. This, too, would be in conflict with the Shared Principles and the US model BIT.

Subjecting pre-establishment commitments to dispute settlement is a key issue for the US. The US envisions future investment negotiations with China and India, and it does not want to create a precedent that would make agreements with those countries unenforceable in certain respects. Similarly, exempting commitments not to impose performance requirements from dispute settlement would be very difficult for the US to accept. There is speculation among investment experts that Canada’s apparent concessions to the EU on these points is unlikely to affect the US negotiating position in TTIP, but it certainly appears to be a key issue in the upcoming negotiations.

A level playing field

The US 2012 model BIT contains provisions specifying that non-discrimination obligations apply to state-owned enterprises (SOEs), which often have special privileges in a national economy, such as preferential government financing or privileges that are not available to foreign investors. The Shared Principles similarly emphasise that SOEs and private enterprises must be subject to the same regulations and compete under the same conditions. Although it is unclear whether the Ceta will address SOEs specifically, early Canadian commentary on the agreement indicates concern that the agreement will interfere with the function of Crown corporations in favour of private interests. Although Canada may not like strict disciplines on favouritism to SOEs, the US and the EU appear to be aligned in this regard.

Strong protection for investors and investments

The US model BIT provides for clear limits on either direct or indirect expropriation but nonetheless requires prompt, adequate, and effective compensation when actual expropriation takes place. The Shared Principles also include this protection. According to the leaked Ceta text, the EU and Canada have also taken an approach that is in sync with the US model BIT with respect to limiting the types of government measures that can be considered indirect expropriation, and therefore actionable and remediable. The Ceta reportedly states that measures designed to protect legitimate public welfare objectives that are applied in a non-discriminatory way do not constitute expropriation. The US model BIT contains similar language in Article 6. Thus, in the TTIP negotiations, it appears that the US and EU will begin from a position of basic agreement.

Fair and binding dispute settlement

The availability of investor-state arbitration to settle investment disputes is a hallmark of US BITs and FTAs. Article 29 of the 2012 model BIT contains additional measures intended to increase the transparency of the dispute set-
The inclusion of an investor-state arbitration clause in an investment agreement between developed countries can be controversial. Australia, for example, insisted that its FTA with the US not include such a provision. This has led to debate over the pros and cons of investor-state arbitration as a means of settling disputes under investment treaties. The inclusion of an investor-state arbitration clause in the TTIP investment agreement, therefore, may be more controversial than the Shared Principles would suggest, given the possibility that certain European countries may not be comfortable with binding dispute settlement.

Robust transparency and public participation rules

As noted, the US and the EU generally appear to be on the same page regarding the desirability of transparency in dispute settlement. Despite the platitudes, however, the extent to which each side actually will incorporate notions of transparency into other aspects of investment policy, such as permitting public involvement in the development of domestic laws implementing the investment agreement or otherwise relating to investment, remains to be seen.

Responsible business conduct

The US and the EU agreed that governments “should urge that multinational enterprises operate in a socially responsible manner”. Thus, they agreed to promote adherence to the OECD Guidelines for Multinational Enterprises. Such a provision likely would not be controversial in the TTIP investment negotiations.

Narrowly tailored reviews of national security considerations

The Shared Principles state that review of the national security implications of foreign investments “should focus exclusively on genuine national security risks”. The US has an established practice for reviewing investments that implicate national security considerations under the Committee on Foreign Investment in the United States (Cfius). An issue to watch will be whether the EU tries to incorporate safeguards against Cfius overreach into the TTIP investment agreement.

It remains to be seen how many of the Shared Principles actually will be shared by the US and EU once negotiations become serious and the horse-trading begins. In addition, the public and private stakeholder responses to the Ceta investment agreement, which likely will be finalised and revealed to the public in detail during the early stages of the TTIP negotiations, could prompt changes in the dynamics of the negotiations. Although it is certainly too soon to tell, the available evidence suggests that the US and EU are largely on the same page with respect to investment policy. There is certainly reason for optimism that an agreement providing effective protections for investors throughout the largest potential trading bloc in the world is within reach.

About the author

Stephen Jones is a partner in King & Spalding’s Washington D.C. office. The former chair of the firm’s international trade practice (2005-2013), he represents companies and industries in trade remedy proceedings, particularly anti-dumping and countervailing duty investigations, administrative reviews, and appellate litigation. Jones appears regularly before the US Department of Commerce, the US International Trade Commission, the Office of the US Trade Representative, the US Court of International Trade, the US Court of Appeals for the Federal Circuit, and Nafta dispute settlement panels. He also advises clients on investment issues and dispute settlement under the WTO and other international agreements.

In addition to trade remedies, Jones also counsels US importers on compliance with US customs laws, including internal investigations, audits, compliance programs and penalty proceedings. He also advises on the customs provisions of Nafta and other free trade agreements, and conducts international trade due diligence in connection with corporate transactions and public disclosures.

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Although the 2014 Finance Law (the FL) published on December 31 2013 in the Algerian Official Journal does not introduce new taxes or tax increases, it contains a number of provisions that may impact operations in Algeria.

New measures are reportedly introduced to encourage productive investment, to promote domestic production and to improve tax control, which are among the main objectives of the FL. Most notably, however, import-export companies, which, up to December 31 2013, could be owned up to 70% by foreign shareholders, must now be owned by a majority (51%) of Algerian resident shareholders like any other Algerian entity.

The most relevant provisions of the FL are summarised below.

**Article 5 of the FL amending article 142 of the Tax Code**
The FL modifies Article 142 of the Tax Code to limit the requirement to reinvest the share of profits relating to exemptions or reductions on the corporate profits tax and the professional activity tax (which is newly included), to those exemptions granted during the operational phase of an investment project. However, the reinvestment obligation must always be exercised within a period of four years as of the end of the fiscal year whose results were subject to preferential treatment.

**Article 12 of the FL amending article 256 of the Registration Code**
In notarial deeds relating to the transfer of property rights, as well as business assets or clientele, and to the transfer of shares, 20% of the transfer price must be released by the parties. Moreover, a deposit of 20% (instead of 50% previously) of the transfer price must be remitted to the notary.

Agreements incorporating companies with foreign capital are no longer subject to this mandatory deposit of the share capital, provided that the parties remit to the notary an advance deposit certificate issued by an authorised bank.

**Article 27 of the FL amending article 20 ter of the Code of Tax Procedure**
New measures aim at fighting against the risk of indirect transfer of profits abroad through arrangements between a parent company and its subsidiaries. Specific information (such as the nature of the relationship between the Algerian company and one or more companies located outside of Algeria, the method for determining transfer prices with foreign companies, the consideration offered and the activities of the foreign companies) must be provided to the tax administration at its request.

**Article 36 of the FL amending article 123 of Decree 93-18 (1994 Finance Law) as amended**
Import and customs clearance of used equipment less than two years old whose production or production range is not available in Algeria, are authorised until December 31 2015. These used materials are imported by contractors and producers for their own needs and must be kept in their assets for at least five years. The Ministry of Industry is supposed to draw up a list (regularly updated) of said authorised equipment.

Article 55 of the FLThis article deals with the support of foreign investments that contribute to the transfer of know-how or that result in the production of goods with an integration rate higher than 40%. Even though this measure is to be followed by specific regulations, we assume that the determination of the level of know-how which must be transferred to benefit from the tax or tax-like benefits and the computation of the degree of integration in the local economy (the degree to which local resources are used to produce the finished good, such as: production on site rather than simply conditioning and assembly; use of local components rather than imported components; use of local subcontractors) will be prone to controversy.

Article 55 reads as follows:

Any foreign investment in partnership, which contributes to the transfer of know-how towards Algeria and/or produces goods as part of an activity organised in Algeria, with an integration rate higher than 40%, benefits from tax and tax-like benefits, determined by the National Investment Council in accordance with the 51/49% rule of the share capital allocation. The application for tax and tax-like benefits is filed by the foreign investor and/or in partnership with the authorised departments of the Ministry of Industry and Investment. The contribution to the transfer of know-how and the production of goods with an integration rate higher than 40%, as well as the procedures for the grant of tax and tax-like benefits by the National Investment Council, are set by regulations.

**Article 56 of the FL amending article 4 bis of Ordinance 01-03 (the Investment Code)**
As noted above, the share capital of newly incorporated import-export companies registered with the Commercial Registry (CNRC) on or after January 1 2014, must be owned by a majority of resident Algerian nationals. Thus, the 49/51% ownership rule replaces the 70/30% rule for import-export entities.

On the other hand, the FL eases the approval procedures for direct foreign investments or investments in partnership with foreign investors. Notably, compulsory submission to the screening of the National Investment Council is removed. The Council’s review will only be required in cases where the granting of benefits is requested by investment projects involving foreigners.

The amended Article 4 bis reads as follows:

Foreign investments in economic activities consisting in the production of goods and services are subject, prior to their implementation, to a declaration of investment with the agency referred to in Article 6 below. [ie the National Investment Council].

Foreign investment can only be achieved in partnership where the resident national shareholding represents at least 51% of the share capital. The national ownership may consist in the addition of several partners.

New measures are reportedly introduced to encourage productive investment.

Notwithstanding the provisions of the preceding paragraph, import activities for the resale of the imported products “as is” can only be carried out by foreign individuals or companies in the framework of a partnership where the resident national shareholding is at least equal to 51% of the share capital.

The provisions of the above paragraph come into force as of 1 January 2014.

Any change of registration in the Commercial Registry triggers a prior obligation for the company to comply with above-references rules of allocation of the share capital.

However, the latter requirement does not apply to amendments concerning:

- the change in the share capital (increase or decrease) that does not involve a change in the proportions of the allocation of the share capital defined above;
- the transfer or exchange, between old and new directors, of qualifying shares under Article 619 of the Commercial Code, provided that the value of such shares does not exceed 1% of the share capital of the company;
- the removal of an activity or the addition of a related activity;
- the modification of the activity due to the change in the classification of economic activities;
- the appointment of the management of the company;
- the change of registered office address.

Direct foreign investments or in partnership are required to show a hard currency balance surplus in favor of Algeria throughout the lifetime of the project. A text from the Monetary Authority will specify the implementing rules of this paragraph.

Necessary funding to achieve foreign investments, directly or in partnership, except for the formation of the share capital, is established, except in particular cases, by having recourse to local funding. A regulatory text will specify, as needed, the implementing rules of the present provisions.

**Import-export companies must now be owned by a majority of Algerian resident shareholders**

In 2009, documentary credit became the only means of payment of imports with only one exception for inputs and spare parts imported to meet production requirements up to a certain amount. However, following the discontent of Algerian importers, the mandatory rules of payment by documentary credit were relaxed by article 23 of the Supplementary Finance Law for 2011, including for the importation of services. However, the importation of goods for sale as is, that did not qualify as strategic products of an urgent nature, remained subject to the letter of credit requirement.

From now on, these two means of payment (payment against documents and documentary credit) can both be used to pay all imports without limitation.

In 2009, documentary credit became the only means of payment of imports with only one exception for inputs and spare parts imported to meet production requirement up to a certain amount. However, following the discontent of Algerian importers, the mandatory rules of payment by documentary credit were relaxed by article 23 of the Supplementary Finance Law for 2011, including for the importation of services. However, the importation of goods for sale as is, that did not qualify as strategic products of an urgent nature, remained subject to the letter of credit requirement.

New measures aim at fighting against the risk of indirect transfer of profits abroad

In order to strengthen the preemptive right of the Algerian government, the waiver certificate must, in accordance with article 57 of the FL, be delivered to the notary in charge of drafting the assignment deed within a maximum period of three months (instead of one month previously) from the date of the application filing.

**Article 58 of the FL amending article 9 of the Investment Code**

National or foreign investments into economic activities of production of goods and services no longer benefit from the exemption from registration tax and property advertising costs.

Investments creating less than 100 jobs benefit from the exemption of corporate profits tax and professional activity tax for three years.

Investments creating more than 100 jobs benefit from the exemption of corporate profits tax and professional activity tax for five years.

Investments in strategic fields, whose list is drawn up by the National Investment Council, benefit from the exemption of corporate profits tax and professional activity tax during five years without any obligation to create jobs.

**Article 59 of the FL amending article 9 ter of the Investment Code**

The FL removes the specific provisions relating to the procedures for granting incentives to investment projects of less than DZD.5 billion ($19 million).

**Article 60 of the FL amending article 12 ter of the Investment Code**

Benefits granted to investments with a national economic interest are no longer limited to five years for the realisation phase.

**Article 81 of the FL amending article 69 of Ordinance 09-01 (Supplementary Finance Law 2009)**

As of January 1 2014, cash against documents is restored as a second means of payment of imports of goods for sale as is, along with the commercial documentary credit.
Céline van Zeebroeck, a Belgian licensed attorney, advises US corporations doing business in and with Algeria, Morocco and Tunisia, and other developing nations in French-speaking Africa, with an emphasis on local corporate, antitrust/competition, labour and tax issues. She has travelled extensively to Algeria counseling US and European-based clients in regard to large infrastructure projects.

Van Zeebroeck has co-authored with Michael Coleman several articles on Algeria concerning the Algerian Code of Public Tenders of 2002 and the repeal of the statutory ban on the retention of intermediaries, two articles on the Algerian Hydrocarbons Law of 2005 as amended in 2006, an article on the ins and outs of Algerian project finance in 2007, the effect of the 2009 Supplementary Finance Law on foreign companies (2009), the Algerianisation measures introduced by the 2010 Supplementary Finance Law, the new Code on Public Tenders (2010), and an article on the relaxation of the mandatory partnership rules (2011).

Van Zeebroeck has co-authored with Michael Coleman several articles on Algeria concerning the Algerian Code of Public Tenders of 2002, the repeal of the statutory ban on the retention of intermediaries, the tax aspects of the 2005 Hydrocarbons Law as amended in 2006, an article on the ins and outs of Algerian project finance in 2007, the effect of the 2009 Supplementary Finance Law on foreign companies (2009), the Algerianisation measures introduced by the 2010 Supplementary Finance Law, the new Code on Public Tenders (2010), and an article on the relaxation of the mandatory partnership rules (2011).

Her native language is French. In addition, she is fluent in English, Dutch and Spanish. She is a special legal consultant at Baker & McKenzie in Washington, DC. She studied law at the Facultés Universitaires Notre-Dame de la Paix of Namur (Belgium), the Universidad Complutense of Madrid (Spain) and the Catholic University of Leuven (Belgium), where she received her JD. She also obtained a LLM from The University of Chicago.

Before joining the Chicago office of Baker & McKenzie, van Zeebroeck completed her attorney training in Belgium. She is admitted to the Brussels Bar and is currently based in Baker & McKenzie’s Washington DC office.

Michael L Coleman was born and raised in Belgium. He is a graduate of the University of Toronto (BA hons), the School of Law of the University of Brussels (JD magna cum laude) and Tulane Law School (JD, order of the Coif and Editor Tulane Law Review). Michael Coleman joined Baker & McKenzie as an associate in 1973 and was elected partner in 1980. He is now resident in the firm’s Chicago office.

Since 1973, one of Coleman’s areas of concentration has consisted of advising US corporations doing business in and with Algeria, Morocco and Tunisia, and other developing nations in French-speaking Africa, with an emphasis on local corporate, antitrust/competition, labour and tax issues. He has travelled extensively to Algeria counseling US and European-based clients in regard to large infrastructure projects.

Coleman authored during the 80s and 90s many articles on the legal and tax treatment of expatriates assigned to Algeria for turnkey projects and on the negotiation of industrial joint-venture agreements in Algeria. More recently, he co-authored with Céline van Zeebroeck, an associate of Baker & McKenzie, two articles on the Algerian Code of Public Tenders of 2002 and the repeal of the statutory ban on the retention of intermediaries, two articles on the new Algerian Hydrocarbons Law of 2005 as amended in 2006, an article on the ins and outs of Algerian project finance in 2007, the effect of the 2009 Supplementary Finance Law on foreign companies (2009), the Algerianisation measures introduced by the 2010 Supplementary Finance Law, the new Code on Public Tenders (2010), and an article on the relaxation of the mandatory partnership rules (2011).

Coleman is fluent in French and English and has a working knowledge of Dutch.

Jessica Norrant-Eyme, a French licensed lawyer, advises US corporations doing business in Europe and in French-speaking Africa regarding corporate, labour, tax, competition, banking and financial issues.

Fluent in English and French (her native language), she is a law clerk at Baker & McKenzie in Washington, DC. She studied law at the faculté Jean Moulin Lyon III (France) where she received her JD in private law, her LLM in business, and tax law and a certificate in US law.

Before joining the DC office of Baker & McKenzie, Norrant-Eyme completed her attorney training in Paris (France) at Clifford Chance and subsequently worked as an associate at CMS Bureau Francis Lefebvre Lyon (France) in the corporate department.

She is admitted to the Bar of Lyon (France) and is based in Baker & McKenzie’s Washington DC office.
Australia

Kevin O’Sullivan, Peter Wiese and Heath Lewis, Clayton Utz

1. Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?
The largest sources of FDI into Australia are the US, the UK, Japan, China (including Hong Kong), the Netherlands and Singapore.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?
FDI into Australia’s mining sector attracts the largest share (32%) of total FDI into Australia.

The energy (oil and gas), manufacturing, retail and finance sectors also attract significant FDI.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?
The Government of the Commonwealth of Australia (Government) welcomes FDI.

One of the responsibilities of the Australian Trade Commission (Austrade) - the Government’s trade, investment and education promotion agency - is to promote and facilitate productive FDI into the country. Austrade has offices in over 50 countries and can provide international investors with:
• initial coordination of investment enquiries and assistance;
• information on the Australian business and regulatory environment;
• market intelligence and investment opportunities;
• identification of suitable investment locations and partners in Australia; and
• advice on Government programmes and approvals.

Each Australian state and territory government also provides information on opportunities within their respective jurisdiction and local requirements.

2. Investment vehicle

2.1 What are the most common legal entities and pass-through vehicles used for FDI in your jurisdiction, and how long do they take to become operational?
A foreign company may carry on business in Australia either through an Australian branch or Australian subsidiary.

To carry on business through an Australian branch, a foreign company must register with the Australian Securities and Investment Commission (ASIC). A registered foreign company must have a local registered office and must appoint a local agent to represent it.

The energy (oil and gas), manufacturing, retail and finance sectors also attract significant FDI.

The largest sources of FDI into Australia are the US, the UK, Japan, China (including Hong Kong), the Netherlands and Singapore.

The energy (oil and gas), manufacturing, retail and finance sectors also attract significant FDI.

The two main types of company are proprietary and public. A proprietary company is limited to 50 non-employee shareholders and cannot engage in public fundraising. Proprietary companies enjoy less regulation and cost less to administer. A public company may be listed on the Australian Securities Exchange (ASX).

Registration of an Australian branch of a foreign company, or of an Australian company, takes approximately one week once all required information is to hand. Alternatively, the acquisition of shelf companies or new incorporations may be completed within 24 hours.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?
An Australian company must have a local registered office, Australian resident directors (one for proprietary companies, two for public companies), and an Australian resident company secretary (optional for proprietary companies).

A registered foreign company must have a local registered office and must appoint a local agent to represent it.

3. Investment approval

3.1 For foreign investment approval (including national security review) explain the following:

a) The regulator/s’ name, factors it must consider when making its decisions, and how much discretion it has;

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and Foreign Investment Policy. FATA notifications are lodged with the Foreign Investment Review Board (FIRB) for assessment. FIRB makes recommendations to the Treasurer, who has statutory discretion to prohibit any proposal regarded as contrary to Australia’s national interest.

The Treasurer typically considers the following factors:
• National security: whether the investment affects Australia’s ability to protect its strategic and security interests;
• Competition: whether an investor may gain control over market pricing and production of a good or service in Australia, or over global supply of a good or service;
• Other Government policies: the impact on Government policies;
• Economy and community: the impact on the Australian economy and community generally; and
• Character of the investor: whether the investor operates on a transparent, commercial basis and is subject to adequate regulation.

The Treasurer also considers:
• whether the foreign investor is wholly or partly government owned, and whether it operates on an arm’s length and commercial basis;
• whether the investor is pursuing broader political or strategic objectives that may be contrary to Australia’s national interest; and
• the size, importance and political impact of the investment.

The Treasurer may object to (ie reject) a notification or approve it (including by making it subject to certain mandatory conditions).
b) Any investment caps and other legislative restrictions;
Subject to certain exceptions, FIRB is not concerned with transactions that do not exceed prescribed monetary thresholds. Today, foreign investors are exempt from notifying:
- transactions valued at less than A$248 million (US$225 million), or
- A$1,078 million for US or New Zealand investors; or
- transactions involving developed non-residential commercial real estate valued at less than A$54 million (or less than A$5 million if land is heritage listed).

FIRB will require notification of all acquisitions (regardless of value):
- in vacant non-residential land;
- in residential land;
- in Australian urban land; or
- by foreign governments or their agencies.

c) Which party must notify and when/if notification is mandatory or voluntary;
Notification must be made by the foreign investor and should occur in advance of a transaction. Failure to notify of a prescribed transaction is an offence under the FATA, but does not invalidate any act done in contravention of the FATA.

However, non-compliance may result in substantial penalties and potentially trigger the Treasurer's powers under the FATA, including to order divestiture.

d) What information must be included with notification and what is the review fee;
There is no fee to submit a notification. Notifications should include the following information:
- explanatory covering letter including details of the proposal;
- identity of the parties;
- applicable standard form FATA notices;
- latest audited financial statements for the investor and the target;
- the consideration;
- reasons for the proposal;
- the investor's future intentions for the target;
- relevant transaction agreements; and
- other supporting documentation.

e) How long does the review and approval process take, and are there any fast-track options;
The Treasurer has 30 days to reach a decision (which can be extended by up to 90 days), and FIRB has 10 days thereafter to communicate the decision. There are no formal fast-track options.

f) Is there the ability to consult on a named or unnamed basis;
Parties may consult with FIRB or Austrade on a named or unnamed basis.

g) Does notification/review occur pre- or post-closing, and are there any pre- or post-filing requirements unique to FDI;
Notification/review generally occurs prior to closing. A FIRB condition precedent is invariably included in FDI transaction documents in Australia.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals;
If the Treasurer does not object to the proposal within 30 days (or 90 days if extended), they lose the ability to block or impose conditions on the transaction. There is no prescribed right of appeal against an unfavourable decision.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.
The following sector-specific restrictions apply to FDI:
- Total foreign investment in Australian international airlines is limited to 49%.
- Foreign ownership of airports offered for sale by the Commonwealth is limited to 49%, with a five percent airline ownership limit.
- Only majority Australian-owned ships may be registered in Australia, unless designated as chartered by an Australian operator.
- Aggregate foreign ownership of telecommunications company Telstra is limited to 35% and individual foreign investors may only own up to five percent.
- Foreign ownership in the banking sector must be consistent with the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998, and Government banking policy.
- For areas of military significance (such as the Woomera Prohibited Area), FIRB may require the approval of the Australian Department of Defence as part of its assessment.

