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**HOW TO STRUCTURE INVESTMENT AND
TRADE OPERATIONS FOR AMERICANS
IN THE ROC: A LAWYER'S
EXPERIENCE**

CHUN LI*

I. INTRODUCTION

In writing this paper, my sole purpose is to bring to the notice of prospective American investors and traders certain crucial aspects relating to investment and trade in the Republic of China (hereinafter ROC) from my many years' experience of private law practice in that country.

Land and People

As many are undoubtedly aware, the ROC used to be a huge national entity whose territory embraced the entire Mainland China and many outlying islands, large and small, including, among others, Taiwan, Quemoy, Matsu and Penghu (the Pescadores). In late 1949, following the Communist take-over of Mainland China, the government of the ROC moved its seat to Taiwan. At present, only Taiwan, Quemoy, Matsu, and Penghu are under the effective control of that government, Taiwan being the largest land mass of all, on which over 95 percent of the ROC's population resides.

For centuries Taiwan has been known to Westerners as Formosa, a name given by the 16th century Portuguese mariners who first occupied and administered the island following their

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discovery. Subsequently, the island was taken over by the Chinese and renamed "*Tai-Wan*," meaning literally "terraced bay." In 1887 Imperial China proclaimed it a province, formally bringing it within the ambit of the Chinese Empire. Upon China's defeat in the first Sino-Japanese War in 1895, Taiwan was ceded to Japan, thus becoming a Japanese colony. It was restored to China in 1945 after World War II. Thereupon, it was made a province of the ROC.

Shaped roughly like a tobacco leaf, Taiwan is 240 miles in length and 85 miles in width at its broadest point. It has a total land area of 13,885 square miles. Its present population is approximately 16 million, with an annual rate of increase at slightly less than two percent.

Some comparison between Taiwan and mainland China might be of interest. Mainland China, with a total land area of 4.4 million square miles, is 300 times the size and its massive people of 800 million 50 times the population of Taiwan. However, notwithstanding Mainland China's undisputed superiority in territorial space and manpower, it lags behind the ROC in the important areas of economic development and foreign trade. In 1976 foreign trade of the ROC totalled US\$15,760 million, while that of Mainland China was only US\$13,400 million.

Economic Development and Foreign Trade

Since the early 1950s the people and government in Taiwan have made economic development their foremost national goal. Through a series of governmental processes which included a land reform program, basic social structural changes, many legislative enactments designed to encourage investment, credit revision, expansion and improvement of infrastructure, and upgrading of education, the economy of the ROC has prospered, so much so that today many leaders of the world community speak of her as a model of economic development among developing nations. Concomitantly, foreign trade of the ROC has expanded by leaps and bounds. The latest statistics of the International Monetary Fund lists her the twentieth among the world's trading countries. She is a major trading partner of the United States, being as of the present the twelfth on the list of America's trading partners. Two-way trade between the United States and the ROC in 1976 amounted to over US\$4.6 billion, with the latter enjoying a surplus of approximately US\$1.3 billion. If trade between the two

countries keeps expanding, it is hopeful that the ROC will move up to the seventh or sixth place among U.S. trading partners within the next few years.

Taiwan has been one of Asia's most attractive investment sites and it will remain so if the government's present development-oriented policy continues. Foreign investment since 1952 totals US\$1.405 billion. The United States is the single largest investor (US\$470.04 million), followed by overseas Chinese (US\$411.33 million), Japan (US\$215.9 million) and European countries principally West Germany and the Netherlands (US\$161.6 million). Since the energy crisis in late 1973, foreign investment has somewhat tapered off, but this is believed to be a transient phenomenon. As economies of major industrial powers are gradually recovering, it is expected that more foreign investors will come to the ROC to make investment in the years to come.

II. BRIEF DESCRIPTION OF ROC LEGAL SYSTEM AND MAJOR GOVERNMENT AGENCIES REGULATING INVESTMENT AND TRADE

Legal System

Although ancient Chinese society was principally guided by the moral teachings of Confucius, law as a social institution was known to the Chinese as early as before the birth of Christ. China's first legal code, *Fa Ching* (The Canons of Law), dates back to 255-206 B.C. in the Ch'in dynasty. From then on down to the Ch'ing (Manchu) Government (1644-1911), all Chinese dynasties had their own codes of law. It should, however, be noted here that from today's point of view, these codes could hardly have been called law, as they were enacted without any form of legislative process. Largely penal in nature, they were actually fiats promulgated by the governor for control of the governed.