Note that this is a non-exhaustive list and industry-specific legislation may also apply.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.
The Australian Competition and Consumer Commission (ACCC) is the principal regulator of competition clearance under the Competition and Consumer Act 2010 (Cth) (CCA). The CCA prohibits mergers that would (or are likely to) have the effect of substantially lessening competition.

The ACCC’s informal clearance process enables merger parties to seek the ACCC’s view on whether it will seek an injunction to stop a merger from proceeding. The ACCC encourages merger parties to notify the ACCC where: the products of the merger parties are either substitutes or complements; and the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

Pre-notification to the ACCC of mergers or acquisitions is not compulsory under the CCA. However, as non-compliance with the CCA attracts severe penalties, parties normally seek an informal clearance as a matter of course before completing a transaction.

4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?
As a general rule, there are no specific structures or intermediary jurisdictions that are particularly favourable for FDI.

Foreign investors may conduct business through an Australian branch rather than an incorporated subsidiary to consolidate the financial results of the company in the foreign jurisdiction. Australian subsidiaries of foreign companies may consolidate under the foreign parent.

Transactions between consolidated group companies are ignored for tax purposes and losses can be transferred between members.

Certain venture capital limited partnerships are exempt from capital gains tax (CGT) subject to conditions. They are taxed at the partner level as flow-through entities. A partner’s share of income derived from an eligible venture capital investment is exempt, as is the gain made on disposal of an eligible venture capital investment.
Distributions by managed investment trusts to foreign investors are generally subject to concessional withholding tax rates.

The investment manager regime (IMR) ensures that certain investment income and gains of qualifying widely-held foreign funds that operate through an Australian financial intermediary are tax exempt. The exemptions are extended to foreign beneficiaries and partners of IMR foreign funds.

Disposals of non-land Australian assets by non-residents are not subject to CGT. ‘Land’ includes interests in entities principally deriving their value from land, where a non-portfolio (greater than 10%) interest is held.

5.2 Explain any local content or local participation requirements relevant to foreign investors.
Nil.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?
Non-Australian residents can apply to the Department of Immigration and Border Protection (Department) for a subclass 457 visa. This visa enables a person to work in Australia for up to four years and must be paid at least the minimum entitlements that an equivalent Australian worker would receive for performing the same role. Companies seeking to utilise this visa must satisfy the Department that there is a lack of suitably qualified workers within Australia to perform the role.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?
Anti-money laundering and counter-terrorism legislation regulate currency and exchange transactions, particularly in the financial and banking services sectors.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
Counter-terrorism legislation restricts Australian companies from providing domestic currency to certain entities associated with terrorism or jurisdictions subject to trade sanctions.

6. Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
See answer to 3 above.

6.2 What challenges if any do investors find in getting certainty around local law and regulation?
Generally speaking, Australian law is well understood and generally consistently applied through courts. Sophisticated, confidential legal advice is readily available.

7. Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
Australia has both federal and state jurisdictions, with the appropriate forum dictated largely by the subject matter of the dispute. In each jurisdiction, the relevant case management rules ensure that cases run as efficiently as possible. Superior courts in Australia publish statistics in relation to efficiency and performance standards. For example, the Federal Court of Australia completes 92% of cases within 18 months.

A judgment creditor is generally able to enforce a judgment through a range of statutory procedures, including the seizure and sale of assets. A judgment debt may also form the basis of a statutory demand under the Corporations Act which, if unpaid, may allow insolvency proceedings to be brought against a corporate debtor.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?

International arbitration awards made in a foreign jurisdiction are enforceable at the federal level in accordance with the provisions of the International Arbitration Act 1974 (Cth), while domestic arbitration awards...
made in Australia are enforceable at the state and territory level according to the Commercial Arbitration Act applicable in that jurisdiction.

The judgments of certain foreign countries’ courts can be enforced in Australia by registration under the Foreign Judgments Act 1991 (Cth) without the need for fresh proceedings. Generally this process is available only with respect to money judgments from countries with which Australia has reciprocal enforcement arrangements. Certain foreign judgments may also be enforceable in Australia at common law.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

Enforcement of arbitration awards made in Australia can generally be expected in those jurisdictions that are signatories to the New York Convention and/or the UNCITRAL Model Law. The enforcement of judgments of Australian courts can be expected in those jurisdictions with which Australia has an agreement for the reciprocal enforcement of judgments (see above). Otherwise, whether an Australian judgment is enforceable in a particular foreign jurisdiction will depend on the local laws of that jurisdiction.

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Kevin O’Sullivan is a partner in Clayton Utz’s corporate energy & resources team. He has extensive cross-border experience in energy and resources, corporate and broader commercial transactions, particularly M&A, joint ventures, distressed transactions, foreign investment, and project development.

His relevant experience includes representing Agrium in its A$1.3 billion acquisition of AWB Limited by scheme of arrangement. A key feature was obtaining FIRB approval in record time through key relationships, early and consistent engagement with FIRB, and commercially and politically focussed application documentation. O’Sullivan also acted for Chubu Electric Power in relation to its equity investments in – and significant long-term LNG offtake arrangements from – the A$52 billion Gorgon LNG project, and the $34 billion Ichthys LNG project. Elsewhere he advised Shin-Etsu Chemical in its acquisition of the Simcoa Group of Companies.


Peter Wiese advises in a wide range of matters in connection with mining, oil and gas, electricity, M&A and corporate areas.

He has acted in connection with the sale, purchase, development and operation of many public and private infrastructure and resources assets, including in connection with: airports; telecommunications; rail; regulated and unregulated gas pipelines; upstream and downstream oil and gas; and, upstream and downstream electricity assets. He also has extensive experience advising on commodity and asset transactions in connection with LNG and domestic gas, gold, iron ore, alumina, nickel, coal and other resources.

For many years, and again in 2013, Wiese has been rated in Chambers Global Guide in the first band of energy and natural resources lawyers in Australia. He is also rated as ‘leading individual’ in Australian energy and resources law by The Legal 500.

Heath Lewis is a corporate partner in the Perth office of Clayton Utz. He practises in all areas of corporate and commercial law, with a particular focus on M&A (both private treaty and regulated), equity capital markets (including initial public offerings and secondary raisings), incorporated and unincorporated joint ventures, and corporate and securities law and regulation.

Lewis acts for a number of ASX and TSX-listed clients, as well as significant private firms, most often in the energy and natural resources industry (all sectors including mining, agribusiness, and oil and gas).

He has been recognised by his peers in the Australian Financial Review’s list of leading lawyers in M&A and corporate/governance, and was recognised as a worldwide leading practitioner in the International Who’s Who of Mining Lawyers for 2013.
BRAZIL

Darcy Teixeira Junior and Andre Maruch, TozziniFreire Advogados

1. Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?
In recent years, the most important sources of FDI in Brazil have been the United States, the United Kingdom, Spain, China, Germany, Japan and France. The total investment received by Brazil in 2012 was around $65 billion.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?
The Brazilian government has implemented several official programmes over the last few years to foster specific sectors of the national infrastructure. It has set up public auctions for the management of airports, ports, roads and railways by private companies. Recent discoveries of huge deposits of oil on the Brazilian coast will require investment in infrastructure, the naval industry, oil refinery and professional education. Further, major international events to be held in Brazil such as the Fifa World Cup and Olympic Games, in 2014 and 2016 respectively, will require investment in some specific sectors such as public transportation, security and hotels.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?
The Brazilian economy is receptive to FDI, which is demonstrated by the steady growth of foreign investments in the country and a modern legislation that guarantees reliability and safety to investors. The central bank issues rules on the formalities that must be complied with regarding FDI. In addition, the Ministry of Development is in charge of enhancing foreign trade through customs regulations.

2. Investment vehicle

2.1 Investment vehicle

2.1 What are the most common legal entities and [pass-through] vehicles used for FDI in your jurisdiction, and how long do they take to become operational?
Brazilian law offers several kinds of entities to run a business. The most popular ones are the limited liability company (Limitada) and the corporation (Anônima). The shareholders of these companies enjoy limited liability and, therefore, do not have their personal assets exposed to occasional failures of the business (except for certain circumstances in which the disregard doctrine applies).

The Limitada provides for a more flexible operation, with fewer administrative burdens, which makes it suited to less complex businesses. On the other hand, the Anônima is regulated by more complex and rigid rules of management and operation, and is recommended for more intricate enterprises. The Anônima may also be used to gather funds from a wide range of investors when registered as a publicly-held company with the Brazilian Securities Commission (CVM).

However, both entities may be used for small or big businesses, regardless of the amounts involved.

These companies usually require 30 days to be created.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?
The creation and operation of companies controlled by foreigners do not generally differ from the ones controlled by Brazilian citizens, as Brazilian law prohibits any kind of discrimination related to the origin of the capital.

The officer of any Brazilian company must be resident in Brazil. A Brazilian company that desires to appoint a foreigner as officer must apply for their permanent visa. To do this, the foreign shareholders need to invest R$600,000 ($258,300) for each officer. This amount may be lowered to R$150,000 if the company creates at least 10 new jobs within the following two years.

Any investment in a Brazilian company must be made through the execution of exchange agreements in order to allow the proper banking transfer and its registration with the Brazilian central bank.

3. Investment approval

3.1 For foreign investment approval (including national security review) explain the following:
a) The regulator’s name, factors it must consider when making its decisions, and how much discretion it has;
b) Any investment caps and other legislative restrictions;
c) Which party must notify and when/if notification is mandatory or voluntary;
d) What information must be included with notification and what is the review fee;
e) How long does the review and approval process take, and are there any fast-track options;
f) Is there the ability to consult on a named or unnamed basis;
g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;
h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?
Brazilian law provides that foreign capital is subject to the same regulations applicable to national capital. Therefore, due to the free inflow and outflow of proceeds, no approval is required for foreign investments regarding exchange issues. Any foreign investment must be registered with the Central Bank in a declaratory fashion.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.
Foreign investment is generally allowed in Brazil, and no specific authorisation from the Government is required.

There are a few exceptions:

- Foreign capital is not allowed in nuclear energy activities.
- Foreign capital is not allowed in health care services, except when specifically permitted by law.
- Foreign capital is not allowed in post office services.
- Foreign participation is limited to 30% in Brazilian press and broadcasting companies.
- Opening of new branches of foreign financial institutions and increases in the percentage participation of foreign individuals or legal entities in the corporate capital of Brazilian financial institutions are prohibited, except...
when specifically authorised by the Brazilian President.

- Foreign participation in voting shares is limited to 20% in Brazilian airline companies and depends on prior approval from the Civil Aviation Agency (although the constitutionality of this limitation is subject to debate).
- Acquisition of rural properties within the border strip (150km alongside inland borders) depends on prior approval from the National Security Council.
- Acquisition of other rural properties is subject to certain conditions and limitations.

Regardless of whether foreign investors are involved or not, activities in various regulated sectors will be subject to specific rules and conditions, including approvals and supervision by the relevant regulatory agency (for example, insurance, telecommunications, energy, oil and gas, water and sanitation).

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.

The authority responsible for overseeing competition clearance is the Administrative Council for Economic Defence (CADE) which analyses material M&A cases that may jeopardise competition. The submission of an operation to CADE’s analysis, whose approval is treated as a condition precedent in M&A operations, is mandatory in the event that one of the companies involved has achieved revenues of at least R$750 million in the previous year, and the other company has achieved at least R$75 million. Upon the submission, CADE will render its decision in 240 days, extendable for 90 additional days.

4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

Brazil exempts dividend income, even if earned by foreign investors. Therefore, it is uncommon to find tax structures that are more favourable for FDI into Brazil than a simple contribution to capital.

Some double taxation treaties provide for a tax-sparing credit in connection with dividends, interest and royalties, particularly the treaties with European countries, such as the Netherlands, Belgium, Luxembourg and Spain. Thus, depending on the investment structure, such treaties may be favourable.

As to debt financing, interest expenses are deductible for corporate income tax (IRPJ/CSLL) purposes, commonly at a 34% rate, as detailed below. Interest income is subject to a 15% withholding tax (IRRF) and to transfer pricing (usually Libor [London Interbank Offered Rate] plus 5.5% spread). Payments to blacklisted jurisdictions are subject to IRRF at a 25% rate. Thin capitalisation limitations also apply at a 2:1 ratio (0.33:1 ratio if the beneficiary is located in a blacklisted jurisdiction).

Short-term foreign loans are also subject to IOF/FX, at a six percent rate. If the term of the loan is superior to 360 days, principal and interest payments are subject to zero percent rate IOF/FX.

There are 30 double taxation treaties in force. Brazil has not ratified any bilateral investment treaties or other agreements. Negotiations involving foreign parties and location of the parties usually determines the selection of governing law (for example New York law, English law). Negotiations involving foreign parties are normally carried out in English.

4.2 What are the applicable corporate tax rates?

The corporate tax rates vary according to the profit calculation regime elected by companies incorporated in Brazil. If the companies are obliged to report their income under the Actual Profits regime, they are subject to the non-cumulative social contributions on total revenues (PIS and COFINS), which total a creditable rate of 9.25% on the corporate gross revenue for the taxable period.

If the Brazilian company chooses to be under the Presumed Profits regime (with an annual revenue of R$78 million or less), its profit margins are statutory, and they range from 8% to 32% depending on the category of earned income. On this statutory basis, the applicable IRRF rate is 15%, plus 10% on any amount of the profits exceeding R$20,000, multiplied for the months of the taxable period. Also, a statutory basis of 12% or 32% applies on the income earned by the company for purposes of CSLL, which is imposed at a rate of 9%. Brazilian companies under the Presumed Profits regime are also subject to the cumulative PIS and COFINS, which total a non-creditable rate of 3.65% on the corporate gross revenue for the taxable period.

4.3 Does the government have any FDI tax incentive schemes in place?

There are several tax incentives in Brazil, depending on the industry and location of the investment, such as the Manaus Free Trade Zone, infrastructure projects, oil and gas industry, and the automotive industry.

Aside from such incentives, states and municipalities will usually provide value-added tax (ICMS) and services tax (ISSQN) incentives for FDI in the fields of energy, logistics and transportation. These incentives have become more widespread due to the preparation of Brazil for the World Cup in 2014 and the Olympic Games in 2016.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors?

The Brazilian Development Bank (BNDES) provides some benefits to Brazilian companies, but most of such benefits are directed to Brazilian-owned investments. States may also provide financial incentives, especially if the investment is relevant for the public interest and generates local jobs and income. Municipalities also provide such incentives. Please note that they are limited by their budgetary constraints.

5. Operating locally

5.1 What is the most common governing law of contracts and local business language?

Brazilian law is used in agreements between Brazilian parties (even if they are controlled by foreigners). In international agreements, the type of agreement and location of the parties usually determines the selection of governing law (for example New York law, English law). Negotiations involving foreign parties are normally carried out in English.

5.2 Explain any local content or local participation requirements relevant to foreign investors.

As a general rule, no local content or local participation requirements apply, except in specific cases and industries when provided by law (for instance, local content rules in certain oil and gas activities and local participation in airport management).
5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?
The issuance of visas by the Ministry of Labour (MTE) usually takes 60 days. Business visas allow a 90-day stay in Brazil per year for the purpose of representation of foreign shareholders. There are also specific work visas for temporary purposes, such as for the rendering of services and technical assistance.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?
There are no foreign currency or exchange restrictions applicable to the Brazilian currency (Real: R$).

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
Brazilian companies are free to carry on business in foreign jurisdictions.

6. Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
No

6.2 What challenges if any do investors find in getting certainty around local law and regulation?
Local laws and regulations are generally stable and well known, although their interpretation may be subject to heated debate, and court decisions may vary accordingly.

7. Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
Brazil has not ratified any bilateral or multilateral investment treaties, so foreign investors may not commence investment-treaty arbitrations against the state.

On the other hand, commercial arbitration, both domestic and international, has become widespread, and is now an efficient dispute resolution mechanism for contracts of higher value or complexity.

For disputes subject to resolution before judicial courts, although proceedings may comply with due process and legality, a final, enforceable, decision may take years to be obtained, being subject to a plethora of appeals and reviews.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
Brazil is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Foreign judgments (including foreign arbitral awards) become effective in Brazil solely on confirmation by the Superior Court of Justice. The confirmation proceeding does not entail a review of the merits of the decision, since its purpose, among others, is to ensure that formal aspects were observed, that the party against whom an award is being enforced had been granted a full right of defence, and that no fraud or violation of Brazilian law has occurred throughout the proceedings.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?
Brazil’s membership of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards affords Brazilian arbitral awards the same overall ease of recognition in other New York Convention member states as foreign awards do in Brazil.

Moreover, Brazil is party to several multilateral and bilateral treaties on the recognition of foreign judgments and administrative acts, including, among others, the OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards and the Mercosur Protocol on Jurisdictional Assistance and Cooperation Regarding Civil, Commercial, Labor and Administrative Matters.

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Canada

Paul Collins, Mike Devereux and Michael Laskey, Stikeman Elliott

1 Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?
The US, followed by the EU, are the principal sources of FDI into Canada. However, Canada does not give preference to FDI from any particular countries or regions.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?
They key sectors which attract FDI into Canada are: (i) manufacturing; (ii) management; (iii) mining and oil and gas extraction; and (iv) finance and insurance. However, Canada does not give preference to FDI in particular industries.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?
The Canadian government is generally supportive of FDI, subject to applying greater scrutiny on FDI by state-owned enterprises. The federal government is principally responsible for promoting FDI into Canada, but consults with provincial and municipal governments and regulators as necessary, as well as other branches of the federal government.

2 Investment vehicle

2.1 What are the most common legal entities and pass-through vehicles used for FDI in your jurisdiction, and how long do they take to become operational?
The most common legal entities used for FDI in Canada are corporations and partnerships.

In Canada, a corporation can be incorporated as a federal corporation under the laws of Canada, or as a provincial corporation under the laws of one of the provinces of Canada. Generally speaking the legislation is comparable, however there are some practical differences.

The corporate statutes of Nova Scotia, British Columbia and Alberta do permit the possibility of incorporating an unlimited liability company, or ULC. As the name implies, shareholders generally have unlimited liability, and may become liable for the ULC’s debts and obligations. A ULC may be treated as a so-called disregarded or check-the-box flow-through entity for US tax purposes.

It should be noted that, although not a distinct form of business organisation, joint ventures are also commonly used for FDI in Canada.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?
For corporations, incorporation in most Canadian jurisdictions is a straightforward process and does not require any substantive government approvals. A simple filing and the payment of the requisite fee is all that is required.

Certain jurisdictions in Canada do have residency requirements for a corporation’s board of directors. Under the federal statute, at least 25% of the directors of a corporation must be resident Canadians, and to transact business at a board meeting at least 25% of the directors present must be resident Canadians. The corporate statutes of the provinces of British Columbia, Prince Edward Island, New Brunswick, Nova Scotia and Quebec do not contain residency requirements.

Partnerships are generally formed upon the entering into of a partnership agreement and there are required filings for the formation of limited partnerships, which, similar to incorporation, are straightforward.

3 Investment approval

3.1 For foreign investment approval (including national security review) explain the following:
a) The regulator/s’ name, factors it must consider when making its decisions, and how much discretion it has
Subject to certain exemptions, every acquisition of control by a non-Canadian of a Canadian business (even where such business is already controlled by a non-Canadian) requires either notification or review under the Investment Canada Act (ICA). Notification is a simple, technical filing which may be made any time up to 30 days after closing, while review is a longer and more in-depth process which typically requires the investor to make undertakings regarding the conduct of the acquired business.

Whether a transaction is subject to review or notification depends on a variety of criteria, including the size and nature of the acquired business. However, subject to certain exceptions, a direct acquisition of a non-cultural Canadian businesses by a non-Canadian investor (provided that either the seller or the purchase vehicle is ultimately controlled by nationals of a World Trade Organisation member state) is subject to review if the book value of the acquired assets exceeds C$344 million ($323.5 million), indexed annually to inflation. In the near future, the book value of assets test will change to an enterprise value test for investors that are not state-owned enterprises.

If a transaction is subject to review, it may not be completed until the minister of industry determines that it will be of net benefit to Canada. In practice, reviews are conducted by the Investment Review Division of Investment Canada, which makes a recommendation to the minister. Although the minister has very broad discretion to determine whether a transaction will be of net benefit to Canada, the Investment Canada Act (ICA) lists six factors which must be taken into account, where relevant, including the effect of the investment on Canada’s economy, the degree and significance of participation by Canadians in the business, the compatibility of the investment with national policies and other, related criteria.

In addition to the above, prescribed factors, the review will also be affected by: (i) whether the Canadian business is engaged in prescribed cultural activities (which may also lead to a review by the minister of Canadian heritage); (ii) whether the transaction raises national security concerns; and (iii) whether the investor is controlled or influenced by a foreign state.

b) Any investment caps and other legislative restrictions;
No formal investment caps or other, similar restrictions exist under the ICA.
However, as a matter of policy, the government has stated that investments by state-owned enterprises (defined very broadly under the ICA to include even entities that are influenced by a foreign government) in Canada’s oil sands will be permitted only in ‘exceptional circumstances’. Although this policy does not apply to other sectors or regions, the Canadian government will carefully scrutinise all acquisitions of control by state-owned enterprises.

c) Which party must notify and when/if notification is mandatory of voluntary;

The obligation to comply with the ICA is that of the investor alone.

If a transaction is subject to review under the ICA, a pre-closing application for review is mandatory and must be submitted to Industry Canada by the investor (the acquirer) before closing.

As noted above, if a transaction is not subject to review under the ICA, the investor must simply submit a notification form, which is mandatory but which may be submitted any time up to 30 days following closing.

d) What information must be included with notification and what is the review fee;

If a transaction is subject to review, the application for review must include prescribed information about the investor (including its business activities, its ownership structure), a copy of the purchase and sale agreement, and information about the Canadian business being acquired (including its annual reports and financial information as well as a description of its activities and number of employees). In addition, and most importantly, the application must attach a so-called plans document, setting out a detailed description of the investor’s plans for the Canadian business, comparing them with the operations of the Canadian business.

If a transaction is not subject to review, the notification form must include basic information about the investor (including its ultimate owner) as well as basic financial and operational information about the acquired business.

No governmental review fees apply to either applications for review or notification forms.

e) How long does the review and approval process take, and are there any fast-track options;

Once an application for review has been filed and certified to be complete, the minister of industry has a 45-day period within which to make a net benefit determination, which period may be unilaterally extended once by the minister for up to an additional 30 days, and thereafter extended with the consent of the investor. If, during the course of the review, the investor is provided with notice that the transaction will be subject to a national security review, additional time periods apply.

In practice, ICA reviews typically take a minimum of 60-75 days, and may last longer depending on the complexity of the transaction and the willingness of the investor to commit to undertakings regarding the conduct of the Canadian business.

f) Is there the ability to consult on a named or unnamed basis;

The Investment Review Division of Industry Canada is typically willing to consult with parties (or their counsel) and to provide non-binding, informal guidance on either a named or unnamed basis.

The ICA also includes a provision by which anyone may request a formal, written opinion from the minister of industry as to whether the ICA applies to them. However, this provision is rarely used, as the minister is, in most cases, granted the discretion to choose not to provide a written opinion.

g) Does the notification/review occur pre- or post-closing, and are there any pre- or post-filing requirements unique to FDI;

Other than the processes described above – application and assessment for transactions subject to review, or notification for transactions not subject to review – there are no other, FDI-specific pre- or post-closing filing requirements under the ICA.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?

Technically, if the minister of industry does not notify the investor within the initial 45-day waiting period that he will extend the period for 30 days, or if the minister allows a subsequent 30-day period to expire without further extension, he is deemed to be satisfied that the impugned investment is likely to be of net benefit to Canada.

However, in practice, the minister will not allow a waiting period to expire without either making a net benefit determination or seeking an extension of time. If the minister requests an additional 30-day extension (after the first such extension, which he may impose unilaterally without the consent of the investor) and the investor refuses to grant such extension, the minister will very likely make an adverse net benefit determination to avoid the deeming provision described above. As such, investors must effectively consent to extend the statutory waiting period until the minister has completed his review.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.

No sectors are formally restricted or otherwise subject to a higher standard of review under the ICA. However, Canadian Heritage (a department of the Canadian federal government) has released two policies which severely restrict foreign investment in the book publishing and distribution sector and in the film distribution industry. As noted above, the Canadian government has also determined as a matter of policy that acquisitions of Canadian oil sands businesses by entities controlled or influenced by a foreign state will be permitted only in exceptional circumstances.

In addition, certain sector-specific laws and regulations impose limitations (or, in some cases, prohibitions) on foreign investment. For example, legislation in the following sectors of the Canadian economy imposes restrictions on foreign investment: (i) telecommunications; (ii) broadcasting; and (iii) financial institutions.

Also as noted above, the ICA includes broad national security provisions for investments which, in the opinion of the Canadian government, may be injurious to Canadian national security. Recent experience has indicated that the government is prepared to apply the national security provisions very expansively in the telecommunications sector.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.

Competition clearance is governed by the Competition Act and overseen by the Competition Bureau, an independent government agency. All mergers are subject to review and may be challenged by the Competition Bureau, regardless of their size or the nationality of the purchaser. In addition, mergers are subject to mandatory pre-closing notification if certain size thresholds are exceeded. In general, a merger must be notified to the Competition Bureau if: (i) the Canadian assets of the target, including all affiliates (or, in the case of an acquisition of assets, the Canadian assets being acquired), exceed C$80 million, or the revenues in or from Canada generated by those assets exceed C$80 million; and (ii) the total assets in Canada or the total revenues in, from or into Canada of all of the parties to the transaction (including all upstream and downstream affiliates), on a combined basis, exceed C$400 million.

If a transaction is subject to mandatory pre-merger notification, it may not close for 30 days following the submission of a complete notification form by both parties to the transaction. The Competition Bureau may extend the statutory waiting period by issuing a supplementary information request, similar to a second requested in the US.
Transactions may be subject to review under both the Competition Act and the ICA. Although the Competition Bureau and the Investment Review Division will typically communicate with each other (and any other applicable branches of the federal, provincial or municipal governments), the review processes are independent and cannot be combined.

4 Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?
The tax structure that will be useful for a particular investment into Canada will depend on many factors. Broadly speaking, FDI commonly takes place in the following forms: (i) by establishing a Canadian subsidiary; (ii) by carrying on the business in Canada as an unincorporated branch or as an entity with flow-through tax treatment; or (iii) by carrying on the business in Canada but restricting its presence such that it does not have a permanent establishment in Canada, if the investing entity is resident in a country with which Canada has a tax treaty. Where FDI into Canada involves acquiring the shares of a Canadian corporation, non-residents frequently consider establishing an acquisition corporation resident in Canada to access favourable tax benefits.

Canada has a large network of international tax treaties. Several jurisdictions are regularly used as intermediaries for FDI, including the Netherlands and Luxembourg.

4.2 What are the applicable corporate tax rates?
In general, the federal income tax rate for corporations for the 2013 taxation year is 15%. Provincial corporate income tax rates for 2013 range from 10% to 16%.

4.3 Does the government have any FDI tax incentive schemes in place?
The Canadian tax system provides for preferential domestic tax treatment and a number of fiscal incentive regimes designed to encourage investment in particular sectors of the Canadian economy, including manufacturing and processing, capital investment, small business, oil and gas exploration, and scientific research and experimental development. The Canadian federal government and, in particular, the government of each of the provinces provide generous tax incentives for the performance of scientific research and experimental development (SR&ED) in a particular province. The determination of whether certain activities constitute SR&ED is very technical and fact specific.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors?
Not applicable.

5 Operating locally

5.1 What is the most common governing law of contracts and local business language?
The governing law of most contracts is driven mainly by the province in which the company has its operations or head office or where the subject matter of the contract relates.

In Canada, the local business language is generally English. However, in the province of Quebec it could be French (although English is commonly used as well).

5.2 Explain any local content or local participation requirements relevant to foreign investors.
As explained above, if a foreign investment is subject to review under the ICA, investors are typically required to provide undertakings as to the future conduct of the acquired business. Such undertakings typically include local content and local participation requirements (for example, local sourcing, preferential treatment to local businesses, maintaining a Canadian physical presence, maintaining Canadians on executive and leadership teams).

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?
Foreign workers may be able to secure work permits as intra-corporate transferees if they have been employed for more than one year in a senior managerial or specialised knowledge position and are transferring to an equivalent position with a Canadian affiliate, subsidiary or branch office. Citizens of certain countries will also require a visa to permit entry to Canada (even if they qualify for a work permit as an intra-corporate transferee). Shareholder representatives may enter for business meetings related to the foreign investment, as long as they are not working for or on behalf of the Canadian entity. The same citizenship considerations apply as to whether they need a visa in order to enter Canada.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?
Canada has no system of exchange controls and, therefore, once a Canadian business has been acquired, any after-tax profits from that business can generally be freely paid out to the non-Canadian parent. Canadian dollar income can also then be freely exchanged into another currency at the best available rate of exchange and sent out of the country, subject to any applicable requirement to satisfy Canadian withholding tax obligations.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
Canadian law imposes restrictions in respect of certain countries. These restrictions largely implement sanctions imposed by the United Nations Security Council. There may also be export restrictions in relation to various countries in respect of technology and military equipment.

6 Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
As noted above, although the ICA is the principal law of general application governing foreign investment into Canada, other, sector-specific laws exist in certain industries which may limit or restrict the ability of foreign companies to acquire Canadian businesses. Canadian counsel should be contacted well in advance of any contemplated acquisition, and can provide advice as to whether any sector-specific requirements may apply.

6.2 What challenges if any do investors find in getting certainly around local law and regulation?
Most provinces in Canada have a well-developed legal system based on common law. The legal system in the province of Quebec, which is also well-developed, is based on civil law.
7 Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?

Decisions made under the ICA (including, for example, a decision to prohibit a foreign investment transaction) are considered to be made by the Cabinet of the Canadian federal government, and are not subject to appeal in the courts.

However, if the minister believes that a foreign investor has violated undertakings it made to the federal government in order to obtain approval to complete its investment, he may sue the investor in Canadian federal court.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?

In general and subject to exceptions, the judgments of foreign courts are entitled to recognition and enforcement in Canada, provided there is a real and substantial connection between the action and the foreign court. However, the application of this doctrine varies by jurisdiction, and the meaning of real and substantial connection is subject to considerable uncertainty. Canadian counsel should be sought before seeking to enforce any foreign judgments or arbitral awards in Canada.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

Each jurisdiction varies in its approach to private and public international law. However, as noted above, decisions made under the ICA are considered to be made by the Cabinet of the Canadian federal government (and not by a Canadian court or regulatory body), and are therefore not subject to appeal in the Canadian courts.

About the author

Paul Collins is head of the competition and foreign investment group. He practises corporate and commercial law and specialises in the area of competition law, providing both transactional and general compliance advice, and advice on marketing and advertising law. Collins is also a leading advisor for foreign investors in connection with the Investment Canada Act. His practice puts him in constant contact with the federal Competition Bureau and the Investment Review Division of Industry Canada. He served as senior deputy commissioner at the mergers branch of the Competition Bureau from May 2010-12 where he was instrumental in the Bureau’s review of high-profile corporate transactions, as well as the development of key Bureau policies arising from the significant amendments to the Competition Act introduced in 2009. He is an active member of the Canadian, American and International Bar Associations.

Mike Devereux is a member of the corporate finance and securities group in the Toronto office of Stikeman Elliott. His practice focuses on securities and corporate law, with a particular emphasis on public and private mergers and acquisitions, corporate finance transactions, corporate governance and shareholder activism. He has acted for issuers, boards of directors, special committees and other transaction participants in numerous M&A transactions, including both friendly and hostile transactions. He also regularly provides advice on corporate governance and securities regulatory compliance matters to various issuers, and has been involved in several contested shareholder meetings. Devereux has also worked in the Sydney, Australia office of Stikeman Elliott, where he advised on international corporate finance and M&A transactions. He is a member of the Law Society of Upper Canada and the Canadian Bar Association.

Michael Laskey is a member of the competition and foreign investment group in Stikeman Elliott’s Toronto office. His practice focuses primarily on the review of transactions under the Competition Act and the Investment Canada Act. In addition, Laskey advises clients on compliance issues related to the Competition Act as well as federal and provincial marketing and advertising laws and regulations. He is a member of the Law Society of Upper Canada and the Canadian Bar Association. He holds a Master of Arts degree in economics.
China

Lu Yi and Sophie Han, Paul Hastings

1. Overview of FDI in the jurisdiction

1.1. Which countries are the principal sources of FDI into your jurisdiction?

Despite substantial fluctuations in the Asian and global economies, China has attracted more FDI than any other developing country. In 2012 it attracted $121 billion of FDI, second only to the US, with the total value of China’s inward FDI stock at the end of 2012 estimated at $830 billion.

Overall, on the basis of realised FDI value as at 2012, the major sources of inward FDI into China is from the following countries and regions: Hong Kong 43.78%; British Virgin Islands (BVI) 9.56%; Japan 6.45%; US 5.19%; Singapore 4.38%; Taiwan 4.22%; and South Korea 3.91%.

In recent years, countries and regions from Southeast Asia such as Hong Kong, Macau, Taiwan Province, Japan, the Philippines, Thailand, Singapore and South Korea, have been the major FDI force into China. In 2012, Hong Kong alone accounted for 54.15% of the whole FDI inflow to China. There are also signs that multinational companies from developed countries are placing larger projects in China, and the number of projects from high-growth economies continues to increase.

1.2. What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

The Chinese government is focused on high-quality investment projects that generate longer-term economic value and that increase employment. Data from the Ministry of Commerce’s (MOC) 2013 Statistics on FDI in China (published on October 14, 2013) indicates that the key sectors attracting FDI include manufacturing, real estate, leasing and business services, and retail.

<table>
<thead>
<tr>
<th>Sector</th>
<th>No of enterprises</th>
<th>Share %</th>
<th>Contractual FDI value</th>
<th>Share %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>494,715</td>
<td>64.80</td>
<td>16,309.87</td>
<td>57.57</td>
</tr>
<tr>
<td>Real estate</td>
<td>51,318</td>
<td>6.72</td>
<td>4,396.33</td>
<td>15.52</td>
</tr>
<tr>
<td>Leasing and business services</td>
<td>43,671</td>
<td>5.72</td>
<td>1,603.57</td>
<td>5.66</td>
</tr>
<tr>
<td>Retail</td>
<td>70,897</td>
<td>9.29</td>
<td>1,306.67</td>
<td>4.61</td>
</tr>
<tr>
<td>Transportation, warehousing</td>
<td>10,054</td>
<td>1.32</td>
<td>793.35</td>
<td>2.80</td>
</tr>
<tr>
<td>Agriculture, forestry, animal</td>
<td>22,009</td>
<td>2.88</td>
<td>640.12</td>
<td>2.26</td>
</tr>
<tr>
<td>Scientific research and technical services</td>
<td>14,682</td>
<td>1.92</td>
<td>585.36</td>
<td>2.07</td>
</tr>
</tbody>
</table>

1.3. Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

The Chinese government is fully supportive of FDI, and MOC and its local counterparts are mainly responsible for driving FDI.

2. Investment vehicle

2.1. What are the most common legal entities and [pass-through] vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

FDI in China typically takes the form of foreign-invested enterprises, which are structured as Sino-foreign equity joint ventures (EJVs), Sino-foreign cooperative joint ventures (CJVs) or wholly foreign-owned enterprises (WFOEs). Large foreign investors can also establish holding companies in China, which offer platforms for them to further invest and establish multiple subsidiaries throughout China. Non-legal entities typically include representative offices of foreign entities. Partnership is also available as an investment vehicle. Among all these legal entities, WFOE is the most popular one in recent years.

It generally takes two to three months to establish a WFOE, and another one to two months for the WFOE to become fully operational (for instance, it completes the tax registration and can issue official invoices to customers). The one-to-three month period for establishment could be shorter or significantly longer, depending on a number of factors, primarily its business, amount of total investment, the efficiency of the foreign investor itself, and the responsiveness of the relevant approval and registration authorities. It typically takes a much longer period of time to form a Sino-foreign joint venture and most time will be spent on negotiations between the joint venture partners and the preparation of the joint venture contract.

2.2. What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

Key requirements for establishment and operation of a foreign invested enterprise (FIE) include, among other things, the following:

(a) The business scope of an FIE is required to be approved by MOC or its local branches, and registered with the State Administration for Industry and Commerce (SAIC) or its local branches.

The business scope will be set forth in the FIE’s articles of association, shown on its business licence, and will limit the business activities that the FIE may legally undertake. Accordingly, it is important that the investors carefully consider all business activities to be undertaken by the FIE, and ensure that the proposed scope is broad enough to encompass such business activities.

(b) Foreign investors are required to inject capital into the FIEs, and such injection must meet the minimum amount requirement. For example, to establish a sole-shareholder WFOE, the minimum capital requirement is Rmb100,000 ($16,419). In practice, the capital injection plan should be commensurate with the proposed business plan, and substantiated by projections in the feasibility study report of the FIE, one of the documents to be submitted to the MOC or its local branch for approval. Capital may be contributed in cash or in kind, while at least 30% of the registered capital should be in cash. When capital is contributed in instalments, the first instalment must be not less than 20% of the registered capital or the minimum capital requirement, and must be paid within three months from the date the business licence is issued. The deadline for completing the contribution is generally two years from the date the business licence is issued.

(c) An FIE is required to form a board of directors. In case of a mid-size FIE, the board of directors often consists of three board members, including one board chairman, who concurrently may serve as the legal representative of the
FIE. Alternatively, the foreign investor of an FIE may appoint one person to serve as the FIE’s executive director in lieu of forming a board, and in this case, the executive director may serve as the legal representative of the FIE.

(d) The FIE is also required to set up a board of supervisors or appoint a supervisor.

3. Investment approval

3.1. For foreign investment approval (including national security review) explain the following:

a) The regulator/s’ name, factors it must consider when making its decisions, and how much discretion it has;

Government examination and approval for FDI can come from district, municipal, provincial or central-level government authorities, depending on the size and industry of the projects. Certain large-scale projects may require approval by the state council.

MOC is the major FDI regulator and is the governmental department charged with administering and ensuring that the FDI is in line with state policy. In practice, approval authority is often delegated to MOC’s subordinate local commissions (Coftecs). In order to promote regional economic growth, Coftecs tend to be more flexible in the approval process than MOC.

The National Development and Reform Commission (NDRC) and its local branches also exercise approval authority over certain foreign investment projects, typically those involving construction of plants or infrastructure. Apart from MOC and NDRC, various industry administrative authorities also claim jurisdictions on FIEs in their respective industries.

MOC is also in charge of merger control review and national economic security review.

b) Any investment caps and other legislative restrictions;

Total investment is the total amount of funds required to establish an FIE, which includes capital (which must be paid in and is defined as registered capital) and loans. PRC law has certain requirements on a minimum ratio of registered capital vis-à-vis total investment in order to ensure that an FIE is not under-capitalised.

c) Which party must notify and when/if notification is mandatory or voluntary;

After MOC/Coftec approval is obtained (as evidenced by an approval certificate), the investor must register with SAIC or its local branches) to obtain the FIE’s business licence, which step marks the formal establishment of an FIE.

Subsequently, the FIE must also register with various other government authorities, including those relating to organisation code, tax, statistics, finance, customs, and foreign exchange.

d) What information must be included with notification and what is the review fee;

The primary documents required to establish an FIE generally include, among others, standard application letters and forms required by the government authorities, a feasibility study report, a joint venture contract (not required for WFOEs) and articles of association.

The review fee varies from locale to locale, but is generally not a significant amount. As an example, the government charges approximately Rmb2,000 for establishing a WFOE in Shanghai.

e) How long does the review and approval process take, and are there any fast-track options;

It generally takes two to three months to establish an FIE. There is no statutory fast-track option, although such period could be shorter or significantly longer depending on a number of factors discussed above.

f) Is there the ability to consult on a named or unnamed basis;

Yes, consultations can be made to the regulators on a named or unnamed basis, with the latter method being more commonly used due to the investors’ desire to preserve confidentiality before they make official applications to the relevant government authorities.

3.2. Briefly explain the investment restrictions for any special/restricted sectors.

All FDI projects are subject to restrictions imposed by a catalogue released by MOC and NDRC, which divide FDI projects into four categories: (1) permitted; (2) encouraged; (3) restricted; and (4) prohibited. FDI projects under the latter three categories are specifically listed, and if an industry sector is not specifically listed in these categories, it is deemed to fall within the permitted category. However, the actual classification of any type of proposed business activity is subject to the discretion of the relevant approval authorities. Furthermore, in certain strategic industries, policy guidelines may limit foreign ownership in an FIE up to 50%, specifically forbid 100% ownership by foreign investors or require investment in the form of a joint venture with Chinese investors.

A number of the restricted or prohibited industries are worth mentioning here:

Telecommunications: The PRC law classifies telecom businesses into two types, basic and value-added. Prospective telecom operators are required to obtain a licence to engage in either type. Generally, basic refers to the provision of infrastructure facilities and basic voice and data transmissions, both domestically and internationally, while value-added refers to the provision of specialised services via the basic infrastructure facilities. Foreign shareholding cannot exceed 49% in an FIE engaging in basic telecom services or 50% in an FIE engaging in value-added telecom services.

Securities: Foreign investors may invest up to 49% in securities companies and securities investment fund management companies.

Publication of books, magazines, and newspapers: This is classified as a prohibited industry.

It should be noted that, keen to tap into China’s capital markets, foreign investors have commonly used different means, including setting up a variable interest entity (VIE) structure, to achieve greater control over FIEs operating in the restricted or prohibited industries. That being said, there have been growing concerns about the future status of the VIE structure in China’s regulatory landscape given the negative attitudes of certain Chinese government authorities and courts towards the structure.
3.3. Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.

The Anti-monopoly Bureau (AMB) of MOC oversees competition clearance, and such notification is mandatory after the relevant transaction documents are executed, and before the closing of the transaction takes place (if the thresholds for the antitrust filing are met).

The antitrust review process is typically as follows, which must be completed pre-closing:
- initial 30-day review: AMB should complete an initial review of the proposed transaction by the 30th day after AMB's official acceptance of the filing. Within the 30 days, AMB will either: (i) issue a decision to accept, reject or condition the transaction; or (ii) extend the review period for an additional 90 days.
- second stage review: AMB may decide to extend the review period for an additional 90 days. This typically takes place if AMB believes that the case is relatively complex or the applicant should make supplemental filings.
- further extended review: AMB may further extend its review for an additional 60 days, if: (i) the parties consent to the extension; (ii) the filing is inaccurate and requires further review; or (iii) a material change occurs to the parties after the filings.

As a result of the review, AMB may render a decision to:
- approve the transaction;
- conditionally approve the transaction, subject to the imposition of certain restrictions or conditions designed to mitigate any perceived negative impact on competition; or
- block the transaction.

4. Tax and grants

4.1. Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

An investor's particular commercial considerations, any applicable regulatory limitations and home country tax considerations, all play a role in determining the most appropriate form for its investment. That being said, it is common for foreign investors to interpose an overseas holding company to hold a Chinese subsidiary, through which they can obtain business and tax benefits, such as possible lower withholding tax rates and access to beneficial tax treaties. Jurisdictions where such holding companies are often located include Hong Kong, Singapore, Barbados, and Mauritius.

4.2. What are the applicable corporate tax rates?

The standard company income tax rate is 25%. Special rates apply to small-scale enterprises (20%), and enterprises with new high-technology status (15%).

4.3. Does the government have any FDI tax incentive schemes in place?

The principal incentives include a 15% preferential tax rate applicable to new high-technology enterprises and a 50% super deduction for qualifying research and development expenditure.

There is a geographically-based incentive focused on new high-technology enterprises. Tax exemptions and other preferences apply to the agriculture, forestry, animal husbandry and fishery sectors, software and integrated circuit industries, major infrastructure projects, certain environmental projects and certain transfers of technology.

In addition, encouraged foreign investment projects can enjoy certain tax incentives under prevailing regulations. For instance, equipment and parts imported by an FIE within the encouraged scope can generally be exempted from customs duties.

4.4. Other than through the tax system, does the government provide any other financial support to FDI investors?

The local government may also provide financial subsidies to FIEs in its territory, which are usually negotiated on a case by case basis.

5. Operating locally

5.1. What is the most common governing law of contracts and local business language?

PRC law is the most common governing law of contracts. We also see that foreign and domestic parties often choose Hong Kong law as a middle ground.

Most business meetings in China are conducted in Mandarin, the official language of China. That being said, English still remains a common business language in major cities such as Beijing and Shanghai.

5.2. Explain any local content or local participation requirements relevant to foreign investors.

None.

5.3. How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?

An FIE and its expatriate personnel will need to apply with the labour, public security and customs authorities to complete relevant registration and visa formalities. While there is a trend towards tightened working visa requirements by the government, we have not experienced any substantial difficulty in foreign investors securing expatriate visas for shareholder representatives and workers.

5.4. What foreign currency or exchange restrictions should foreign investors be aware of?

The Chinese government maintains strict exchange controls, although the general trend has been towards a gradual liberalisation of China's foreign exchange markets and specific controls over companies and individuals. The foreign exchange authority is the State Administration of Foreign Exchange and its local branches.

5.5. Does the country prohibit domestic companies from doing business in any foreign jurisdictions?

Generally no, but outbound investments by domestic companies in certain countries or regions need to be approved by MOC in advance.

6. Legal and regulatory framework

6.1. Are there any other FDI-specific laws that foreign investors must be aware of?

There are numerous Chinese laws and regulations governing FDI, the most notable ones being the PRC Company Law and the laws and regulations specifically governing WFOEs, CJVs and EJVs.