In the closing years of the Ch'ing dynasty, because of China's repeated military defeats at the hands of foreign powers, agitations for constitutional, legal, social and industrial reforms gained nationwide momentum. Legal reforms were given top priority as the entire Chinese nation was pained by the humiliating effects of the extraterritorial rights imposed by the victorious powers. The Ch'ing Government made a special effort to formulate new laws to meet public demands, but before the work was completed, revolution broke out in 1912 causing the downfall of the Manchu dynasty.

After the establishment of the Chinese Republic, the work of law reform continued. In the initial stage assistance of Japanese legal scholars was sought. As Japanese law is by and large German and French oriented, so is ROC law. Up to the time the ROC Government evacuated to Taiwan in 1949, the nation had various modern statutory laws comparable to those in force in other civilized nations.

Today the laws previously used in Mainland China remain in force in ROC-controlled territory.

The ROC has three levels of courts. On the national level, there is the Supreme Court, which is the court of last resort. On the provincial level, there is the High Court, which is a court of intermediate appellate jurisdiction. The High Court may have one or more branches, depending upon the volume of judicial business that comes before it. On the local level, there is the District Court, a court of first instance having general jurisdiction in both civil and criminal cases. Attached to each court is a Public Procurator's Office staffed by one or more public procurators whose duty it is to investigate and prosecute criminal offenses on behalf of the State. The nation's chief public procurator is the Procurator-General, an executive official serving under the Minister of Justice.

Like other foreigners, Americans in the ROC, except for those enjoying diplomatic privileges and immunities or those enjoying privileges and immunities under the Status of Forces Agreement, are all subject to the jurisdiction of ROC courts. ROC criminal law has both territorial and extraterritorial application. Thus, if a ROC national or foreigner commits a certain act outside the ROC which is an offense under her criminal law, such as counterfeiting ROC national currency, sedition or high treason, the actor is punishable by ROC law. Once he is in ROC territory, he can be arrested, prosecuted, tried, and convicted.

There are no jury trials in ROC courts. For this reason, the judge is all powerful: he finds facts, rules on evidence, and renders judgment. The role of the lawyer in the courtroom is rather limited — a trial is in the main the judge's show. In this respect, the ROC judge very much resembles his counterpart in German courts.

There are local bars and one national bar in the ROC. The national bar is an association of all local bars. ROC bars, however, are in fact lawyers' guilds, as, unlike bars in the United States, their membership is restricted to private law practitioners and does not extend to judges, public procurators, government attorneys and law professors.

Agencies Regulating Investment and Trade

Foreign investment and trade are under the jurisdiction of the Ministry of Economic Affairs (MOEA). A special agency by the name of Investment Screening Commission (ISC) was set up within the MOEA to screen and approve investment applications submitted by overseas Chinese and foreign nationals. A Vice-Minister of the MOEA serves *ex officio* as Chairman of the ISC, whose membership includes several officials at the vice-minister level of other ministries and representatives of the provincial and local governments. The ISC has a secretariat and a number of divisions, each charged with certain responsibilities of daily routine. Decisions, however, are made by the members of the Commission at meetings on a collective basis.

For every investment application that has to do with manufacturing, the clearance of the Board of Industrial Development, also an agency under the MOEA, is essential. The Board has responsibility for the overall planning of the nation's industrial development, so investment applications involving manufacturing activities are subject to its review. In fact, without its favorable recommendation a foreign investment application has little hope of being approved by the ISC.

If a foreign investor desires to import from abroad equipment and raw materials for its own plant, his investment application will, as a rule, be forwarded by the ISC to the MOEA's Board of Foreign Trade (hereinafter BOFT) for review and recommendation. Invariably, the BOFT will require the foreign investor to purchase equipment and raw materials from the local market to the extent that they are available locally. What is more, it will refuse to permit the foreign investor to import used equipment from abroad for fear that foreign manufacturers would use the ROC as a dumping ground for obsolete equipment. Only in very exceptional cases where the foreign investor is able to support importation of used equipment with incontestable grounds will the BOFT make an exception to the above.

On a more general level, the BOFT controls all imports and exports through its power to grant import and export licenses. Together with the Bureau of Commodity Inspection of the MOEA, it also exercises a certain degree of supervision over the quality of export merchandise. Occasionally, the BOFT, when requested to do so, will go out of its way to mediate in disputes between the local purchaser and the foreign supplier and vice versa.

Mention should also be made of still another agency under the MOEA which, though not regulatory in nature, stands prominently in the government hierarchy insofar as foreign investment is concerned. That agency is the Industrial Development and Investment Center (IDIC), created solely to provide assistance to foreign investors. The IDIC maintains overseas offices in half a dozen major cities around the world, including New York City, Chicago, Los Angeles and Frankfurt. These offices furnish information to and assist prospective investors in identifying investment possibilities in the ROC.

The Ministry of Finance also plays an important role in the administration of foreign investment. Many tax incentives, including those of tax exemption and accelerated depreciation of fixed assets, fall within its jurisdiction. Other investment inducing benefits, such as free importation of equipment, five-year deferred payment or installment payment of import duty, tax rebates for raw materials used for export products, establishment of bonded warehouses or factories, and so on, also must receive its approval. Of all the Ministry's powers the greatest is, perhaps, that of determining what products should be accorded the status of encouraged products, thus entitling them to five years tax exemption. In this connection, attention is called to the fact that not every product manufactured by the investor's plant is eligible for the tax holiday; the Ministry has prescribed certain criteria which products must meet in order to qualify therefor. Reference will be made to such criteria elsewhere in this paper when the subject of foreign investment is to be treated in more detail.

At the provincial level, the Department of Reconstruction of the Taiwan Provincial Government is the agency with which foreign investors will come into the most frequent contact. This agency is responsible for the licensing of all factories in Taiwan save those situated within the Municipality of Taipei, which has its own Bureau of Reconstruction to do the job. The Provincial Department of Reconstruction has one other important function, that is, classifying land and issuing industrial land certificates without which factories will not be permitted to be established. This function is, however, rarely exercised by the Bureau of Reconstruction of the Municipality of Taipei, as land within the city limits is too expensive to be used for factories.

Occasions may arise when foreign investors are called upon to deal with the local governments within whose jurisdictions they keep business offices or factories of their invested enterprises. Clothed with no decision-making or supervisory powers, these

local governments are not regulatory agencies and they treat foreign invested enterprises the same way as they would any local enterprises.

III. THE LAWYER'S ROLE IN FOREIGN INVESTMENT AND TRADE

Local lawyers specializing in investment and international business transactions ought to be a valuable asset to the foreign investor or trader. As a common practice, American investors or traders used to retain their own American lawyers for consultation on legal matters. This is certainly fine at home, but several considerations weigh against the use of American lawyers in the ROC. In the first place, American lawyers usually do not speak, read, or understand enough of the Chinese language to be capable of effectively handling their clients' legal business. Second, it cannot be expected that they possess a thorough knowledge of the local laws and regulations applicable to foreign investment and trade. Third, not being brought up in a Chinese environment, they usually lack that degree of tactfulness which is characteristic of the Chinese in the course of human relations. Of all these qualifications the last is particularly important in terms of accomplishment of objectives in Chinese society, but it apparently cannot be acquired through learning processes. Thus, it is perhaps to the advantage of the American investor or trader to utilize the services of a local lawyer to handle for him matters relating to investment or trade in the ROC. A most ideal arrangement, which has in fact been widely adopted by American investors or traders, is to employ a local lawyer to work with their own American counsel. By so doing, the local lawyer complements the work of the American counsel, with the client getting the benefit of the legal talents of both.

The local lawyer's role should not be limited to handling legal technicalities for his clients. It does not take much legal expertise to fill out a foreign investment application or application for import or export license, even though it is required to be written in the Chinese language. What should be the first and foremost requirement for the local lawyer is to help his clients map out investment strategies. For instance, he should be able to advise his clients as to whether a small equity with a large loan from the parent company is a better mode of investment than a large equity investment without a loan, or whether loaning equipment by the parent company to the subsidiary enterprise is a more

flexible arrangement than an outright cash equity investment in times of fast technological or other changes. Advice such as this is crucial to the investor in the sense that it will help him arrive at a correct decision so that he can set his venture on a proper course at its very beginning.