6.2. What challenges if any do investors find in getting certainty around local law and regulation?

While other challenges do exist, the most difficult ones regard relationships, prohibited and restricted industries and complexity of rules and regulations. There are situations where regulations may be difficult to grasp or inconsistently enforced, which in turn causes confusion or frustration. This is in part due to the multiple authorities involved in oversight, and loosely interpreted regulations.
7. Dispute resolution

7.1. How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?

The use of litigation to protect commercial entities is affected by many factors, including limitations on the right to sue, the use of other means to achieve similar ends, conflicting policy goals, and the strength and independence of the courts. These factors affect certain areas of law and types of cases more than others.

Some investors continue to be concerned about party or government interference in particular cases involving key state-owned enterprises or industrial sectors, where the amount at stake is high or the legal issue particularly significant to national or local interests.

7.2. Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?

PRC law provides for the enforcement of foreign court judgments in accordance with international treaties or the principle of reciprocity, as long as they do not violate basic principles of Chinese law, state sovereignty and security or the public interest. Reciprocity is interpreted as willingness by a foreign court to enforce a judgment issued by a Chinese people’s court, which is generally difficult to establish.

Accordingly, foreign judgments are generally not enforceable in China given the lack of a treaty. It should be noted that mainland China and Hong Kong have made arrangements to mutually recognise and enforce judgments in civil and commercial matters in limited situations.

In contrast, foreign arbitration awards are generally enforceable in China because China is one of the contracting countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

7.3. Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

Judgments from China are generally not enforceable in other jurisdiction given the lack of a treaty. That being said, there are sporadic cases where other jurisdictions, such as Singapore and California, US, have enforced Chinese judgments.

Chinese arbitration awards are generally enforceable in the territory of another contracting country of the New York Convention.

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About the author

Lu Yi is a partner in the corporate practice of Paul Hastings and is based in the firm’s Shanghai office. Her practice focuses on M&A, private equity financing and venture capital investments, real-estate acquisitions, and foreign direct investment.

Before joining the firm, Lu spent several years as senior counsel at Siemens China, and before that practiced in a leading PRC law firm and a German law firm.

Lu passed the bar in China in 1998 but does not hold a current practicing certificate. She is also admitted in the State of New York.

Lu is fluent in English, Mandarin Chinese, and the Shanghai dialect.

Sophie Han is an associate in Paul Hastings’ corporate department and is based in the Shanghai office. She focuses her practice on corporate and commercial law, investment management, foreign direct investment, and M&A in China.

She advises multinational clients on their transactions and operations in China, including M&A, foreign direct investment, corporate compliance and employment matters.

Han received her LLB from Shanghai International Studies University in 2007 and her Masters of laws from Stanford Law School in 2012.

She passed the bar China in 2007 but does not hold a current practicing certificate. She is fluent in Mandarin, English and Cantonese.
1. Overview of FDI in the jurisdiction

1.1. Which countries are the principal sources of FDI into your jurisdiction?

The principal source of FDI into Ireland are the US, the UK and Germany. The US is, however, the largest investor in Ireland with approximately 50% of all FDI investment being American. As the only English speaking country in the eurozone, Ireland has been a beneficiary of US investment to the extent that the US has invested more than $165 billion in Ireland; this equates to more than the total invested in the BRIC [Brazil, Russia, India, Russia] countries combined.

While all of Europe experienced a decline in FDI in 2012, Ireland performed better than other countries, with a much smaller decline in FDI. As a result, Ireland increased its market share of FDI in Europe to 3.78%. Ireland's performance reflects the growing stabilisation of the Irish economy and strong growth in repeat investments by existing investors, especially from the US.

In recent years, Ireland has also been targeting newer emerging countries such as the People’s Republic of China with frequent government trade missions to these jurisdictions and to other emerging markets. There are also signs that Chinese companies are placing larger projects in Ireland.

1.2. What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

The Irish government is focused on high-quality investment projects that generate long-term economic value and employment. The following table from the Industrial Development Authority (IDA) Ireland’s annual report for 2012 indicates the key sectors attracting FDI in Ireland, measured as the total employment in IDA-supported companies.*

<table>
<thead>
<tr>
<th>Sector</th>
<th>Number</th>
<th>% Change 2011/2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pharmaceuticals</td>
<td>22,154</td>
<td>0.0%</td>
</tr>
<tr>
<td>Computer, Electronic &amp; Optical Equipment</td>
<td>15,884</td>
<td>+1.8%</td>
</tr>
<tr>
<td>Medical/Dental Instruments &amp; Supplies</td>
<td>24,438</td>
<td>+4%</td>
</tr>
<tr>
<td>Metals &amp; Engineering</td>
<td>10,474</td>
<td>+1.8%</td>
</tr>
<tr>
<td>Miscellaneous Industry</td>
<td>4,986</td>
<td>-0.3%</td>
</tr>
<tr>
<td>International &amp; Financial Services (incl, Software)</td>
<td>74,849</td>
<td>+7.4%</td>
</tr>
<tr>
<td>Total</td>
<td>152,785</td>
<td>+4.5%</td>
</tr>
</tbody>
</table>

* Including part-time, temporary and short-term contract employees

1.3. Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

The Irish government is wholly supportive of FDI, and it has been a cornerstone of national economic development since the 1960s. As a result of this emphasis on FDI, Ireland has become an important base to some of the most significant global companies, and the government is constantly working to make Ireland as attractive as possible for FDI. In recognition of Ireland’s efforts in this regard, the IMO World Competitiveness Yearbook 2012 ranked Ireland first in the world for investment incentives for attracting foreign investors.

IDA Ireland is the government agency responsible for attracting and supporting FDI into Ireland. It has offices throughout Ireland, six offices in the US, and others in Western Europe and in Asia, to support FDI into Ireland.

2. Investment vehicle

2.1. What are the most common legal entities and (pass-through) vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

Ireland ranks very highly in the various global tables for ease of doing business. As a small country, Ireland is flexible and can be responsive to the needs of investors; it seeks to avoid bureaucracy and red tape whenever possible.

The most common form of investment vehicle is the private company (limited or unlimited). Incorporation of a private company takes approximately five days. Certain foreign investors may also register a branch of a company incorporated in another country, and registration takes place in a matter of days.

2.2. What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

(a) Private company limited by shares

There are no FDI-specific rules regarding the establishment and operation of a private company limited by shares. Incorporation is a straightforward process.

A private limited company must have one secretary and a minimum of two directors. At least one of the directors is required to be resident in a member state of the European Economic Area (EEA). However, this requirement does not apply to any company which holds a bond, in the prescribed form, in force to the value of €25,394.76 ($34,538). The bond provides that, in the event of a failure by the company to pay the whole or part of a fine imposed in respect of an offence under the Companies Acts 1963-2012 or the Taxes Consolidation Act 1997, or a penalty under the latter legislation, an amount of money up to the value of the bond will be paid by the surety in discharge of the company's liability. The secretary may be one of the directors of the company.

Directors must prepare annual accounts to be submitted to the Companies Registrations Office (CRO) once a year, and these must generally include a profit and loss account, balance sheet, directors’ report, business review report, a directors’ remuneration report and an auditors’ report.

(b) Branch

Any company which is incorporated outside of Ireland and establishes a branch in Ireland must be registered with the CRO. A branch is a place of business, which has the appearance of permanency, has a management structure in place, and is materially equipped to negotiate business with third parties without resource to the parent body. The registration must take place within one month of the establishment of the branch in Ireland. There...
are some differences between the requirements imposed on a company from a member state of the EU, and companies from other countries.

Any company incorporated abroad, that establishes a branch in Ireland, must file certain papers with the CRO. All companies are required to file accounting documents.

3. Investment approval

3.1. For foreign investment approval (including national security review) explain the following:

a) The regulator/s name, factors it must consider when making its decisions, and how much discretion it has;
b) Any investment caps and other legislative restrictions;
c) Which party must notify and when/if notification is mandatory or voluntary;
d) What information must be included with notification and what is the review fee;
e) How long does the review and approval process take, and are there any fast-track options;
f) Is there the ability to consult on a named or unnamed basis;
g) Does notification/review occur pre- or post-closing, and are there any pre- or post-filing requirements unique to FDI;
h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?

Not applicable in Ireland

3.2. Briefly explain the investment restrictions for any special/restricted sectors.

There are no legal or regulatory restrictions specific to FDI into Ireland; generally speaking, the same rules apply to overseas owners of, and investors in, businesses as apply to Irish owners and investors. However, a number of sectors require businesses to obtain appropriate permits or authorisations to operate. Although there is no particular prohibition on FDI into these sectors, the terms of the permits or authorisations may well contain consent rights for the relevant regulator or other provisions which will be relevant for consideration in connection with FDI. Examples include:

- Energy: the gas and electricity industries in Ireland are regulated by the Commission for Energy Regulation (CER), and companies involved in these sectors will require a CER licence. This is likely to contain provisions relevant when considering an investment in, or acquisition of, a licence holder.
- Broadcasting: a licence from the Commission for Communication Regulation (ComReg) will be required by any entity which is providing television or radio services. These licences are likely to contain an obligation to notify ComReg of a substantial change of shareholding or a change of control. However, any restrictions on ownership of a broadcasting company apply equally to domestic and foreign acquirers, and there are no FDI specific considerations.
- Water and sewage: companies in Ireland are regulated by the Environmental Protection Agency (EPA). The EPA grants both Integrated Pollution Prevention and Control (IPPC) licences and EPA waste licences for certain activities. IPPC licences are generally open-ended, subject to compliance with their conditions, although a time limit can be included as a condition. Waste licences often have a limited time span. IPPC and EPA waste licences can only be transferred with the EPA’s prior consent. The EPA will not consent to such a transfer unless it is satisfied as to both the technical and financial competence of the proposed transferee.

3.3. Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process?

Irish competition law rules and the Irish Competition Acts 2002 to 2012 (the Competition Act) require that certain mergers, acquisitions and joint ventures are notified to the Irish Competition Authority for approval, prior to completion. Unless the necessary approval has been obtained from the Competition Authority under the Competition Act, an acquisition for which such approval is required will be void.

While certain industries (such as media and banking) have specific tests, as a general principle, the Competition Act will only apply where all of the following thresholds apply:

- the worldwide turnover of each of two or more of the undertakings involved in the acquisition in the most recent financial year was not less than €40 million;
- each of two or more of the undertakings involved in the acquisition carries on business in any part of Ireland; and
- the turnover in Ireland of any one of the undertakings involved in the acquisition in the most recent financial year must not be less than €40 million.

The notification regime is mandatory, and mergers, acquisitions or joint ventures coming within the scope of the Competition Act must be notified within one month of the conclusion of a binding agreement or the making of a public bid.

The Competition Act provides for a two-phase examination process for mergers. In Phase I the Competition Authority has an initial period of one month in which to decide whether to allow the merger to be put into effect on the grounds that it would not substantially lessen competition, or to carry out a more detailed investigation. If, at the end of Phase I, it is unable to form that view, an eight-week Phase II investigation is initiated. Phase II gives the Competition Authority an additional three months to further investigate the merger and decide whether it should be cleared (including subject to conditions) or blocked.

4. Tax and grants

4.1. Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

One structure we commonly see used by US multinationals investing into Ireland is what is referred to as the double Irish structure. This can be used by US multinationals to exploit intellectual property (IP) outside the US. Briefly, this structure involves the non-US IP being held by an Irish incorporated entity resident for tax purposes in a low-tax jurisdiction such as the Cayman Islands, Bermuda or Isle of Man (IrishCo 1) with a cost sharing agreement in place with the US entity. IrishCo 1 licenses the IP to a second Irish incorporated entity resident in Ireland for tax purposes (IrishCo 2) for which IrishCo 2 pays a royalty fee to IrishCo 1. The royalty income of IrishCo 1 is subject to the low rate of tax in the jurisdiction in which it is resident, and is normally not treated as Subpart F income in the US. Further, IrishCo 2 gets a deduction for the royalty fee paid to IrishCo 1, which, in effect, reduces the taxable profits of IrishCo 2. The taxable profits of IrishCo 2 are then generally subject to Irish corporation tax at the rate of 12.5%.

4.2. What are the applicable corporate tax rates?

Income derived from trading activities is subject to Irish corporation tax at the standard rate of 12.5%, one of the lowest in Europe. Income derived from non-trading (or passive) activities is subject to Irish corporation tax at the higher rate of 25%.
4.3. Does the government have any FDI tax incentive schemes in place?
The Irish tax legislation contains a number of measures which enhance Ireland’s attractiveness as a location for choice for FDI. Such measures include:

- Corporation tax at the rate of 12.5% on profits generated from the trading activities, including the active exploitation of IP.
- A tax credit for expenditure incurred on qualifying research and development (R&D) activities. Briefly, the credit is comprised of 25% of the incremental spend by a company in a specific year on its qualifying R&D expenditure over its qualifying expenditure in a base year (2003).
- Tax depreciation for capital expenditure incurred to acquire a variety of intangible assets over a 15-year period.
- Wide domestic exemptions from withholding tax on dividends and interest payments made by an Irish company.
- An exemption from capital gains tax for Irish holding companies disposing of qualifying shareholdings in subsidiaries.

In addition, Ireland has a wide network of double taxation agreements (70 signed to date), thus increasing its attractiveness as a location from which to do business.

4.4. Other than through the tax system, does the government provide any other financial support to FDI investors?
A wide range of discretionary grants and incentives are available through the IDA to support businesses in Ireland. There is no formal screening process for foreign investment in Ireland, though investors looking to receive Irish government grants or assistance are often required to meet certain employment and investment criteria. These screening mechanisms are transparent, and do not impede investment, limit competition, or protect domestic interests.

5. Operating locally

5.1. What is the most common governing law of contracts and local business language?
Irish law is the most common governing law of contracts. Although Irish (Gaelic) is the national language, English is the language used by most of the population and all business is conducted in English.

5.2. Explain any local content or local participation requirements relevant to foreign investors.
There are none.

5.3. How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?
Nationalities of countries in the EEA and Switzerland generally have a right to live and work in Ireland.

Work permits are available for occupations with an annual remuneration of €30,000 or more (with a small number of exceptions where the remuneration is lower). The work permit is granted for two years initially, and then for a further three years. Either the employer or employee can apply for the employment permit, based on an offer of employment. Work permits are issued by the Department of Jobs, Enterprise and Innovation.

5.4. What foreign currency or exchange restrictions should foreign investors be aware of?
None

5.5. Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
Ireland from time to time puts in place trade controls, generally at the instigation of the United Nations, the EU or the Organisation for Security and Co-operation in Europe. These include arms embargoes, import licensing, financial sanctions, travel bans and export licensing.

Trading outside the EU is often subject to restrictions and may require additional licences. Goods are controlled both at the time of export from Ireland and when imported into another country. Depending on the destination of goods, export licences may need to be obtained for certain categories of products and associated technology or software.

6. Legal and regulatory framework

6.1. Are there any other FDI-specific laws that foreign investors must be aware of?
No.

6.2. What challenges if any do investors find in getting certainty around local law and regulation?
The challenges are limited. Ireland has a transparent and stable legal and regulatory system, making it attractive to foreign investors. Ireland also has comprehensive double taxation agreements in place with a vast number of countries, which serve to promote trade and investment between Ireland and the partner countries.

7. Dispute resolution

7.1. How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
Commercial disputes are usually dealt with in the Irish High Court which has jurisdiction to hear all claims with a monetary value in excess of €38,092.14. However, the Commercial Court (a division of the High Court) sometimes offers a more expedited process. The Commercial Court deals with commercial disputes with a monetary value in excess of €1 million. However, the Commercial Court judge hearing the application has overall discretion to allow or refuse to enter a case onto the commercial list.

While the courts remain the usual forum for the resolution of commercial disputes in Ireland, there is a growing interest in the use of alternative dispute resolution (ADR) as an alternative or an additional forum to the Irish court system.

7.2. Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
According to Council Regulation (EC) 44/2001 of December 22 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), EU member state judgments in civil and commercial matters are immediately enforceable across the EU without the need for an intermediate registration process in the enforcing state. The extent, however, to which a foreign judgment will be given recognition in Ireland, will be dependent upon the principles of private international law of the country of recognition.

According to the Arbitration Act 2010, which applies the United Nations Commission on International Trade Law (UNCITRAL Model Law) to all arbitrations (including international commercial arbitrations), all arbitral
awards – irrespective of the country in which it was made – shall be recognised as binding and, upon application in writing to the competent court, shall be enforced (subject to certain exceptions stated in the Uncitral Model Law.)

7.3. Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

According to Brussels I, EU member state judgments in civil and commercial matters are immediately enforceable across the EU without the need for an intermediate registration process in the enforcing state. The extent to which an Irish judgment will be recognised in a foreign non-EU jurisdiction will be less certain, and will be dependent on the relevant jurisdiction.

As Ireland is a party to the New York Convention on the recognition and enforcement of foreign arbitral awards, Irish arbitration awards can be enforced relatively easily in 149 countries around the world.

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Kuwait

Ahmed Barakat and Akusa Batwala, ASAR – Al Ruwayeh & Partners

1. Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?
The principal sources of FDI in Kuwait include; the US, western European countries (including the UK, France, Spain, and Portugal), Egypt, India, Japan and more recently China.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?
The current government focus for FDI is on infrastructure investment such as: wastewater treatment, power, roads and bridges, ports and communication. The government is also keen to attract foreign capital into other sectors such as land and sea freight, tourism, real estate, health, urban development, information technology and software development.

It should be noted that while Kuwait is a geographically small country, it is a wealthy country with a relatively open economy and self-reported crude oil reserves of approximately eight percent of world reserves. Petroleum accounts for nearly half of the country’s GDP, 95% of export revenues and 95% of government income. Kuwait, however, in comparison to other GCC countries, has been slow in diversifying and reforming its economy, in part because of its positive fiscal situation, but also due to the nature of the regulations governing foreign investment.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?
Kuwait has in the past been open to foreign investment, and with the introduction of new laws in recent years, the country would appear to be even more open to foreign capital. Kuwait recently passed into law the new Foreign Direct Investment Law 116 of 2013 (the FDI Law) aimed at promoting and stimulating direct investment in the State of Kuwait. The law was published in June 2013, and will come into force in January 2014. This law is intended to modernise FDI legislation and make it more accommodating. It establishes a public authority that will be known as the Kuwait Direct Investment Promotion Authority (KDIPA). Its mandate will be to promote direct investment, streamline the business environment for both local and foreign investors and serve to implement government developmental goals, including: bringing modern technology to Kuwait, creating jobs, supporting and developing the domestic private sector and contributing to the diversification of the economy to reduce dependence on oil.

The FDI Law incentives include: foreign investors being permitted to own up to 100% of a local entity, income tax exemptions (for a limited duration), exemption from import duties, utilisation of state land, protection from expropriation, and employment of foreign labour.

Further, foreign companies are given an option to open and operate a branch in Kuwait, and to establish a representative office to exclusively conduct marketing studies (but not commercial operations). Additionally, licensed entities will be exempted from the general restrictions on foreign entities doing business in Kuwait. The FDI Law opens up all economic sectors to foreign investors, except those exempted by a council of ministers’ decision.

The FDI Law will also be applicable to participants in other FDI government schemes, including partnership projects established under Kuwait’s Build-Operate-Transfer (BOT) Law (Law 7 of 2008) and the Privatisation Law (Law 37 of 2010). The FDI Law is also set to reduce the time needed to process an investment licence to a maximum of 30 days from receipt of the application. It further introduces the concept of a so-called one stop shop to accelerate the process.

The FDI Law repeals Law 8 of 2001, and therefore all entities established under the same, including the Kuwait Foreign Investment Bureau and the Foreign Capital Investment Committee, will cease to exist. All their funds, assets, obligations and rights have been transferred to the KDIPA by the FDI Law.

The executive regulations of this law are yet to be passed and it is therefore yet to be seen what change this will bring about to the influx of FDI.

2. Investment vehicle

2.1 What are the most common legal entities and (pass-through) vehicles used for FDI in your jurisdiction, and how long do they take to become operational?
Kuwait law generally provides that foreign companies conducting business in Kuwait must do so either through an agent or through a Kuwaiti partner (through the establishment of a Kuwaiti company with Kuwaiti participants). Most foreign companies operate in Kuwait through a Kuwaiti agent, and under the agency arrangement, the foreign principal would be able to carry on business in Kuwait under the umbrella of the agent’s commercial licence. The agent’s commercial licence would have to cover the activities that the foreign principal proposes to undertake in Kuwait. If the foreign entity proposes to enter into governmental contracts, it will need to have its agency registered at the Ministry of Commerce and Industry (MOCI).

Kuwait recently issued a new Commercial Companies Law, Law 25 of 2012 (as amended). The Companies Law offers a number of options for business entities. However, the two most popular forms of company are: a joint stock company which can be private or public (KSC), and a with-limited-liability company (WLL).

Incorporation of a company may take eight to twelve weeks.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?
KSCs are essentially shareholding companies. Kuwaiti nationals must (except possibly where the KSC is publicly traded at the Kuwait Stock Exchange) hold at least 51% of the shares of the KSC. The shareholders in a KSC may either be individuals or legal entities. There is no limit on the number of shareholders, however, a minimum of five shareholders is needed. The liability of each shareholder is limited to the nominal value of the shares held by that particular shareholder. The capital requirement of the company is determined by its objects.

The management of a KSC is given to a board of directors, whose composition and term of office are described in the articles. Foreigners may be directors; however, the chairman of the board must be a national of a Gulf Cooperation Council (GCC) country, and the deputy chairman and chief executive officer must be resident in Kuwait (but can be of any
nationality). The board must consist of a minimum of three directors, who are elected by the shareholders.

A Kuwaiti WLL requires at least two partners and can have a maximum of 50 partners. It requires 51% Kuwaiti participation in the company’s capital, and the objects of the company will determine its capital requirement. The MOCI has developed a list of activities that a WLL can engage in, and the corresponding capital requirement for such activities. Certain activities cannot be combined, and WLLs cannot engage in certain activities including banking or insurance. The entire capital of a WLL must be paid up prior to incorporation.

The management of a WLL is given to one or more managers who may be named in the company’s constitutive documents or appointed by the general assembly. The manager is liable to the company, the shareholders and third parties for breach of the provisions of the law, the company’s constitutive documents and for mismanagement.

The form of articles of association for both a KSC and WLL are in a standard form issued by the MOCI. The shareholders in these companies often also enter into a form of shareholders agreement to regulate the management and affairs of the company.

3. Investment approval

3.1 For foreign investment approval (including national security review) explain the following:

a) The regulator/s name, factors it must consider when making its decisions, and how much discretion it has;

If investing via a commercial company, the MOCI will consider the company incorporation application in coordination with the relevant sector regulator, to determine whether the company may be incorporated and so licensed.

For investments under the FDI Law, an application will have to be submitted to KDIPA created under the FDI Law. The KDIPA will be mandated to set the criteria against which investors’ applications will be evaluated.

b) Any investment caps and other legislative restrictions;

The law makes no reference to any investment caps and opens all areas to FDI, except those exempted by Council of Ministers Resolutions. The executive regulations are expected to provide more guidance on this matter. We are not aware of any such ministerial resolution being issued as yet.

c) Which party must notify and when/if notification is mandatory or voluntary;

The executive regulations (once issued) shall give the procedures for submitting applications for investment licences. The executive regulations will also contain the information and data that will be required in the application and the related fees.

d) What information must be included with notification and what is the review fee;

See answer to c) above.

e) How long does the review and approval process take, and are there any fast-track options;

The FDI Law provides that the licence application will be decided within 30 days from the date of submission of the application. If achieved, this will be an enormous improvement to the previous system.

f) Is there the ability to consult on a named or unnamed basis;

See answer to c) above.

g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;

See answer to c) above.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals;

The FDI Law provides that the KDIPA will give its decision in writing with justification for any rejection. The decision may be challenged by the applicant.

Note that if investing via an agent, there is no regulatory approval required. The agent would typically have all the business licences required for the principal to operate in Kuwait.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.

There are certain sectors that have restrictions (mainly concerning the ownership of such entities) with respect to foreign participation and these include (but are not limited to):

- establishing printing presses and publishing houses;
- establishing newspapers and magazines;
- pilgrimage and Omra services; and
- commercial agencies.

Additionally, with respect to banks, following the enactment of Law 20 of 2000 and its implementing regulations, foreign investors (ie both companies and individuals) are entitled to purchase unlimited shares in the capital of joint stock companies listed on the Kuwait Stock Exchange except with regard to Kuwaiti banks where restrictions on ownership generally still apply. Furthermore, direct and indirect interests in five percent or more in the shares of a listed company, and any change in such interests, must be carried out and disclosed in compliance with specific regulations and laws concerning the same.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process?

Competition is regulated by Law 10 of 2007 Regarding the Protection of Competition. Article 4 of the Competition Law provides that any ‘agreements, contracts, practices or decrees, which are harmful to free competition, are prohibited’ and persons in a ‘control position’ are further prohibited from engaging in certain enumerated transactions that are considered anti-competitive, or abuse their control position. A control position is defined in the law as a: ‘position through which a person or a group of persons, that work with each other directly or indirectly, can control the products market. This is through possessing more than 35% of the volume of the intended market’. The law further regulates mergers and acquisitions that could potential affect free competition. Article 8 provides for the requirement of any persons or entities engaging in mergers or acquisitions that will lead to a control position or increase an existing control position, to notify the Competition Authority who will examine the proposed action and either permit or reject the same. This review will cost the applicant 0.1% of the paid capital or total value of the assets in question up to a maximum amount of KD100,000 ($353,000).

The Competition Authority established under Law 10 of 2007 has been recently established, and given its infancy, it is yet to be seen how effective this body will be.
4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country? If the vehicle chosen for FDI is a local company, the same will not be subject to income tax; however, any foreign corporate shareholders will have to pay tax on their portion of profit or income generated by the company's operations in Kuwait. This is subject to any tax incentives that may be granted under the FDI Law.

4.2 What are the applicable corporate tax rates? Income tax in Kuwait is regulated by Decree 3 of 1955 as amended (the Tax Law). The existing tax rate is a flat 15% levied on the profits of any corporate body trading or doing business in Kuwait. Income tax is in practice, however, only applied to foreign or non-GCC corporate entities.

4.3 Does the government have any FDI tax incentive schemes in place? One of the incentives provided under the FDI Law is a tax exemption for a given period of time. It is yet to be seen what criteria has to be met to benefit from such incentive.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors? No.

5. Operating locally

5.1 What is the most common governing law of contracts and local business language? Kuwaiti law permits parties to an agreement to select foreign law as governing law, and Kuwaiti courts should interpret such agreement in accordance with the foreign law chosen. A choice of foreign law would, however, not be upheld in Kuwait to the extent it is deemed to violate Kuwaiti public policy. Where the agreement involves a foreign entity, it is common for the parties to choose the law of a neutral country, and this is typically English law.

While Arabic is the official language of the State, the local business language is a combination of Arabic and English. Official documentation is, however, generally in Arabic.

5.2 Explain any local content or local participation requirements relevant to foreign investors. See answer to 2.2, above. Companies established in Kuwait generally require 51% Kuwaiti participation.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers? All foreigners (except for GCC nationals) working in Kuwait require residence and work permits which must be sponsored by a Kuwaiti entity. The duration for processing the same is dependant on a number of factors including: the nationality and qualifications of the individual and whether the sponsoring entity has the adequate quota space on its labour file to employ an expatriate.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of? There are no foreign currency restrictions in Kuwait, and investors are free to repatriate their profits abroad without restriction.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions? There are no restrictions on the operation of Kuwaiti companies abroad (except with respect to Israel).

6. Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of? See answer to 1.3 above

6.2 What challenges if any do investors find in getting certainty around local law and regulation? Kuwait's laws are relatively accessible. All laws can be accessed from the Official Gazette archives. There are also a number of online resources that are frequently updated with the latest laws and amendments. However, there are ministerial resolutions that are frequently issued by ministries that may not be as readily available. These would typically require attendance at the particular government department to access them.

7. Dispute resolution

7.1 How efficient are local courts' enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of? The Kuwaiti courts need to streamline their operations and procedures and improve the training of judges and staff to become more efficient. Litigation matters are typically lengthy, as matters are generally referred to the Experts Division before they are considered by a judge.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction? Parties to a contract may grant jurisdiction to foreign courts over disputes that arise from their agreements. This however, does not prevent Kuwaiti courts assuming jurisdiction in certain circumstances. Additionally, Kuwaiti courts will only enforce foreign judgments if there is reciprocity of enforcement of judgments between the country that issues the judgment and Kuwait.

Kuwait law also recognises arbitration as a form of dispute resolution. Kuwait is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and should therefore recognise and enforce foreign arbitral awards rendered in a country which is also a party to the Convention.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions? See answer to 7.2 above
About the author

Ahmed Barakat is the managing partner at ASAR. He received his Bachelor of Law with Honours at Cairo University, Egypt (1981) and his Masters of Law in International Law and Business Transactions at New York University, US (1984). He is admitted to the New York and Egypt Bar.

Prior to joining ASAR, Barakat worked as a lead counsel at the Kuwaiti Authority for Assessment of Compensation Resulting from Iraqi Aggression, and at Baker & Mckenzie in New York.

He specialises in commercial, construction and tax litigation, as well as local and international arbitration. Barakat also advises clients on corporate and commercial matters, as well as Islamic banking and investment.

Barakat has published various articles in prestigious publications such as the Oxford Business Group and IFLR. He has lectured in various workshops, spoken at various conferences, and has also appeared on Kuwait TV speaking on various legal issues including Kuwait’s tax laws. He is fluent in English and Arabic.

About the author

Akusa Batwala is a senior associate at ASAR – Al Ruwayeh & Partners with over 10 years legal experience. She received her law degree from the University of Leeds in England and her Masters degree in IT and Telecommunications Law from the University of Strathclyde in Scotland. At ASAR, she practices in the areas of commercial and corporate law, and is advising on a number of government infrastructure projects including power, transport, health, wastewater treatment and real estate development. The majority of these are being procured under public private partnerships.
Nigeria

Folake Elias Adebowale and Jumoke Lambo, Udo Udoma & Belo-Osagie

1 Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into Nigeria?

The principal sources of FDI into Nigeria, measured in terms of new projects, are the United States, the United Kingdom, the Republic of South Africa, India and France. Measured in terms of capital invested the United States, Canada, France, China and India are the principal sources.

Nigeria remains one of sub-Saharan Africa's largest recipients of foreign direct investment inflows, with its FDI receipts estimated as falling between 10% and 15% of total FDI into sub-Saharan Africa. This is despite the weak global economy and incidences of political instability, to which the United Nations Conference on Trade and Development's (UNCTAD) 2013 World Investment Report attributes a $1.9 billion decline in FDI inflows into Nigeria between 2011 and 2012.

1.2 What are the key sectors in Nigeria which attract, or the government is seeking to attract FDI?

Measured in terms of capital invested in Nigeria, the sectors that have traditionally attracted FDI have been petroleum (oil and gas) and petroleum services, telecommunications, hotels and tourism, chemicals and real estate. In terms of new projects, the key sectors that have attracted FDI include oil and natural gas, financial services, telecommunications, business services, food and tobacco. There has also been a discernible increase in FDI into the fast moving consumer goods sector. The government is keen to attract FDI into key areas of the economy such as power, infrastructure development and agriculture.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

The Nigerian government is striving to make Nigeria one of the top 20 global destinations for FDI by 2020, and is very supportive of FDI. Nigeria has a relatively liberal environment for investment, and the government continues to develop initiatives aimed at streamlining existing processes and costs to further facilitate doing business in Nigeria.

The key government and other bodies charged with responsibility for driving FDI in Nigeria include the federal ministers for finance and the coordinating minister for the economy, and for industry, trade and investment, petroleum, communications and technology, together with other ministries and the governments of the 36 states and Federal Capital Territory of Nigeria. The government recognises the need to diversify the application of FDI inflows as well as their application to all sectors that play a key role in the country's economic development.

2 Investment vehicle

2.1 What are the most common legal entities and (pass-through) vehicles used for FDI in Nigeria, and how long do they take to become operational?

There are several vehicles available for doing business in Nigeria, including private and public limited and unlimited liability companies and partnerships. Of these, private and public limited liability companies are the most common vehicles utilised for FDI in Nigeria. Section 54 of the Companies and Allied Matters Act, chapter C20 Laws of the Federation of Nigeria (CAMA) requires foreign companies to do business through a limited liability company that is incorporated in Nigeria. In addition, limited liability companies have perpetual succession, may sue and be sued in their own names, may incur liabilities, allow the investor to appoint (directly or indirectly) the persons to manage the company. Any liability that the investor may incur as its proprietor is limited to the extent of its shareholding and it is relatively easy to transfer equity shares in a limited liability company, should an investor wish to divest. While limited exemptions to this mandatory incorporation requirement may be granted at the discretion of the Federal Executive Council, such exemptions are rare and are usually only granted for limited periods in respect of specific government-sponsored projects.

Limited liability companies may be incorporated within two to four weeks of the submission of an appropriate application being submitted at the Nigerian Corporate Affairs Commission. Following this, any company with foreign participation will need to be registered with the Nigerian Investment Promotions Commission under the Cap N117, LFN 2004 (NIPC Act), must register with tax authorities, and must obtain a business permit from the Federal Ministry for the Interior before it can commence business in Nigeria. All together, these processes may together require as much as 12 to 15 weeks to complete.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

There are no FDI-specific rules regarding the establishment and operation of companies limited by shares.

In addition to incorporation as outlined in 2.1, however, certain post-incorporation approvals must be obtained by companies with foreign participation. These include registration with the Nigerian Investment Promotions Commission, registration with the tax authorities, and the procurement of a business permit and expatriate quota approvals for any expatriate personnel proposed to be employed by the company, from the Federal Ministry for the Interior. Depending on the proposed area of business, additional requirements may apply, such as Department of Petroleum Resources' registration and licensing requirements for petroleum sector participants, and Nigerian Communications Commission (NCC) registration for telecommunications sector participants.

Foreign companies must have a share capital of at least N10 million ($63,000) to qualify for a business permit. Foreign directors who intend to be resident in Nigeria and expatriate employees will also require immigration approvals in order to be able to live and work in Nigeria. These approvals are the expatriate quota positions and the Combined Expatriate Residence Permit and Aliens Card (CERPAC).

Although Nigerian companies are required to have at least two shareholders and two directors, there is no general requirement that a Nigerian vehicle utilised for FDI purposes must have local directors. Petroleum sector companies are, however, required by the Nigerian Oil and Gas Industry Content Development Act 2010 and the guidelines issued by the Nigerian Content Development and Monitoring Board to obtain NCDMB approval of applications for expatriate quotas.
3 Investment approval

3.1 For foreign investment approval explain the following:

a) The regulator/s' name, factors it must consider when making its decisions, and how much discretion it has;

There is no general requirement for a national security review of foreign investments. The incorporation process is fairly straightforward and companies will usually be incorporated upon the submission of complete and appropriate documentation and payment of official fees to the Corporate Affairs Commission (CAC). The exercise of the CAC's discretion here is otherwise limited to, for example, non-compliant applications and prohibited businesses or the proposed use of corporate names that have already been registered. NIPC registration is also fairly straightforward.

The Federal Ministry of Information (FMI) has fairly wide discretion. The submission of complete documentation and evidence of the importation of foreign shareholders' equity participation into Nigeria are crucial factors in determining whether the FMI will grant foreign investment approvals. The discretion to grant expatriate quota approvals is dependent to a large extent on the ability of the applicant to adduce satisfactory evidence that there are no suitably qualified Nigerians who can provide the required skills and services.

The Securities and Exchange Commission (SEC) is empowered to review mergers, acquisitions and business combinations. The SEC also regulates competition and monopolies. It has wide discretion in reviewing transactions and may request such information and documentation as it deems necessary before it approves them.

Depending on the sector in which the FDI is being made, it may also be necessary to obtain sector-specific approvals before the FDI can be concluded. For example, FDIs into the telecommunications sector, depending on the structure of the investment, may require the prior approval of the Nigerian Communications Commission.

b) Any investment caps and other legislative restrictions;

Companies with foreign participation must have a minimum share capital of N10 million. A larger share capital may be required by the CAC at incorporation, or subsequently by the NIPC at registration for companies engaged in certain industries, such as petroleum exploration and production.

The Nigerian Investment Promotions Commission Act prohibits investment in: the production of arms and ammunition; the production of, and dealing in narcotic drugs, and psychotropic substances; the production of military and paramilitary wears and accoutrement including those of the police and the customs; immigration and prison services; and such other items as the Executive Council of the Federation may from time to time determine.

Foreign investors are free to invest in the Nigerian oil and gas industry, up to any amount. However, a foreign investor seeking to acquire controlling equity in a company that has been granted an Oil Exploration Licence to explore for petroleum resources, an Oil Prospecting Licence to prospect for petroleum resources, or an Oil Mining Lease to exploit petroleum resources, by the Nigerian Minister of Petroleum Resources, or that otherwise holds participating interests in an oil or gas field in Nigeria, will require the prior written consent of the Minister to make the investment. Similarly, an acquisition of an oil or gas field in Nigeria (or any participating interest in either) will require ministerial consent.

In addition, the Nigerian Oil and Gas Industry Content Development Act enacted in 2010 (Local Content Act) requires that Nigerian companies be given preferential (and in some cases exclusive) consideration in bids for the award of contracts and licences in the Nigerian oil and gas industry. A Nigerian company is defined as a company that is incorporated in Nigeria, at least 51% of the shares of which must be held by Nigerians. The Local Content Act has led to a boost in the number of joint ventures and strategic alliances between locals and foreign investors seeking a competitive advantage, or to increase their eligibility for contract awards.

The consent of the Central Bank of Nigeria is required for the acquisition of more than 10% of a bank's shareholding; the consent of the National Insurance Commission is required for the acquisition of more than 25% of the shares of an insurance company; and, the consent of the NCC is required for the acquisition of more than 10% of the shares of a telecommunications company. Such sector-specific approval requirements apply to both Nigerian and foreign companies.

Technical services or management or licensing agreements for the provision of such services by foreign companies in Nigeria must be registered with the National Office for Technology Acquisition and Promotion (NOTAP) and the fees payable are subject to caps prescribed by NOTAP. NOTAP approval is required to access official foreign exchange for making offshore payments to service providers.

c) Which party must notify and when/if notification is mandatory or voluntary;

All of the authorisations discussed in 3.1 (a) and (b) are mandatory approvals and not notifications. The applicant in most cases will be the acquirer or the Nigerian entity that is either being established or being utilised for the business venture. The approvals are mandatory and must be obtained prior to commencing business.

d) What information must be included with notification and what is the review fee;

This varies with each application. For example, business permit applications must be supported by: the company's incorporation documents; certificate of capital importation banker's reference; tax clearance certificate; feasibility report application letter; and a duly completed application form. The review fee is N50,000. Application fees of N50,000, and a processing fee of 0.3% of the first N500 million, 0.225% of the next N500 million and 0.15% of any sum thereafter of the consideration paid is payable to obtain SEC approval for acquisitions, the requirements for which are relatively extensive.

e) How long does the review and approval process take, and are there any fast-track options;

The application for a business permit usually takes between 6-8 weeks. SEC approval for acquisitions can take at least 60 days to process. There are no fast track options available for any of the approval processes outlined. Complete, accurate and compliant applications may help to expedite processing, which is often at the discretion of the relevant regulator.

f) Is there the ability to consult on a named or unnamed basis;

It is generally possible to make enquiries with the FMI, the SEC, the Department of Petroleum Resources (DPR), the NCDMB and most regulators on a named or anonymous basis.

g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;

Approval (or at the very least approval in principle) is generally required pre-closing, and there are no pre- or post-closing filing requirements that are unique to FDIs other than the requirement that details of all foreign investments should be filed with the NIPC and the Central Bank of Nigeria by authorised dealers of the Central Bank of Nigeria for statistical purposes.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals;

Applications will generally be addressed, and applicants may follow up with regulators where there are delays. Aggrieved or dissatisfied applicants may generally appeal decisions but the discretion of the FMI is absolute.
3.2 Briefly explain the investment restrictions for any special/restricted sectors.

We have outlined restrictions and considerations for special sectors above. In relation to the petroleum sector, eligibility to be given first or exclusive consideration for bids in relation to contracts and licence awards depends on the extent of Nigerian participation or utilisation of Nigerian goods and services. The cabotage regime restricts ownership and participation in the maritime sector.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.

This varies from sector to sector. The NCC oversees competition issues relating to telecommunications sector participants. The SEC generally oversees competition clearance in relation to mergers, acquisitions and business combinations subject to very limited exemptions. Competition compliance reviews and clearance usually involve filing a formal detailed application and submitting specified documents and information to the relevant regulator, depending on the relevant sector in which the target or company does business. The regulator will then usually issue an approval in principle subject to fees being paid and to prescribed conditions being met pre- or post-transaction.

4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

Nigeria has entered into, and ratified double taxation treaties (DTTs) with Belgium, Canada, China, the Czech Republic, France, Netherlands, Pakistan, Philippines, Romania, Slovakia, South Africa, and the United Kingdom. The effect of these DTTs is that the rate of withholding tax on dividends, interest and royalties that are payable to recipients resident in such countries is reduced from 10% to 7.5%. The tax, when withheld and remitted to the tax authorities, represents the final tax due on that income in Nigeria.

Interest payments on foreign loans granted to Nigerian companies (in foreign currency whether in Nigeria or outside Nigeria) that meet the moratorium and tenor requirements prescribed in the Companies Income Tax Act are exempt from tax. The tax exemptions applicable to foreign loans are as follows:

<table>
<thead>
<tr>
<th>Repayment period including moratorium</th>
<th>Grace period</th>
<th>Tax exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above seven years</td>
<td>Not less than two years</td>
<td>100%</td>
</tr>
<tr>
<td>Five to seven years</td>
<td>Not less than 18 months</td>
<td>70%</td>
</tr>
<tr>
<td>Two to four years</td>
<td>Not less than 12 months</td>
<td>40%</td>
</tr>
<tr>
<td>Below two years</td>
<td>Nil</td>
<td>Nil</td>
</tr>
</tbody>
</table>

If the terms of a foreign loan transaction satisfy the above stated requirements, then a Nigerian borrower will not have, or would have a reduced obligation, to withhold tax on the interest payments made in relation to the loan.

Interest payments on Federal Government of Nigeria bonds and short-term securities are exempt from tax, and interest payments on state and local government, corporate and supra-national bonds are also exempt from tax for corporate investors up to January 1 2022 (or such other tenure if the period is extended), but there is no limitation for individual investors in the above instruments.

A company granted a pioneer status certificate is exempt from companies’ income tax and tertiary education tax for a period of five years. Dividends distributed by such a company will also not, during this period, be liable to withholding tax.

4.2 What are the applicable corporate tax rates?

The corporate tax rate for Nigerian companies is effectively 32% of assessable profits comprising 30% companies’ income tax and 2% tertiary education tax. Where, in any year of assessment, the total assessable profit from all of a company’s sources of income results in a loss, or where the company’s ascertained total profits result in no tax payable, or in a tax payable which is less than the minimum tax, the company will be liable to pay a minimum tax, which shall be calculated as follows:

- if the turnover of the company is N500,000 or below and the company has been in business for at least four calendar years, the minimum tax will be: (i) 0.5% of gross profit; (ii) 0.5% of net assets; (iii) 0.25% of paid-up capital; or (iv) 0.25% of turnover of the company for the year, whichever is higher;
- if the turnover of the company is higher than N500,000, the minimum tax will be whatever is payable as per the preceding paragraph, plus additional tax on the amount by which the turnover exceeds N500,000, computed at the rate of 0.125% of the turnover of the company for the year.

There are, however, three categories of companies that are not liable to pay a minimum tax. These are companies engaged in agricultural business, companies that commenced business less than four years prior to the year of assessment, and companies whose shareholding comprises of at least 25% foreign capital.

4.3 Does the government have any FDI tax incentive schemes in place?

Please see our response in paragraph 4.1 above.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors?

While there are no FDI-specific financial support initiatives by government, there are various investment incentives that are available, for instance, to companies that manufacture goods or that are engaged in activities for export purposes. There are various tax and investment incentives that are available to companies that manufacture goods or that are engaged in activities for export purposes and to other companies, but which are not specific or limited to FDI.

5 Operating locally

5.1 What is the most common governing law of contracts and local business language?

The most common governing law of contract is Nigerian law, and the local business language is English. Nigerian courts will however, generally uphold any other applicable law preferred by the parties subject to certain exceptions.

5.2 Explain any local content or local participation requirements relevant to foreign investors.

Please see the discussions above in relation to the NIPC, the Nigerian Oil and Gas Content Development Act and cabotage issues. Under the NIPC Act, foreign investors may own 100% of the equity of a limited liability company, and others not on the prohibited list as outlined above.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?

Business visas generally prohibit employment in Nigeria, but it is not difficult to procure resident and work permits for foreign employees and management or directors who will reside in Nigeria, for whom expatriate quota positions have been approved by the FMU, which has absolute discretion. The discretion to grant expatriate quota approvals is dependent to a large extent on the ability of the applicant to adduce satisfactory evidence that there are no suitably qualified Nigerians who can provide the required skills and services.
5.4 What foreign currency or exchange restrictions should foreign investors be aware of?
Generally, there are no restrictions on currency convertibility and repatriation. The effect of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, chapter F34, the Laws of the Federation of Nigeria 2004 (the FEMM Act) and regulations made under that statute, is that a foreign investor wishing to remit dividends and profits offshore with funds from the official foreign exchange market must have inflowed investment capital through, and obtained a certificate of capital importation (CCI) evidencing such importation from, an authorised dealer of the Central Bank of Nigeria. The CCI is issued upon conversion of the inflow into naira.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
No, it does not.