It is not even unusual for American investors or traders to consult with their local lawyers on business issues. To generalize here the kind of advice sought by them is both impractical and impossible, but a couple of examples may throw some light on the nature of questions they commonly ask. They may, for instance, be concerned with the pricing of their export products and ask whether it should be at a higher or lower level because of possible consequences upon their present or future tax liabilities. They may also ask whether purchase of raw materials from local sources is, in regard to cost and in other respects, more desirable than importation from abroad. Quite obviously, not every local lawyer is competent to answer such questions, as they call for some familiarity with the client's business as well as a fair knowledge of general business know-how. These examples nevertheless give some indication of the whole spectrum of services the local lawyer may be called on to perform.

If the American investor or trader is not physically present in the host country, the local lawyer may have to act as his representative. In this capacity, the local lawyer will conduct negotiations with the client's business counterparts or officials of government agencies on behalf of his absentee principal. He will thus be more than the investor's or trader's attorney; in a truer sense, he will become the latter's business agent.

Last, but not least, the local lawyer will at times serve as interpreter for his American clients, most of whom do not speak the Chinese language. While English is the second language for the majority of the educated sector of the ROC population, it is deemed advisable and prudent for the American investor or trader to use his Chinese lawyer as interpreter in conversation with his business counterparts or government officials, particularly when matters of legal importance are involved.

At present, there are in the ROC a dozen or so law practitioners who not only have excellent English language capability but also received legal training in the United States, some being holders of the J.D. degree. These lawyers are generally competent for legal service to American investors and traders.

IV. INVESTMENT

Not all American investors or traders have the same business objectives in the ROC. Some are attracted to the country by the favorable investment climate there and they desire to set up factories to manufacture products for sale to local consumers or for export, or both. Others are interested in purchasing merchandise from local producers and exporting it to the United States and/or other areas, and vice versa. Still others simply want to send a representative to the ROC and have him stationed there for liaison purposes, such as doing market research, supervising execution of purchase orders by local suppliers, maintaining contact with prospective customers, and so on. Depending on the objectives of a particular client, the local lawyer's role is to advise him on the proper approach to take and to assist him in the structuring of his operations within the legal framework of the ROC.

From what has been stated, it may be appropriate to classify the business objectives of American investors and traders in the ROC, according to their nature, into two major categories, *i.e.*, investment and trade. Representatives of American business establishments sent to and stationed in the ROC are *sui generis*, having little to do with either investment or trade. They perform, nevertheless, a pattern of activities quite commonly adopted by American companies, thus deserving some treatment as a separate and distinct category. The main object of the writer, as previously stated, is to deal with certain crucial legal aspects relating to foreign investment and trade.

Foreign Investment — Legal Definition and Scope

To the layman, investment may conceptually mean a variety of business undertakings: setting up a factory for manufacture of products, forming a company to carry on trade, purchasing real estate, buying stocks and bonds, and the like. The writer had the personal experience of being asked on one occasion by an American businessman to assist him in making an "investment," as he called it, in the ROC by opening a steak house.

The legal definition of investment can, of course, be markedly different. Under the Statute for Investment by Foreign Nationals, promulgated July 14, 1954, and last amended June 22, 1968 (hereinafter SIFN), investment has a restricted meaning. Only the

establishment of one of the following enterprises will be treated legally as foreign investment: (i) productive or manufacturing enterprises capable of meeting domestic needs; (ii) enterprises whose products have export markets; (iii) enterprises which will foster the development and improvement of the nation's major industries, including mining and communications industries; and (iv) other industries which will benefit the nation's economic and social development. Thus, it is clear that not every type of business is open to foreign investors. The dominant theme is production and manufacture, since the government policy with respect to foreign investment is primarily oriented toward national economic development.