6 Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
The key legislation and regulations that affect FDI have been identified in our responses to the preceding questions. It should be noted that recently, discrete rules and regulations have been made by the SEC that seek to regulate private equity funds and managers, and that there are a variety of policies and initiatives that are being developed by the Nigerian government with the common objective of boosting FDI in Nigeria, for instance in relation to private equity and venture capital investments. In terms of draft legislation, the petroleum industry bill and the changes that it will introduce if passed as drafted will have important implications for FDI into the petroleum sector.

6.2 What challenges if any do investors find in getting certainty around local law and regulation?
Where a statute or regulation is not clear, it is generally possible for investors or their local advisers to address verbal (or, for more definitive responses) written enquiries to regulators for clarification and guidance. The timing of the responses to such requests is, however, difficult to predict as this is entirely at the discretion of the relevant regulators.

7 Dispute resolution

7.1 How efficient are local courts' enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
The procedures for the enforcement of judgments and arbitral awards in Nigeria are fairly straightforward, and the courts are quite efficient in applying the relevant rules. Nigerian courts do not, however, have a very robust costs system to discourage frivolous challenges to enforcement proceedings. This means that enforcement proceedings in Nigerian courts can often be protracted or even truncated as a result of manifestly frivolous and dilatory tactics and applications employed by award or judgment debtors, given that the failure of such applications will not expose such debtors to significant penalties or liability in terms of costs.

7.2 Do the courts of Nigeria respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
Yes, Nigerian courts recognise and enforce foreign judgments, if registered within a period of 12 months from the date on which the judgment is made. Although the Foreign Judgment Reciprocal Enforcement Act empowers the minister of justice to issue an order extending the provisions of the Act to judgments of any foreign country, if he is satisfied that judgments of superior courts in Nigeria will enjoy reciprocal recognition in that country. The effect of the minister's order, when exercised, is to make judgments of such country enforceable within a period of six years from the date the judgment was made. The minister, however, has yet to exercise his power under the Act. Consequently, foreign judgments of any country will have to be registered and enforced within a period of 12 months from the dates on which such judgments are made.

Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Consequently, Nigerian courts will recognise and enforce foreign arbitral awards emanating from countries that have ratified the Convention.

7.3 Are judgments and arbitration awards from Nigeria as an FDI jurisdiction generally enforceable in other jurisdictions?
We have no data regarding whether or not judgments and arbitral awards from Nigeria are enforced in other jurisdictions. Furthermore, the recognition and enforcement of Nigerian judgments and awards in other jurisdictions will be a question of the law of the jurisdictions involved.
About the author

Folake Elias Adebowale is a partner on Udo Udoma & Belo-Osagie’s (UUBO) corporate advisory, private equity and oil and gas teams. Adebowale’s specialisations include foreign investment and the acquisitions and disposals of interests in diverse sectors including food, fast-moving consumer goods (FMCG), beverages, energy, telecommunications, health, agro-allied and paints. She recently advised a consortium of private equity, development finance institutions and other investors on acquiring one of Nigeria’s oldest listed banks, and assists petroleum sector participants with local content compliance.

Adebowale is ranked by Chambers Global for M&A and private equity, by the IFLR 1000 for M&A and by Who’s Who Legal for natural resources and project finance.

She represents UUBO on the legal and regulatory council of the Emerging Markets Private Equity Association and on the committee inaugurated by the Ministry for Industry, Trade and Investment to make recommendations for attracting and supporting private equity and venture capital activity in Nigeria.

Jumoke Lambo is a partner and heads the business advisory unit at Udo Udoma & Belo-Osagie. She is the co-head of the firm’s telecommunications team and oversees Alsec Nominees, its company secretarial practice. She has extensive experience in telecommunications law and general corporate practice with an emphasis on legislative drafting, M&A, foreign investment, corporate restructuring, regulatory compliance and due diligence. Her specialisations include foreign investment, media and telecommunications, and capital market transactions.

Lambo is recognised by the Nigerian edition of Who’s Who Legal for her M&A practice and also by IFLR’s Expert Guides. She is a fellow of the Centre for International Legal Studies (CILS) and sits on the board of advisors for the Lazarski LLM programme, a partnership between the Lazarski University of Warsaw, Poland and the CILS. She is also a member of the Nigerian National Committee of the International Lawyers for Africa (ILFA).
Poland

Zbigniew Drzewiecki and Tomasz Ludwik Krawczyk, Drzewiecki Tomaszek & Partners

1 Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?

Poland is one of the most attractive locations for foreign investment in Europe. Among the foreign enterprises that have invested in Poland, those from the EU have predominant position (87.1% of FDI stock for 2011), which includes investors from the Netherlands (15.1%), Germany (13.5%), France (12.5%) and Luxembourg (10.4%). The most significant investor from outside Europe is the US (4.9%). According to reports held by the National Bank of Poland, the FDI inflow in 2012 in Poland reached €4,716 million ($6,338). The majority of the inflow in 2012 came from Germany (€3,494 million) and France (€3,132 million). Moreover, the 2,318 corporations registered in Poland at the end of 2011 were controlled by foreign investors mainly from Germany (332), Netherlands (129) and the US (164).

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

In the document Programme for supporting investment of major importance to the Polish economy for the years 2011 - 2020, the Polish government introduced a strategy to attract foreign investment. The policy regarding FDI concentrates on achieving two specific objectives: to increase the share of innovative, high-tech investment; and to create highly productive jobs. Therefore, the government supports FDI in particular in the following priority sectors: automotive; electronics; aviation; biotechnology; modern services; and research and development.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

As nearly 90% of the important investments in Poland are made by foreign entities, the government is strongly supportive of FDI. As mentioned above, the Polish government has implemented a long-term strategy which includes supporting business by financial grants and creating special economic areas (industrial and technology parks and special economic zones). To improve conditions for FDI in Poland, the government founded the Polish Information and Foreign Investment Agency (PAIiIZ). The government also evaluates the condition of FDI in Poland in order to meet entrepreneurs’ expectations. For example, in July 2013, as a response to business needs, the government extended the special economic zones’ existence from 2020 to 2026. Besides PAIiIZ, there are no separate bodies responsible for FDI in particular, however, key expertise for FDI is passed onto the state agencies operating as state controlled companies (such as the Industrial Development Agency).

2 Investment vehicle

2.1 What are the most common legal entities and (pass-through) vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

The most popular vehicle to operate business in Poland is the limited liability company (sp z oo), as it meets requirements for both small and large scale activities. According to the official statistics, limited liability companies made up approximately 83% of all the companies in Poland in June 2013. Investors usually choose joint-stock companies to operate large undertakings. This form of activity is useful, as it enables investors to raise funds with the stock exchange, since only joint-stock companies may become a public company in the Polish jurisdiction. Moreover, some areas of business activity, such as banking or insurance, require a joint-stock company to run the business.

It should be noted that entities from countries outside the European Economic Area (EEA) may only conduct business activity in Poland through the following vehicles: limited partnerships; limited joint-stock partnerships; limited liability companies; or, joint-stock companies. Furthermore, in order to conduct business in Poland, foreign entrepreneurs may establish a branch office or (only for advertising and promoting purposes) a representative office.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

Company formation is very similar for both limited liability companies and joint-stock companies. At first, shareholders sign the bylaws. The bylaws require notarial deed and they should indicate the company's seat in Poland, and share capital and shares held by each shareholder. From the moment of signing the bylaws the company may operate as an entity known as a company in the process of formation. Subsequently, the company should be registered in the entrepreneur’s register of the National Court Register. The registration process includes notification to the relevant tax and social insurance authorities. A company is managed and represented by a board of directors. In a joint-stock company, it is also mandatory to appoint a supervisory board, while in a limited liability company this is optional. There are no restrictions regarding the members' nationality or residence.

Directors must prepare annual reports to be submitted to the National Court Register once a year, and these must generally include a financial report and directors’ report.

3 Investment approval

3.1 For foreign investment approval (including national security review) explain:

a) The regulator/s’ name, factors it must consider when making its decisions, and how much discretion it has;

b) Any investment caps and other legislative restrictions;

c) Which party must notify and when/if notification is mandatory or not;

d) What information must be included with notification and what is the review fee;

e) How long does the review and approval process take, and are there any fast-track options;

f) Is there the ability to consult on a named or unnamed basis;

g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?

Not applicable in Poland.
3.2 Briefly explain the investment restrictions for any special/restricted sectors.

In general, the same rules apply to the domestic, European and other entities in the matter of requirements to meet in order to run a business in certain sectors. Economic freedom is one of the principles stated in the Constitution of the Republic of Poland; however, conducting business may be subject to restrictions.

Among the areas of activity that are subject to special restrictions, there are the following examples:

Mining sector: private entities may explore mineral resources only on the basis of the real right known as mining usufruct, which may be granted on the basis of an agreement between an entrepreneur and the Minister of Environment. A person who intends to operate a mining undertaking should also obtain a relevant mining permit (which may be granted after a tender procedure) and a decision on environmental conditions which specifies the environmental conditions to operate the undertaking.

Financial services sector: banking, insurance, financial markets and other financial services are subject to supervision by the Financial Supervisory Authority (KNF). Economic activity in these areas usually requires special permit. The KNF issues a number of regulations and undertakes other legal measures to provide regular operation of the financial market.

Energy sector: manufacturing and trading in fuels and energy is subject to the Energy Law Act. The main authority in this area is the Energy Regulatory Office, which is competent for granting licences and monitoring the energy market. Companies intending to conduct business activities in electricity, gaseous fuels, heat or liquid fuels need to obtain a relevant licence.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.

Competition matters in Poland – including the merger clearance process – are under the supervision of the president of the Office of Competition and Consumer Protection. The participants of the planned transaction must obtain prior clearance from the president when their turnover in the year preceding the application exceeds €1 billion globally or €50 million in Poland.

4 Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

There are no tax structures that could be indicated as useful particularly for FDI in Poland; however, Poland is party to the double tax treaties which cover relations with all developed countries.

As for the favourable intermediary jurisdictions, the most popular are companies in Cyprus. Among other typical foreign vehicles to operate in Poland, are UK limited companies, Dutch and Luxembourg companies.

4.2 What are the applicable corporate tax rates?

Poland remains among the most favourable EU countries in respect of the corporate tax rate, and the corporate income tax (CIT) in Poland is calculated at flat rate of 19%.

4.3 Does the government have any FDI tax incentive schemes in place?

The Polish legal system provides several incentives for entrepreneurs. Regarding the tax law area, the two main incentives should be indicated:

- Income tax exemption: the exemption applies to investors operating in Special Economic Zones (SEZs). In order to establish a business in a SEZ, an entrepreneur should obtain a special permission. Receiving state aid requires the investor to meet several conditions, including that business activity and new jobs should be maintained for a specified period. Moreover, the minimum level of investment enabling the use of public aid is €100,000.
- Exemption for real property tax: the exemption may be granted by the municipal council as one form of state aid. In general, the level of public aid depends on such factors as costs of investment and the costs of creating new jobs.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors? If so, please provide an overview.

The Polish government offers governmental grants. The support may be provided on the basis of an agreement between the minister of economy and the investor. However, the entity that operates the procedure for obtaining financial aid is the Polish Information and Foreign Investment Agency. The financial support is offered for significant investments in the area of the specified priority sectors. The investor may also apply for public aid in other sectors if the project’s minimum eligible costs and number of new jobs exceed a specified level.

5 Operating locally

5.1 What is the most common governing law of contracts and local business language?

The local business language is Polish, and the Polish law of contracts is subject to the Civil Code Act of April 23 1964, which applies to the entire jurisdiction.

5.2 Explain any local content or local participation requirements relevant to foreign investors.

There are no particular requirements related to foreign investors in this matter.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?

As a rule, the citizens of the member states of the EEA and Switzerland have full right to enter and live in Poland due to the EU free movement of people principle. For foreigners from third party states, entrance and stays in Poland require a visa.

A foreigner who wishes to work in Poland is required to obtain a work permit issued by the appropriate regional governor. This rule is subject to several exceptions (for instance, the citizens of the member states of the EEA may generally work in Poland without obtaining a work permit), and simplified procedures are envisaged in certain circumstances, for example, in relation to persons authorised to represent a foreign entrepreneur in their branch or representative office.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?

Whereas Poland, as a European Union member state, is subject to the free movement of capital rule, in general there are no specific restrictions in the area of foreign currency and exchange.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?

Polish law does not prohibit domestic companies from operating business activity in any particular foreign countries. Nevertheless, Poland, as a member of international organisations (such as the United Nations), may be obliged to undertake specific actions such as sanctions and embargoes. Furthermore, foreign trade in some crucial areas may be subject to government control (goods of strategic importance for national security and the maintenance of international peace and security).
6. Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
According to the Act on Acquisition of Real Estate by Foreigners, there is a general rule that foreigners (foreign natural persons, foreign legal entities, but also domestic entities controlled by foreigners) may acquire real estate in Poland or shares in the company owning real estate in Poland, only on the basis of prior permits issued by the minister of foreign affairs. However, with few exceptions, restrictions stipulated by such Act do not apply to entities from the EEA.

6.2 What challenges if any do investors find in getting certainty around local law and regulation?
Poland is often considered to be an FDI-friendly location, due to economic and political stability, human capital and a large domestic market. In order to increase trust in the legal system, Poland has introduced regulations that allow investors to apply for binding legal interpretations (including tax issues). Those who receive such interpretations may not be punished for conduct complying with the issued interpretation. The government has evaluated possible challenges to foreign investors – detailed information on this matter may be found in the document Obstacles to foreign direct investments in Poland issued by PAiIZ (available at the Agency's website).

7 Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
There are no specific features of court procedures that could be particularly challenging to foreign investors, and Polish courts’ efficiency is similar to other developed countries. It should be stated however, that Poland remains within the remit of the continental civil-law system, which may not be familiar to entrepreneurs from the common-law area.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
Both arbitration awards and foreign judgments are generally enforceable in Poland; but enforcement of such rulings requires certification by Polish courts. Polish regulations regarding arbitration implement United Nations Commission on International Trade Law (Uncitral) Model Law on International Commercial Arbitration. As for foreign European rulings enforcement, Poland is subject to the European Union Council (EC) Regulation 44/2001 of December 22 2000, and the Lugano Convention of October 30 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (covering European Union countries, Norway, Switzerland and Iceland). Finally, the Polish Code of Civil Procedure provides provisions regarding certifying foreign judgments from states other than those mentioned above.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?
Polish courts' judgments are generally enforceable in jurisdictions of other European Union countries, Norway, Switzerland and Iceland, on the basis of the above EC Regulation 44/2001 and the Lugano Convention. In general, Polish judgment enforcement in other countries depends on the law of the country of enforcement. For example, there is no international treaty between Poland and the United States regarding the recognition and enforcement of judgments in commercial matters, so in such cases the US law applies.

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Tomasz Ludwik Krawczyk earned his doctorate of Laws at the Cardinal Stefan Wyszynski University in Warsaw and has been a partner at Drzewiecki Tomaszek & Partners since 2008. He specialises in company law, M&A and real estate, and is head of the firm’s corporate department. Krawczyk has served clients in numerous projects covering all aspects of company law, foreign direct investments, and in the resolution of numerous legal disputes. Recently he has advised on the share sale of the country’s leading publisher of telephone books, and the sale and lease- back of office buildings with a value of nearly €170 million. He has also advised several foreign developers in the development projects, and successfully represented a foreign national telecom operator in an antitrust case.

Krawczyk speaks Polish (mother tongue), English and German.
Russia

Jeff Browne and Alexey Kokorin, Chadbourne & Parke

1. Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?
The main sources of FDI into Russia are Cyprus, the Netherlands, Luxemburg, China, the United Kingdom and Germany.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?
The key sectors in Russia that attract FDI are manufacturing, retail, wholesale, extraction of natural resources, real estate, transport, communication and the finance.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?
The Russian Government declared a goal to improve the investment climate in Russia by the end of this decade. The intention is to create an innovative economy, and to reduce the country’s reliance on the export of natural resources. The heads of federal agencies and governors are responsible for creating better investment conditions in Russia.

2. Investment vehicle

2.1 What are the most common legal entities and (pass-through) vehicles used for FDI in your jurisdiction, and how long do they take to become operational?
The most common types of vehicles are the closed joint stock company (zakrytoe aktsionernoe obshchestvo or ZAO) and the limited liability company (obshchestvo s ogrаниченной ответственностью or OOO). Of the two, the OOO is much more flexible and popular. However, unlike an OOO, a ZAO can issue shares.

An OOO typically takes three to four weeks to establish from the date of submission of documents to the registration authority. The registration of a ZAO may take one or two months, because the registration of its share issue is required.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?
Neither ZAO or OOO, nor other Russian companies can be owned 100% by another legal entity (wherever it is incorporated) if that shareholder is itself 100% owned by another person or entity. Thus, either the Russian company or its holding company must have more than one shareholder.

In some cases stipulated by the Federal Law on the Protection of Competition 135-FZ July 26 2006 (the Competition Law), when certain thresholds in terms of asset value or sales revenue of a Russian company’s founders are reached, the prior approval of the Federal Anti-monopoly Service of Russia (the FAS) may be required for the establishment of the Russian company.

In order to perform certain types of activities specified in law (for example, production of medical drugs) a company must obtain the relevant licence.

There is no requirement for a Russian company to have local directors.

3. Investment approval

3.1 For foreign investment approval (including national security review) explain the following:
a) The regulators/s’ name, factors it must consider when making its decisions, and how much discretion it has;
b) Certain actions (including establishing a company, and purchasing shares and other assets) are subject to anti-monopoly control carried out by the FAS and its regional offices. When the FAS is making a decision, it considers the possible effect on competition in that particular product’s market.

Approval may also be required from the Governmental Commission on Foreign Investments (the Governmental Commission) under the Federal Law on Foreign Investments to Companies with Strategic Significance for the Country’s Defence and the State’s Security 57-FZ of April 29 2008 (the Strategic Investments Law). The Governmental Commission considers the possible effect that the proposed action may have on the safety of the state and its defence.

Both of these authorities have the power to act in their sole discretion, and unfortunately their decisions cannot be easily predicted.

b) Any investment caps and other legislative restrictions;
Generally, foreign investors may establish Russian companies and acquire the shares without limitations. However, Russian legislation provides for certain restrictions and caps in respect of shareholdings in companies involved in certain prescribed activities (briefly described in paragraph 3.2).

Investments involving mergers, acquisitions, the establishment of new companies, and the purchase of shares and assets are subject to anti-monopoly control by the FAS. In certain cases, preliminary approval of a transaction or establishing a company or its reorganisation or notification to the FAS of any such action may be required.

FDI involving acquiring control over a company carrying out one of 42 types of activities listed in law and briefly described under question 3.2 (the strategic companies) may require preliminary approval of the Governmental Commission or notification, which will be filed to the FAS. It is forbidden for foreign investors to acquire control over such companies exceeding certain limits (for example, by purchasing more than 50% of voting shares in a strategic company).

b) Which party must notify and when/if notification is mandatory or voluntary;
Preliminary approval from the FAS must be obtained before the respective action, transaction or establishment of a company. Respective applications shall be submitted by, respectively, purchasers, founders (or one of them), companies performing the merger or reorganisation.

Notifications to the FAS must be made by a newly established company itself, the acquiring company (in case of reorganisation by way of acquisition), or the purchaser of the shares or other assets. The notification must be made within 45 days from the date of the relevant action, transaction or establishment of a company.

Applications for preliminary approval from the Governmental Commission will also be filed, and the approval obtained before acquiring control over a strategic company. If only a notification must be made, the notification...
must be submitted to the FAS within 45 days from the date of the transaction. In each case, the application or notification should be submitted by the relevant foreign investor or Russian company controlled by the investor acquiring control over a strategic company.

d) What information must be included with notification and what is the review fee?
An application for preliminary approval by the FAS, or a notification, must include certain prescribed information and be attached with certain prescribed documents related to the involved companies, including their group shareholdings, their business activities, the terms and conditions of the transaction, and their balance sheets.

The fee for review of an application or a preliminary approval by the FAS is R20,000 ($605). There is no fee for notification reviews.

An application for approval by the Governmental Commission must include certain prescribed information and be attached with certain prescribed documents (similar to the documents required for an application for a preliminary approval by the FAS). There is no fee for a review of the application by the Governmental Commission.

e) How long does the review and approval process take, and are there any fast-track options?
It usually takes up to three months to obtain approval from the FAS and up to six months to obtain approval from the Governmental Commission. Unfortunately, there are no fast-track options.

f) Is there the ability to consult on a named or unnamed basis?
It is possible to send a named request to the FAS to get advice regarding the necessity of obtaining preliminary approval (either from the FAS or the Governmental Commission). In practice, it may also be possible to consult on an unnamed basis. However, in this case the FAS’s response is not binding.

g) Does notification/review occur pre- or post-closing, and are there any pre- or post-filing requirements unique to FDI?
The review of an application for approval must occur before closing. The notification (in cases where preliminary approval is not required) must be made after closing. There are no additional pre- or post-filing requirements unique to FDI.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?
Decisions of the FAS and the Governmental Commission may be challenged in court. Transactions or other actions which require preliminary approval from the FAS or the Governmental Commission cannot be performed without such approval. Otherwise, the transaction can be considered void, or the newly established company may be liquidated.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.
There are certain sectors of the Russian economy to which FDI is subject to specific restrictions. For example, if a foreign investor holds more than 49% of the share capital of an insurance company, the company is prohibited from providing certain types of insurance. Foreign persons or companies (or Russian companies owned 50% by a foreign person or company) cannot establish a television channel, a radio channel, or television or radio programmes. There are also restrictions relating to establishing banks and other credit institutions with foreign investments according to quotes provided by the Bank of Russia.

Russian legislation also limits foreign investors from acquiring control over strategic companies that carry out certain activities (there are 42 such types of activity provided by law), including but not limited to the following: military; fishing; encryption hardware and bugging devices; exploration of subsoil and extraction of mineral resources on land plots of federal significance; aerospace; and, certain activities involving a company with a dominant position on a market.

Acquiring control over strategic companies, and any increase in such control is also subject to preliminary approval of the Governmental Commission or notification to the FAS.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process.
Oversight of competition clearance is carried out by the FAS. The merger clearance process generally includes preliminary approval by the FAS, and preliminary approval by the Governmental Commission.

The FAS must be notified in accordance with the Competition Law in cases where certain prescribed thresholds concerning asset value or sales revenue for preliminary approval are not reached, but reached certain lesser thresholds set out by the law.

The FAS notification procedure is also mandatory under the Strategic Investments Law in cases where there is no need to get preliminary approval from the Governmental Commission, but where a foreign investor or its group has acquired five percent or more of a strategic company’s shares.

4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?
Foreign investors in Russia usually use corporate structures involving Cypriot, Dutch or British companies for the purposes of tax optimisation. FDI in Russia can be conducted by using both typical offshore jurisdictions and through so-called holding jurisdictions.

As to typical offshore jurisdictions (such as the British Virgin Islands, Belize, Nevis, Panama, and the Bahamas), these are exempt from taxes on both internal operations and investments. Thus, FDI into the Russian Federation can be carried out through an offshore company, which invests into a Russian company. In this case, the Russian company is not obliged to pay taxes due to the donating nature of the received capital.

However, according to statistics provided by Russian State Statistics Service, by the end of June 2013 the majority of foreign investment into Russia came from Cyprus, the Netherlands and Luxembourg. This is explained by the fact that holding jurisdictions (such as Cyprus, Hong Kong, Luxembourg, the Netherlands, and Switzerland) have beneficial tax treaties with Russia.

4.2 What are the applicable corporate tax rates?
Corporate tax rates in Russia include a corporate profit tax rate at 20%, and a capital gains tax at 20%. Tax rates for dividends include: zero percent tax on dividends paid to a Russian company, if the Russian company owns 50% or more of shares in the dividend payer for at least 365 consecutive days (provided that the dividend payer is not a resident of an offshore jurisdiction); nine percent tax on dividends paid to a Russian company from a Russian or foreign company; and, 15% tax on dividends paid to a foreign company by a Russian company.

4.3 Does the government have any FDI tax incentive schemes in place?
Yes. For example, some tax incentives are provided for participants of the Skolkovo project in the Moscow region (otherwise known as the Russian Silicon Valley). Skolkovo participants are exempt from VAT; profits tax and property tax.

There are also some special economic zones (SEZs) in Russia, such as the Lipetsk region, the Sverdlovsk region, Saint-Petersburg, and the Murmansk
4.4 Other than through the tax system, does the government provide any other financial support to FDI investors? 
Yes. For example, participants in the Skolkovo project and SEZ residents are entitled to be reimbursed for (or exempted from) customs duties for imported equipment, if they meet certain conditions.

Support may also be provided in accordance with regional laws, for example, the Law of Novosibirsk region On State Regulation of Capital Investments in the Novosibirsk Region 97-OZ of April 14 2007 ensures state support to investors if certain conditions are met. The state support in this case is the provision of money from the region in order to co-invest in projects, tax benefits, subsidisation of payments of interests for loans and leasing payments.

5. Operating locally

5.1 What is the most common governing law of contracts and local business language? 
The most common governing law of contracts is Russian law. However, where possible, it is very popular to adopt English law as the governing law for contracts due to its greater flexibility and certainty. New York law is also used in many cases.

The local business language is Russian (most common) and English.

Notwithstanding the popularity of English law (or other foreign laws), sometimes certain contracts must be governed by Russian law. For example, agreements for the transfer of shares in an OOO must be governed by Russian law because such documents must be notarised and notaries will only perform such function in respect of a Russian law contract.

5.2 Explain any local content or local participation requirements relevant to foreign investors.

There are no local participation requirements relevant to foreign investors.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers? 
Foreign workers must obtain individual work permits and work visas before starting work in Russia. Additionally, employers can only employ foreign workers if they have employment permits (permission to hire foreign people). Employment and work permits are generally issued for one year and require reapplication upon expiration (they cannot simply be renewed). Russian legislation provides for certain exceptions from requirements of work and employment permits for certain types of workers (for example, permanently residing in Russia, and involved in certain activities).

It is prohibited to work in Russia on the basis of a business visa (a visa for business trips, negotiations, and concluding contracts). Foreigners may stay in Russia on a business visa for more than 90 days out of a 180-day period. A business visa may be issued for the period up to one year as a general rule, and up to five years for a person representing a major foreign company with major investments in Russian projects (such as the Skolkovo project).

The Russian Government provides a quota for the number of foreigners that can be hired in a given year. In 2014 the quota is stipulated at 1,631,586 people. Once the quota is filled, no further work permits can be issued that year, save for certain exceptions.

Companies intending to hire foreign workers must submit a request for a quota every year before May 1 for the following year. Failure to apply for a quota may result in significant difficulties in employing foreigners.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of? 
All payments between natural persons and legal entities that are Russian residents must be in Russian rubles (although residents can use foreign currency to determine the contract price).

Between non-residents, payments in foreign currency are generally permitted. Payments between non-residents in Russian rubles are permitted through accounts opened in Russian banks only.

As for payments between residents and non-residents, they may be made in Russian rubles or foreign currency and are subject to certain requirements, such as documentation of a transaction with a transaction passport (a document to be made with assistance of a Russian bank).

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions? 
Companies established in Russia are generally free to do business in other countries subject to respective local regulation and international treaties. However, in certain cases restrictions may be imposed. For example, importing certain goods into Russia may be prohibited, as has happened several times in respect of chicken from the US, sweets from Ukraine, and mineral water from Georgia.
7. Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?

Russian courts are relatively effective in dispute resolutions and enforcement. Russia is ranked 10th out of 189 countries by the World Bank’s rating for contract enforcement. The average time required for the resolution of a commercial dispute and enforcement of a judgment is about 270 days, and it takes approximately 36 procedures.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?

According to Russian procedural legislation, foreign judgments must be recognised and enforced by Russian courts if it is provided by international treaties of Russia or by law. In practice, it is difficult to procure recognition and enforcement of foreign judgments in the absence of a respective international treaty. As for arbitration awards, since Russia is a party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), awards must be recognised and enforced. However, Russian legislation provides for certain grounds for refusal in such recognition and enforcement (for example, the contradiction of enforcement of an award to the Russian public policy).

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

The enforceability of Russian judgments and arbitration awards in other jurisdictions depends on the existence of relevant international treaties between Russian and the other jurisdiction, rules of respective local laws, and other factors, such as reasons for mutuality in recognition and enforcement of judgments and arbitration awards. For example, a Russian judgment was recognised and enforced earlier this year in Germany against a German company, even in the absence of a relevant international treaty between the two countries.

About the author

Jeff Browne, counsel at Chadbourne & Parke, has a great depth of experience acting for lenders, borrowers and arrangers on all forms of finance, including commodity finance, real estate finance, acquisition finance, syndicated loans, debt restructuring and derivatives. He also advises on cross-border mergers, acquisitions and joint ventures in Russia, Ukraine and the wider Commonwealth of Independent States. His sector experience includes energy and natural resources, financial services, media, technology and telecommunications, consumer products and retail.

Alexey Kokorin is an associate at Chadbourne & Parke. He specialises in mergers and acquisitions, joint ventures, corporate governance and the regulation of foreign investments, and has been assisting clients in oil and gas, mining and minerals, air transportation, telecommunications, food producing and retail sectors.
1. Overview of FDI in the jurisdiction

1.1. Which countries are the principal sources of FDI into your jurisdiction?

The UK attracts more FDI than any other European country. In 2012 the UK attracted $62 billion of FDI inflows, with the total value of inward stock at the end of 2012 estimated to be $1.3 trillion.

The main source of inward FDI into the UK is the US. However, in recent years, the UK has been targeting emerging markets, and in 2012 India was one of the top five sources of FDI into the UK. There are also signs that Chinese companies are placing larger projects in the UK, and the number of projects from high-growth economies such as Turkey, South Africa, Malaysia, Mexico, Brazil, the Middle East and Russia continues to increase.

1.2. What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

The UK government is focused on high-quality investment projects that generate long-term economic value for and employment in the UK, such as advanced manufacturing, technology, financial services, energy and infrastructure.

1.3. Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

The UK government is wholly supportive of FDI, and foreign investors receive the same support as domestic firms.

The Department of Trade & Investment (UKTI) has overall responsibility for FDI. UKTI works with a range of partners such as Invest Northern Ireland, Scottish Development International, the Welsh Government, London and Partners, and Local Enterprise Partnerships to provide assistance to companies looking to establish businesses in or relocate businesses to the UK.

2. Investment vehicle

2.1. What are the most common legal entities and [pass-through] vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

Various vehicles can be used for FDI into the UK. The most commonly used vehicles are a company limited by shares, a limited liability partnership (LLP), or an establishment/branch office.

2.2. What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

Limited company
There are no rules regarding the establishment and operation of a private company limited by shares which are specific to FDI.

Incorporating a private company is a straightforward process that can be carried out on a same day basis, and without the need for a notary, a bank account or minimum level of share capital (other than a nominal £1).

Establishment/branch
An establishment, also known as a branch office, is an office established in the UK which has its own management and the capacity to conduct business with third parties, but which forms part of a company which is not registered in the UK.

Within one month of opening in the UK, all establishments must register with Companies House and provide certain basic information about itself, a copy of its latest accounts and a copy of its constitution.

2.3. What are the key requirements for establishment and operation of these vehicles which are specific to FDI?

There are no rules regarding the establishment and operation of a private company limited by shares which are specific to FDI.

Directors manage the company on a day-to-day basis. Private companies must have at least one director who is a natural person. There is no requirement that a director be a UK or EU national or resident.

3. Investment approval

3.1. For foreign investment approval (including national security review) explain the following:

a) The regulator’s name, factors it must consider when making its decisions, and how much discretion it has;
b) Any investment caps and other legislative restrictions;
c) Which party must notify and when/if notification is mandatory or voluntary;
d) What information must be included with notification and what is the review fee;
e) How long does the review and approval process take, and are there any fast-track options;
f) Is there the ability to consult on a named or unnamed basis;
g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;
h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?

Not applicable.

3.2. Briefly explain the investment restrictions for any special/restricted sectors.

There are a number of sectors in which businesses need appropriate permits or authorisations from a regulator to operate, such as water and sewerage companies (Water Services Regulation Authority), gas and electricity companies (Office of Gas and Electricity Markets (Ofgem)) and broadcasting (Office of Communications (Ofcom)).

Although there is no particular prohibition on FDI into these sectors, the terms of the permits or authorisations may well contain consent rights for the relevant regulator or other provisions which will be relevant for consideration in connection with FDI. These may include an obligation to notify a substantial change of shareholding or a change of control, a requirement for parent company guarantees, an obligation to maintain a minimum number of independent non-executive directors on the board, ring fencing of assets, and an obligation to maintain an investment grade rating.
3.3. Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process. Mergers that have a ‘Community Dimension’ will fall within the jurisdiction of the European Commission, which is outside the scope of this note.

Under the UK system, a merger situation arises where two or more enterprises cease to be distinct and either a 25% market share test is triggered or the turnover of the target exceeds £70 million ($114 million). There is no requirement to notify a merger in advance for clearance. However, by proceeding without clearance the buyer takes a risk that the merger may subsequently be referred to the Competition Commission which could lead to it being prohibited or to onerous conditions being imposed.

4. Tax and grants

4.1. Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country? Typical entities used to make corporate acquisitions in the UK include English limited companies, Dutch coops/BVs and Luxembourg companies.

4.2. What are the applicable corporate tax rates? From April 1 2013, the main corporation tax rate is 23% for companies whose taxable profits exceed £1.5 million per annum. This will reduce to 21% from April 1 2014 and 20% from April 1 2015. Companies whose taxable profits do not exceed £300,000 per annum are charged a ‘small profits rate’ of 20%, with a sliding rate of corporation tax from 23% to 20% for companies whose taxable profits are between these amounts.

4.3. Does the government have any FDI tax incentive schemes in place? The new patent box regime provides a reduced 10% rate of corporation tax on profits from the development and exploitation of patents. The regime is being phased in over five years from April 1 2013. Incentives may also be available for certain research and development expenditure.

4.4. Other than through the tax system, does the government provide any other financial support to FDI investors? Through various government development agencies and local business support organisations, a wide range of grants and incentives are available to support businesses in the UK. This includes the UK Regional Growth Fund, which aims to create economic growth and sustainable employment in England, and 24 Enterprise Zones in England which offer incentives designed to support both new and expanding businesses.

There are also various grants and incentives available in Northern Ireland, Scotland, and Wales.

5. Operating locally

5.1. What is the most common governing law of contracts and local business language? English law is the most common governing law of contracts (although Scots and Northern Irish law may also apply, particularly in relation to contracts specific to those jurisdictions).

The local business language in the UK is English.

5.2. Explain any local content or local participation requirements relevant to foreign investors. Save as set out elsewhere in this note, there are none.

5.3. How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers? Nationals of countries in the European Economic Area and Switzerland generally have a right to live and work in the UK. For people from outside these regions, the UK government has introduced new rules to enable visa applications for entrepreneurs and high value investors to be fast tracked. There are also special rules enabling multinational companies to transfer their employees to the UK.

5.4. What foreign currency or exchange restrictions should foreign investors be aware of? None

5.5. Does the country prohibit domestic companies from doing business in any foreign jurisdictions? The UK from time to time puts in place trade controls such as arms embargoes, import licensing, financial sanctions, travel bans and export licensing, generally at the instigation of the UN, EU or Organisation for Security and Co-operation in Europe.

Details of current arms embargoes and other restrictions can be found at: http://www.gov.uk/current-arms-embargoes-and-other-restrictions

Export licences may need to be obtained for certain categories of products particularly military goods, dual-use goods (civilian goods with a potential military use or application) and associated technology or software depending on their destination. This requirement will apply even if the goods are being exported to a group company in an affected jurisdiction.

6. Legal and regulatory framework

6.1. Are there any other FDI-specific laws that foreign investors must be aware of? There are no legal or regulatory restrictions specific to FDI into the UK. Generally speaking, the same rules apply to overseas owners of, and investors in, businesses as apply to British or European owners and investors.

Common with many countries globally, foreign ownership of airlines is limited. To obtain an operating licence, an EU air carrier must be majority owned and effectively controlled by EU nationals. However, the European Commission is taking steps to reach agreements between the EU and key partners to liberalise these restrictions and has already entered into comprehensive air transport agreements with the US, Canada and Brazil.

Upon privatisation of certain companies, the UK government often retained a so-called golden share which prevents or restricts FDI into those companies, often on grounds of national security. Companies in which the UK government currently holds a golden share include BAe Systems, Rolls-Royce, QinetiQ, National Air Traffic Control Systems and certain dockyards.

In certain other sectors (particularly in regulated industries), prior authorisation may be required before a change of control or a significant investment occurs. Although these apply equally to UK and foreign investors, a number of these are worth mentioning here:
Businesses regulated by the Financial Conduct Authority: Most companies carrying on business in the banking, insurance and investment sectors in the UK are regulated by the Financial Conduct Authority (FCA). Any person who is intending to acquire control of a regulated entity will need to obtain the FCA's approval before doing so. Failure to do so is a criminal offence. For these purposes, 'control' means directly or indirectly acquiring a 10% stake in an FCA-regulated entity.

Defence: There is no general rule against foreign takeovers of, or investment in, companies involved in the defence industry. However, if a company has any contracts with the UK Ministry of Defence, these will contain terms which will be relevant to consider in the context of a takeover or investment, including a provision allowing the Ministry of Defence to terminate the contract upon a change of control.

Media: There are media ownership rules for television, radio and newspapers. The rules aim to help protect plurality of viewpoints and give citizens access to a variety of sources of news, information and opinion. There is a so-called media public interest test which enables the Secretary of State to intervene in media mergers on public interest grounds.

Football: Anybody who takes over as a director of an English Premier League or Football League club, or the owner of more than 30% of a club's shares, must pass a fit and proper person test.

6.2. What challenges if any do investors find in getting certainty around local law and regulation?

The UK has an extremely stable and mature legal and regulatory system and this is one of the reasons why the UK is a favoured jurisdiction for inward FDI.

The UK is ranked by the World Bank as one of the top jurisdictions in terms of ease of doing business. Notwithstanding this, the UK government has a continuous focus on reducing and eliminating so-called red tape to ensure that the UK remains a competitive and attractive place to do business.

Dispute resolution

7.1. How efficient are local courts' enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?

The courts in the UK are very efficient at dealing with disputes and parties are able to effectively enforce their rights through court proceedings. Proceedings are generally completed within one to two years, although more complex cases can take longer and appeals can also lengthen the process.

The UK courts employ an adversarial system, with each party's case being extensively tested. The parties are required to disclose all documents in their possession that are relevant to the dispute (save for privileged documents). Witnesses generally provide evidence in chief by way of witness statements and are then cross examined orally at trial.

The UK has a loser pays rule in relation to the costs of court proceedings, so that an unsuccessful party generally pays the successful party's costs. Claimants from outside the EU or European Free Trade Association (EFTA) may be required to provide security for costs.

Investors should note that England and Wales, Scotland and Northern Ireland are each separate jurisdictions within the UK, with their own court systems.

7.2. Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?

The UK courts generally respect foreign judgments, unless the foreign judgment can be challenged on the grounds of fraud or public policy.

Save for certain exceptions, a foreign judgment cannot be enforced directly and instead will need to be enforced by way of fresh legal proceedings in the UK. However, a proceeding on a foreign judgment is often determined on a summary basis and the UK courts take a narrow view of the possible defences to such an action.

If a foreign judgment is from a court in certain Commonwealth jurisdictions, or an EU or EFTA member state, the judgment may be enforced directly in the UK once it has been registered.

Arbitration awards are enforceable in the UK by way of an application to a UK court. The UK is a party to the New York Convention of 1958 and so enforcement of an arbitration award made in a contracting state to the New York Convention may only be refused on very limited grounds.

7.3. Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?

The question of whether a judgment from a UK court is enforceable in another jurisdiction is one for the law of the state where enforcement is to take place.

Judgments from UK courts are enforceable by way of registration in other EU and EFTA member states. UK judgments are also enforceable in certain Commonwealth countries.

As mentioned above, the UK is a party to the New York Convention and so arbitration awards from the UK are relatively easily enforced in the courts of other contracting states to the New York Convention.
Garrett Hayes is a partner in the Corporate practice of the London office of Paul Hastings. Hayes’ experience covers a broad range of M&A, private equity, joint ventures and corporate advisory work across a range of sectors. Recent cross-border transactions include advising Shuanghui International Holdings on its $7.1 billion acquisition of Smithfields Foods – one of the most closely watched transactions of 2013 and the largest ever acquisition of a US company by a Chinese company; advising Corsair Communications on its acquisition of Simple Audio Limited; and advising Samsung Electronics on its $310 million acquisition of the wireless connectivity business of CSR and associated $35 million strategic investment into CSR.

Ronan O’Sullivan is the chair of the London office of Paul Hastings and vice chair of the global Corporate Department of the firm. O’Sullivan focuses his practice on capital markets and corporate finance, with emphasis on M&A and securities offerings. He has advised both corporate and institutional clients on equity and equity-linked transactions across a number of sectors, and also has considerable experience in private and public takeover work, joint ventures, and domestic and cross-border restructurings. Recent cross-border transactions include representing Jacobs Engineering Group on the A$1.3 billion acquisition of Australian engineering consulting firm Sinclair Knight Merz; advising leading global mobile money specialist Monitise on its acquisition of Clairmail, a leading US provider of mobile banking and payments solutions; and advising Deutsche Bank in connection with the sale of its €6 billion CMBS loan servicing business to Situs Asset Management.
1 Overview of FDI in the jurisdiction

1.1 Which countries are the principal sources of FDI into your jurisdiction?

On a cumulative basis, through the end of 2012, FDI into the US had reached approximately $2.7 trillion. In 2012, FDI approximated $166 billion, down from approximately $310 billion in 2008, before the global economic recession took its toll on foreign investor activity. FDI by country varies year on year, but in 2012 the Netherlands, followed by France, the United Kingdom, Japan, Canada, Belgium, British Caribbean Islands, Luxembourg, South Korea, and Hungary, led the list of most active countries for sources of FDI, accounting for almost 90% of total FDI. China, at $1.4 billion FDI, was the largest investor of the BRICS countries [Brazil, Russia, India, China, South Africa] in 2012. These figures, however, may be misleading. In our experience, sovereign wealth funds and other foreign investment entities and investors often form investment vehicles in countries like the British Caribbean Islands through which to invest in the US to take advantage of their favourable tax laws, which could skew the numbers in favour of those countries.

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

In 2012, eight of the top sectors for FDI were manufacturing and chemical production, wholesale trade, mining, professional, scientific and technical services, retail trade, information, finance and insurance, and real estate. The number and type of deals we have seen in 2013 indicate an uptick in investments in healthcare (for example, medical device companies), technology, and energy and energy services sectors.

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

We find that the US government is generally supportive of FDI. For example, just as recently as October 31 2013, at the SelectUSA 2013 Investment Summit, President Barack Obama vowed to expand aggressively US efforts to increase FDI by, among other things: coordinating efforts at the federal level to attract FDI; making it easier for foreign investors to understand and comply with the various federal, state, and local requirements for doing business in the US; and creating a “a single point of contact” for interested investors. Though generally supportive, the US does not rank high against other countries with active FDI markets. In 2012, the OECD ranked the US 34th out of 55 countries in terms of regulatory restrictiveness to FDI (number one being the least restrictive).

2 Investment vehicle

2.1 What are the most common legal entities and (pass-through) vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

The legal entities and investment vehicles used for FDI vary depending on the size, type, and source of investment. It is typical, however, that foreign investors utilise limited partnership and limited liability company vehicles for their investment, particularly when a private equity fund or other deal sponsor is engaged in the deal. If, however, investors are concerned about potential US tax payment or filing obligations, then these investors typically utilise a corporate entity investment vehicle.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

Formation of these entities takes at most only a few days to complete (and sometimes within the same day). There are no rules regarding the establishment and operation of a private company that are specific to FDI. Corporations, partnerships, and limited liability companies are formed under the laws of one of the 50 individual states, and these state laws generally do not require that directors be residents of that state or even of the US.

3 Investment approval

3.1 For foreign investment approval (including national security review) explain the following:

a) The regulator/s’ name, factors it must consider when making its decision, and how much discretion it has;
b) Any investment caps and other legislative restrictions;
c) Which party must notify and when/if notification is mandatory or voluntary;
d) What information must be included with notification and what is the review fee;
e) How long does the review and approval process take, and are there any fast-track options;
f) Is there the ability to consult on a named or unnamed basis;
g) Does notification/review occur pre- or post-closing, and are there any pre- or post filing requirements unique to FDI;
h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapprovals?

The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee that, working with the President, oversees national security implications of FDI. In 1988, Congress passed the Exon-Florio Amendment to the Defense Production Act (as amended, Exon-Florio), which granted the President the authority to block FDI that threatens to impair the national security of the US. Although CFIUS is authorised to initiate an investigation, many parties notify CFIUS of a transaction voluntarily. Parties are encouraged to act voluntarily because the transaction remains indefinitely subject to divestment or other appropriate remedies as determined by the President if the parties do not comply with the notification requirements. Foreign investors should be somewhat comforted by the fact that information submitted for CFIUS approval is protected from public disclosure, provided that disclosure to Congress or in any administrative or judicial proceeding is permitted under certain circumstances.
Exxon-Florio requires a three-step process: (1) formal notification to CFIUS and a 30-day review period; (2) a 45-day investigation period for transactions that have raised national security concerns; and (3) a 15-day presidential review period for those transactions that are determined to pose a threat or impairment to national security. The President is authorised to suspend, prohibit, or impose conditions on the transaction to mitigate the identified national security threats. These conditions can range from requiring a subsidiary with sensitive technology to have an independent board of directors comprised of US citizens, to requiring foreign-owned firms to obtain approval to sell certain goods, to requiring firms to adopt IT security policies.