When legal assistance is sought by an American client on a specific investment project in the ROC, the local lawyer should first carefully look into the client's plans to see whether the proposed project can qualify for foreign investment. In this regard, a few key questions should be asked. Will the investment provide import-substitutes needed for domestic consumption? Will the investment produce export items to improve the nation's trade balance and generate more foreign exchange earnings? Will the investment tend to develop or improve the nation's important industries, including mining and communications industries? If the answers to the above are all in the negative, then ask a last question: Will the investment be in any way beneficial to the economic and social development of the nation? This last question is broad enough to provide a leeway through which a good case may be made for the client's project, as any direct financial investment is bound to result in some benefit to the economic and social development of the host country.

The SIFN provides certain privileges and benefits for foreign investors, such as repatriation of invested capital, outbound remittance of net profit, guarantee against requisition or expropriation, waiver of nationality and residence requirements, and so on. Attention is, however, called to the fact that the SIFN itself contains no provisions of tax benefits which for practically every foreign investor are a major incentive. Tax benefits are provided in the Statute for Encouragement of Investment (hereinafter SEI), a statute applicable to both national and foreign investors. These include a five-year tax holiday or accelerated depreciation of fixed assets, a maximum rate of business income tax, import duty exemption or five-year deferred payment of import duty on capital equipment, and many other lesser benefits.

It is overridingly important to point out that even though a proposed project of a foreign investor approved by the government may qualify for foreign investment, it does not necessarily mean that it will be entitled to the tax holiday or accelerated depreciation of fixed assets under the SEI. Only certain enterprises prescribed in government executive orders published from time to time may enjoy such benefits, subject to the further condition that they meet certain procedural requirements. The prescription of these enterprises is officially designated "Categories and Criteria of Productive Enterprises Eligible for Encouragement." The local lawyer must check carefully to see whether the particular investment project proposed by the client falls within the prescribed categories and meets the prescribed criteria.

The latest categories and criteria, amended and published by the Executive Yuan, the nation's highest administrative body, on April 28, 1975,* list 14 categories of enterprises with various criteria as being entitled to encouragement treatment in the form of a tax holiday or accelerated depreciation of fixed assets. The principal category is manufacturing industries, which include: food processing industry, paper industry, rubber processing industry, chemical industry, processing industry of non-metallic minerals, basic metals manufacturing industry, machinery manufacturing industry, electrical equipment manufacturing industry, electronics industry, transportation equipment manufacturing industry, ceramic industry, textile industry, building and prefabricated materials manufacturing industry, and other manufacturing industries (such as clinical and surgical instruments; photographic and optical instruments, watches, clocks, and their parts and assemblies; etc.). The other 13 categories of encouraged industries are: handicraft industry, mining industry, agricultural industry, forestry industry, fishery industry, animal husbandry industry, transportation industry, warehousing industry, public utilities industry, public housing construction industry, enterprises providing technical services, enterprises engaged in tourist hotel operations, and heavy equipment construction industry. For each industry the government prescribed certain criteria of which a detailed description here is infeasible due to limited space.

* Editors' Note: The Statute for Encouragement of Investment was again amended on July 26, 1977. The English translation is available from the Chinese Investment and Trade Office in New York, see p. 22 *supra*.

Prescribed Form of Organization of Invested Enterprises

In addition to the above, the form of organization of the invested business is also a key factor in the granting of the tax holiday or the accelerated depreciation of fixed assets or other prescribed benefits. The SEI (Art. 3) explicitly stipulates that to qualify for productive enterprises within the contemplation of the "Categories and Criteria of Productive Enterprises Eligible for Encouragement," each invested enterprise must be organized as a company limited by shares in accordance with the Company Law. In structure and legal ramifications a company limited by shares is more or less similar to an American corporation, but it does have some unique features which are worthy of note from the standpoint of the American investor. These features are briefly stated below.

1. There must be seven or more incorporators, more than one-half of whom must have their domiciles within the ROC (Art. 128, para. 1). This domicile requirement is, however, waived in the case of foreign investment. Both corporate persons and natural persons can be incorporators. Thus, if X corporation, a Delaware corporation, makes an investment in the ROC and organizes a wholly owned subsidiary under the Company Law, then X corporation itself can be an incorporator. To meet the requirement of a minimum of seven incorporators, it will have to nominate six or more other persons, corporate and/or natural, but preferably its employees, to be incorporators. To qualify for waiver of the domicile requirement, however, such persons must join the principal investor in applying for recognition of their status as co-investors.