Though Exxon-Florio gives the President substantial power over FDI that implicates national security risks, historically the office of the President has been reserved in taking action. According to the 2012 CFIUS Annual Report to Congress, from 2009 to 2011, there were 269 notices delivered to CFIUS, 12 of which were withdrawn, 100 of which resulted in investigations, and none of which resulted in a presidential decision. In fact, it appears that since 1988, out of the 2,666 notices received, only 14 have resulted in a presidential decision.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.

Aside from the national security approvals (noted above), there are industry-specific approvals that a foreign investor must consider.

There are restrictions against foreign ownership in the telecommunications space, particularly with respect to any broadcast and other radio station licences (governed by the Federal Communications Commission). In addition, foreign investment in the US banking sector could implicate numerous federal regulators (such as the Federal Reserve Board, FDIC, Office of the Comptroller of the Currency, and Office of Thrift Supervision) and state regulators. States have sole regulatory authority over insurance companies.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process?

The US Federal Trade Commission (FTC) and the Department of Justice (DOJ) conduct competition reviews with respect to both foreign and domestic transactions. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) requires parties to submit a notification for certain transactions prior to closing. Whether the notice requirement is triggered under HSR depends on, among other things, the effect on US commerce, the size of the transaction, and the size of the parties involved. Once the parties file their notification, there is generally a 30-day waiting period for the FTC and DOJ to review the transaction. However, transactions can be unwound post-closing as FTC/DOJ approval does not exempt the transaction from other anti-trust compliance laws.

4. Tax and grants

4.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for FDI into the country?

Typical entities used to make corporate acquisitions or strategic joint ventures in the US include US limited liability companies (LLCs) and limited partnerships, which are fiscally transparent in the US, and in the case of US real estate-related investment, US real estate investment trusts (REITs), which are effectively tax transparent. While the US has an extensive treaty network, the utility of non-US intermediaries depends on the jurisdiction from which the investor comes. Where foreign investors prefer to avoid US tax filing obligations, they tend to invest through corporate vehicles instead.

4.2 What are the applicable corporate tax rates?

The US federal income tax rate on domestic corporations ranges from 15% to 35% (that is, where net income exceeds $10 million). Certain corporate entities can qualify for an effective federal income tax rate of zero, such as S corporations, REITs and regulated investment companies (such as qualifying mutual funds). Limitations apply to the use and qualification of such entities. US LLCs are generally not subject to federal income tax at the entity level, unless an affirmative election is made to be taxed as a corporation.

4.3 Does the government have any FDI tax incentive schemes in place?

The US is notable for the degree to which its states and localities compete with each other to attract investment, including FDI. For example, New York provides a state investment tax credit of five percent of an investment, up to $350 million, and four percent thereafter. Many states use tax incentives to attract investment, in many cases calibrated to out-compete schemes offered by neighboring jurisdictions.

4.4 Other than through the tax system, does the government provide any other financial support to FDI investors?

The United States Department of Commerce markets dozens of federal programmes to foreign investors. Opportunities include renewable energy incentives, research and development support, rural development funding and other grants. US states and localities offer similar programmes.

5 Operating locally

5.1 What is the most common governing law of contracts and local business language?

Delaware typically serves as the state of choice for newly formed entities. It has the most developed laws governing the relationships among equity owners, management, and boards of directors (or comparable bodies).

5.2 Explain any local content or local participation requirements relevant to foreign investors.

N/A

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?

The level of difficulty varies depending on the country of origin. Foreign investors are advised to seek strong immigration counsel in the US to assist with the process.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?

N/A

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?

See the discussion below regarding OFAC.
6 Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
Foreign investors should be aware of foreign trade control compliance issues, the Foreign Corrupt Practices Act of 1977 (FCPA), and US anti-money laundering laws. The foreign trade control compliance programmes are governed by, among others, the US Treasury Department’s Office of Foreign Assets Control (OFAC), the International Traffic in Arms Regulations (ITAR), and the Export Administration Regulations (EAR). OFAC governs and limits the import and export of products to specific countries and parties based on US national policy and security reasons. ITAR controls the export or transfer of any article or service specifically designed for military or defence application. EAR governs products, technologies, and software that have both military and commercial applications. These programmes provide for civil penalties, and, in certain cases, criminal penalties.

The FCPA is an anti-corruption and bribery statute that, like the programmes addressed above, provides for both criminal and civil provisions. The statute applies to all US companies and persons, as well as to any foreign national in the US.

The US anti-money laundering laws are incorporated in, among others, the Bank Secrecy Act of 1970 and the USA Patriot Act, and are intended to deter the use of secret foreign bank accounts and prevent terrorist financing. The USA Patriot Act requires banks and other financial institutions to establish anti-money laundering programmes to identify their customers. Complying with these know your customer programmes can be burdensome on foreign investors. Failure to comply, however, may result in civil and criminal penalties, forfeiture of funds, and incarceration.

6.2 What challenges, if any, do investors find in getting certainty around local law and regulations?
The programmes and laws governing foreign trade control and the FCPA are nuanced, do not necessarily implicate all foreign investors (the type of product, business, and investor are all important factors to consider when diligencing a potential transaction), and there is no single point of contact for a foreign investor to engage. In addition, some of the laws are vastly different from local laws in the foreign jurisdiction, and foreign investors may lack the experience to implement compliance protocols. As such, great care and attention should be devoted to learning the US regulatory framework and developing compliance protocols.

7 Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
The US is comprised of fifty-one separate jurisdictions, each with its own judicial system and set of laws and procedures. The US also has a separate system of federal laws and courts with its own unique set of procedures. The efficiency of enforcement and dispute resolution proceedings, therefore, can vary widely by region and judicial system.

There are several general features of the US judicial system of which foreign investors should be aware. First, unlike the loser pays systems in many other countries, in the US, the parties generally bear their own attorneys’ fees absent an agreement or statutory provision. US courts allow broad discovery practices, meaning that litigants are often required to turn over large amounts of information. Finally, US courts allow for trial by jury, class actions, and punitive damages, all of which can lead to large verdicts.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
The US has neither enacted a statute nor is party to any treaty mandating the recognition of foreign judgments. Rather, recognition of foreign judgments varies state to state. Many states have adopted some form of the Uniform Foreign-Country Money Judgments Recognition Act, which provides that judgments that are final, conclusive, and enforceable where rendered may be recognised in the US, but also provides bases for non-recognition, such as where the foreign court did not employ due process or lacked jurisdiction to hear the dispute. Depending on the state, an investor may need to file a new action in the US seeking to have its foreign judgment recognised.

In the case of arbitration awards, on the other hand, the US has enacted the Federal Arbitration Act, which implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration (UN Arbitration Convention). Under the Federal Arbitration Act, US courts generally are required to enforce foreign arbitration awards that fall under either of those conventions.

7.3 Are judgments and arbitration awards from the FDI jurisdiction generally enforceable in other jurisdictions?
A number of countries will not enforce US judgments. This is, in part, because there is no multilateral treaty in place, but also because some countries perceive the US system of jury verdicts and unrestricted punitive damages as contrary to their public policy. An investor can attempt to enforce a judgment within the US, however, by going after any US-based assets. Countries that are party to the UN Arbitration Convention should recognise US arbitration awards.
Rob Carlson is a partner in the corporate practice of Paul Hastings and is based in the firm’s Palo Alto office. With extensive experience in corporate finance matters, Carlson focuses on M&A transactions, public and private securities offerings, joint ventures, and other strategic transactions, representing corporations as well as private equity funds. His practice also includes representation of private equity fund sponsors and investors in connection with the formation and operation of private equity funds, and representation of issuers and underwriters in public offerings and private placements of debt and equity securities. He also counsels boards of directors and committees on corporate governance matters. His industry focus includes working with companies and investors in the medical device, biotechnology, software, e-commerce, electronic device, telecommunications, and gaming industries.

Kristen Winckler is a partner in the tax department of the New York office and co-chair of recruiting for New York. Winckler focuses her practice on tax planning and structuring domestic and international business transactions. She advises on the tax aspects of: private investment fund formation and operation and investment by non-US and tax-exempt investors; organization and operation of public and private, equity and debt-focused REITs; domestic and cross-border joint ventures; capital markets transactions including US and non-US capital market transactions including equity and debt securities offerings; and, mergers, acquisitions and restructurings.

Todd Schwartz is an associate in the corporate practice of Paul Hastings and is based in the firm’s Palo Alto office. His practice focuses on M&A, securities, minority and venture capital investments, and restructuring and bankruptcy, representing corporations as well as private equity funds and their portfolio companies in all aspects of their businesses. Schwartz has advised borrowers (including portfolio, privately-held, and public companies), creditors, and distressed investors (including hedge funds and private equity funds) in acquisitions, out-of-court restructurings, and Chapter 11 cases. He also regularly advises boards of directors and senior management regarding their fiduciary duties and corporate governance.
1. Overview of FDI in Vietnam

1.1 Which countries are the principal sources of FDI into your jurisdiction?

The majority of FDI into Vietnam comes from Asian countries. The top three countries are Japan followed by Singapore then South Korea. There has been a 65.5% year on year increase, with the total amount of investment capital reaching $19,234 million for the first ten months of 2013.

The top 10 sources of FDI flowing into Vietnam, according to the Ministry of Finance of Vietnam, are listed below.

<table>
<thead>
<tr>
<th>Number</th>
<th>Country</th>
<th>Investment capital (million $)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Japan</td>
<td>33,665.12</td>
</tr>
<tr>
<td>2</td>
<td>Singapore</td>
<td>28,875.31</td>
</tr>
<tr>
<td>3</td>
<td>South Korea</td>
<td>28,711.09</td>
</tr>
<tr>
<td>4</td>
<td>Taiwan</td>
<td>27,784.79</td>
</tr>
<tr>
<td>5</td>
<td>British Virgin Islands</td>
<td>15,411.87</td>
</tr>
<tr>
<td>6</td>
<td>Hong Kong</td>
<td>12,550.63</td>
</tr>
<tr>
<td>7</td>
<td>The USA</td>
<td>10,602.85</td>
</tr>
<tr>
<td>8</td>
<td>Malaysia</td>
<td>10,320.00</td>
</tr>
<tr>
<td>9</td>
<td>China</td>
<td>6,942.31</td>
</tr>
<tr>
<td>10</td>
<td>Thailand</td>
<td>6,445.38</td>
</tr>
</tbody>
</table>

1.2 What are the key sectors in your jurisdiction which attract, or the government is seeking to attract, FDI?

Manufacturing and processing captured nearly 60% of the total FDI attracted. Other notable sectors along with their corresponding FDI amounts, based on statistics from the Ministry of Finance of Vietnam, are identified below.

<table>
<thead>
<tr>
<th>Number</th>
<th>Sector</th>
<th>Investment capital (million $)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Manufacture and processing</td>
<td>120,964.54</td>
</tr>
<tr>
<td>2</td>
<td>Real-estate business</td>
<td>48,432.91</td>
</tr>
<tr>
<td>3</td>
<td>Hotel and restaurant</td>
<td>10,722.25</td>
</tr>
<tr>
<td>4</td>
<td>Construction</td>
<td>9,809.91</td>
</tr>
<tr>
<td>5</td>
<td>Manufacture, distribution of electricity, gas, water, air conditioner</td>
<td>9,530.18</td>
</tr>
<tr>
<td>6</td>
<td>Information and communication</td>
<td>3,988.16</td>
</tr>
<tr>
<td>7</td>
<td>Art and entertainment</td>
<td>3,664.48</td>
</tr>
<tr>
<td>8</td>
<td>Warehouse and transportation</td>
<td>3,531.26</td>
</tr>
<tr>
<td>9</td>
<td>Agriculture, forestry and fishery</td>
<td>3,336.08</td>
</tr>
<tr>
<td>10</td>
<td>Wholesale, retail and maintenance services</td>
<td>3,296.59</td>
</tr>
</tbody>
</table>

1.3 Is the government generally supportive of FDI? Which government, and regional, bodies are responsible for driving FDI in your jurisdiction?

The Vietnamese government is highly supportive of FDI. Indeed, a significant part of Vietnam’s economy is driven by FDI, which accounts for roughly 23% of the total investment capital of the economy.

Vietnam’s economy is centrally controlled, with the Ministry of Planning and Investment having overall management authority on FDI. However, local governments have been given more autonomy to compete for FDI, organising investment tours with the private sector to spur more interest in specific industries.

2. Investment vehicle

2.1 What are the most common legal entities and pass-through vehicles used for FDI in your jurisdiction, and how long do they take to become operational?

Since Vietnam’s accession to the World Trade Organization (WTO) in 2007, wholly foreign-owned entities account for the most common legal structure for FDI, followed by joint ventures and then investments via arrangements in the form of build-operate-transfer contracts (BOTs), build-transfer contracts (BTs), build-transfer-operate contracts (BTOs), or business cooperation contracts (BCCs). This is according to a report of the Ministry of Finance of Vietnam.

Upon successful screening of an application file, an investment certificate (IC) is issued.

The time it takes to obtain an IC depends on the sector of investment. On average, it takes about three months to obtain an IC in the service sector, and about four months for the manufacture sector.

2.2 What are the key requirements for establishment and operation of these vehicles which are relevant to FDI?

Foreign investors must generally satisfy the following requirements to invest in Vietnam: (i) financial capacity; (ii) experience in the industry engaged; and (iii) other conditions specific to a particular industry, such as environmental protection or qualified key personnel to run the foreign invested company.

Vietnamese law does not require a foreign invested company to have a local Vietnamese director. A foreigner may assume the role of director; but when the director is concurrently the legal representative of the company, the foreign director must have permanent residence in Vietnam.

3. Investment approval

3.1 For foreign investment approval (including national security review) explain the following:

a) The regulator/s’ name, factors it must consider when making its decisions, and how much discretion it has; The Prime Minister has the ultimate power to approve many large scale FDI projects. This power is shared with the Ministry of Planning and Investment, which has overall responsibility to approve and manage FDI. Other ministries are vested with either the right to approve, or to comment on certain aspects of, an FDI project, depending on the specific industry.

Bui Ngoc Hong, Do Huy and Nguyen Xuan Thuy, LNT & Partners
b) Any investment caps and other legislative restrictions;
With its accession to the WTO, Vietnam has opened its economy to foreign investment and reserved only limited sectors where FDI is subject to a phased-out schedule before complete market opening. However, Vietnam does provide more favourable treatment to foreign investors from certain countries, such as Japan, where bilateral investment agreements exist.

e) Which party must notify and when/if notification is mandatory or voluntary;
To obtain approval for FDI projects in Vietnam, foreign investors must apply and submit an application dossier at the relevant licensing authority. The licensing authority has a certain level of discretion in approving or rejecting the application.

d) What information must be included with notification and what is the review fee;
Information required can be separated into two categories. The first category includes information about the investor, for instance, the investor’s corporate record details, and the individual representing the investor. The second category includes information about the company to be set up, and a description of the project to be implemented by the company. Under the second category, the most important information is the amount of capital to be contributed, and the business lines to be engaged.

The licensing authority does not charge to review the application dossier.

e) How long does the review and approval process take, and are there any fast-track options;
There is no fast-track option. The time for review and the approval processes vary. For sectors where the FDI project must first obtain the Prime Minister’s approval, it may take up to 6 to 12 months. The registration procedure takes roughly half a month; the evaluation procedure takes roughly four months.

f) Is there the ability to consult on a named or unnamed basis;
The investor may consult with Vietnamese relevant authorities. Consultation can be conducted via meeting, telephone, or written documentation.

g) Does notification/review occur pre- or post-closing, and are there any pre-or post-filing requirements unique to FDI;
The assessment and review by the authorities are conducted after the full application dossiers have been submitted. If the application is successful, an IC is issued.

h) What is the position if no response is received on an application for approval and are there any rights of appeal from disapproval;
Investors may lodge a claim in case no response is received on their application, or in case of disapproval. A response is usually given within 15 business days of receipt.

3.2 Briefly explain the investment restrictions for any special/restricted sectors.
For investment projects involving sectors or activities which may affect the environment (for instance, manufacturing) such projects are likely required to be located in an industrial zone, and may require an environmental impact evaluation report.

For certain service sectors listed in the WTO commitments, the approval for an FDI project is subject to a phased-out market opening timeline. From January 2014, most of the restrictions on FDI in service sectors under the WTO commitments will be relaxed or removed entirely.

For projects involving import, export and distribution services, investors must come from WTO member countries, provide proof of financial strength, and have sufficient relevant experience in these sectors.

For very special services such as banking, insurance, finance, and securities, FDI approval is subject to higher scrutiny, requiring the satisfaction of more stringent conditions.

3.3 Which authority oversees competition clearance, when is notification mandatory, and briefly explain the merger clearance process?
The Vietnam Competition Authority has oversight over competition matters. Save for some exemptions stipulated by law, a merger, acquisition or consolidation which likely results in a combined market share between 30% and 50% of the relevant market must obtain approval. A combined market share greater than 50% is prohibited except in exceptional circumstances.

There are no deadlines or fees to submit a notification of a merger (subject to review). The clearance process requires the submission of a file containing a number of items, including the business details of the relevant companies, financial statements, a list of goods and services, and a report on relevant market share. The entire file must be notarised, consularised, and translated into Vietnamese. A written response will be provided within 45 days after the file has been received, which may be extended twice, for a maximum of 30 days each time, for complex transactions.

5. Operating locally

5.1 What is the most common governing law of contracts and local business language?
Vietnamese law remains the most common governing law of contracts.

The most common business language in Vietnam is Vietnamese and, for transactions involving foreign elements, English is the dominant foreign language.
5.2 Explain any local content or local participation requirements relevant to foreign investors.
As a member of the WTO, Vietnam is bound by the Agreement on Trade and Investment Related Measures. Accordingly, no requirement on local content or local participation applies.

5.3 How difficult is it for foreign investors to secure expatriate visas for shareholder representatives and workers?
Business visas for temporary stays in Vietnam are relatively simple. However, employment visas for foreign workers are getting tougher to obtain. Recently, Vietnam changed the visa laws. Any company planning to employ foreign workers must now undergo a rigorous review process before the foreign worker can apply for a work permit and resident card. The term for a work permit was reduced from three to two years.

5.4 What foreign currency or exchange restrictions should foreign investors be aware of?
Vietnam has strict foreign exchange control measures. Apart from very few exceptions, all transactions in Vietnam must be conducted in the local currency – the Vietnam dong – or risk being invalidated.

5.5 Does the country prohibit domestic companies from doing business in any foreign jurisdictions?
Vietnam does not prohibit its domestic companies from doing business in any foreign jurisdiction, but requires the company to obtain an offshore investment licence.

6. Legal and regulatory framework

6.1 Are there any other FDI-specific laws that foreign investors must be aware of?
The key pieces of legislation governing FDI are the Law on Enterprises and the Law on Investment. In addition, foreign invested companies are subject to compulsory annual financial audits.

6.2 What challenges if any do investors find in getting certainty around local law and regulation?
Vietnamese laws are sometimes vague, ambiguous, and inconsistent. In such cases, the relevant authorities should be consulted to assist with interpretation.

7. Dispute resolution

7.1 How efficient are local courts’ enforcement and dispute resolution proceedings, and are there any procedural idiosyncrasies foreign investors must be aware of?
Commercial disputes can be resolved in court or, if agreed by the disputing parties, through arbitration. While it usually takes two rounds of court review (trial and appeal) before a judgment is considered final, an arbitration award is immediately final and binding when rendered.

During court proceedings, Vietnamese is the required language of communication, both verbally and in writing. The application of foreign law is not allowed. Meanwhile, arbitrations allow the use of foreign languages during the proceedings, and the application of non-Vietnamese laws.

The courts usually hear and decide cases within 24 months or less. The length of arbitration proceedings varies depending on the parties’ terms of engagement and the governing arbitration rules.

The enforcement of judgments or arbitration awards is governed by the Law on Civil Judgment Enforcement. In practice, enforcement may be delayed due to lack of qualified personnel and any back logs.

7.2 Do the courts of the FDI jurisdiction respect foreign judgments and are arbitration awards enforceable in the jurisdiction?
A judgment granted by a foreign court can be recognised and enforced in Vietnam on a reciprocal basis, so long as the judgment does not violate basic principles of Vietnamese law.

Vietnam is a signatory to the New York Convention on the Recognition of Arbitral Awards. Therefore, recognition and enforcement of foreign arbitration awards may be sought in Vietnam. Arbitration awards from countries that are not members of the Convention may be recognised and enforced if there is reciprocity between Vietnam and the country from which the judgment was rendered.

7.3 Are judgments and arbitration awards from Vietnam generally enforceable in other jurisdictions?
The issue of whether court judgments from Vietnam are enforceable in other jurisdictions is case specific, depending on the laws of the enforcing country. Judgments in Vietnam are rendered after the parties have presented their arguments in a hearing on the merits. Under such circumstances, many courts around the world would typically enforce the judgment subject to typical grounds for non-recognition such as fraud or the local laws require reciprocity. Vietnam is not a signatory to any treaty on the recognition of foreign judgments.

In contrast, Vietnam is a member of the New York Convention on the Recognition of Arbitral Awards, meaning such awards from Vietnam should readily be recognised and enforced in other member jurisdictions.
About the author

Bui Ngoc Hong is a partner of LNT & Partners. His main areas of practice include M&A, corporate and commercial; employment, dispute settlement, and foreign investment.

Hong advises foreign investors in their commercial objectives in all aspects of investment in Vietnam. He is familiar in structuring and establishing business or contractual arrangements, asset or company acquisitions, and private equity matters. He also advises investors on operational issues such as employment, corporate governance, contracts, and dispute settlement. His experience spans through projects in the manufacturing, mining, processing, food and beverages, trading and retail, franchise, tourism, IT services, consultancy management services, advertising, logistics, education, and pharmaceutical sectors.

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Do Huy has over 18 years’ experience handling international transactions and disputes across a range of legal disciplines with cross-border elements, including investments, financings, M&A, joint ventures, trade, licensing, franchising, antitrust and competition, enforcement and infringement actions, tax and holding structures, technology transfers, outsourcing, and internet, privacy and data protection. He regularly advises financial institutions, corporations, funds and investors on their investments into Vietnam.

Huy is an expert on IP law, having negotiated many technology-related transactions and litigated a number of significant IP international disputes. His experience also extends to cross-border disputes, including multi-jurisdictional litigation and international arbitration. He has been lead counsel in trials and arbitrations venued in North and South America, Europe, and Asia.

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Further, Thuy achieved the Best Graduation Thesis on competition law after graduating from Ho Chi Minh City University of Law. He is frequently sought after for comments on drafts of legal regulations for investment law, enterprise law and planning law. Thuy is also a freelance reporter for Vietnam Investment Review, Vietnam News, Global Legal Insights and other legal magazines.

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