2. The company must have, at least, three directors elected from among its stockholders (Art. 192, para. 1). The latter qualification means that to be eligible for election to a directorship, one must, at least, own one share of stock. Since a corporate investor cannot act by itself, it will have to appoint one or more representatives to represent and act for it as stockholder, and such representatives will be eligible for election to directorships. The Company Law does not require directors to have ROC nationality, nor does it require them to keep their residence in the ROC. It does, however, require the chairman of the board of directors to have both ROC nationality and residence, but again such requirements are waived in the case of foreign investment. The

term of office of directors cannot be longer than three years, but they are eligible for reelection (Art. 195, para. 1).

3. Directors must attend board meetings personally, except that the articles of incorporation of a company may provide that one director may by written authorization appoint another director as his proxy to attend board meetings on his behalf (Art. 205). No director, however, may act as proxy for more than one other director. Each director is entitled to one vote.

4. A company limited by shares may, but is not required to, have a number of executive directors elected from among the directors. They meet regularly when the board of directors are in recess to make decisions on corporate business and affairs. The Company Law requires a majority of executive directors to have their residence in the ROC, but if they are foreign investors or co-investors, such requirement is waived under the SIFN.

5. The chairman of the board of directors, elected from among the directors or executive directors, as the case may be, is the legal representative of the company vis-à-vis the outsider. He presides over board and stockholders meetings. He must be an ROC national and have his legal residence in the ROC. Both requirements are, however, waived if the company is a foreign investment company.

6. The Company Law requires a company limited by shares to have, at least, one supervisor elected from among the stockholders. If a company has more than one supervisor, at least one of them must be an ROC resident. Again, this requirement is waived in the case of foreign investment. The institution of supervisorship is of continental origin. Both the German Commercial Code and the Japanese Commercial Code have similar provisions. Under the Company Law the structure of a company limited by shares contemplates three direct sources of power and control: the stockholders, the directors and the supervisor. The directors, whose functions are executive in nature, are solely responsible for the management and business operations of the company. The supervisor, on the other hand, represents the stockholders in overseeing the work of the management and the financial condition of the company. One of his primary functions is to check on the financial reports prepared by the board of directors before they are submitted to the annual stockholders meeting. Although the directors are legally bound to respond to the requirements of the supervisor and to supply to him full information concerning the business operations and financial condition of the company, the ultimate controlling authority

remains the stockholders, who may not only remove directors and the supervisor through their voting power, but may also make policy decisions and declare dividends. In actual practice, however, the stockholders rarely, if ever, do so and tend to rubber stamp recommendations of the directors on matters relating to company policies and dividend distribution.

7. The president and vice president of the company must be ROC residents, although they need not be ROC nationals (Art. 29, para. 4, and Art. 39). This means that if the investor desires to appoint a foreigner to be president or vice president of his invested company, the appointee must take up his residence in the ROC. This, in turn, means that the appointee must enter the ROC with an entry visa, as only this type of visa will make it possible for him to apply for resident status in the ROC.

8. To require stockholders or board meetings to be held within the ROC would cause much inconvenience to foreign investors, even though modern air transportation has considerably reduced the distance between the various continents. For convenience sake, the articles of incorporation may provide the holding of stockholders and board meetings outside the ROC.

Local Participation

To prevent foreign dominance of national economy, most developing countries require some degree of local participation in foreign investment. Either a foreign invested enterprise should be joined by indigenous partners at the time of its initiation, or indigenous partners should be allowed to participate in the enterprise after it has been in operation for a certain number of years. In general, the ROC Government, even at this date, still allows foreign investors to freely set up 100 percent self-owned subsidiaries. However, it does require local participation in certain selected industries. The basic metals manufacturing industry, considered crucially important for national economic and other development, is, for example, one such industry; no foreign investor or investors may own more than 40 percent of total equity except in cases where special approval has been granted by the ISC. Local participation is also required for the electronics industry, but wholly owned subsidiaries are permitted if all their products are intended for export. In the pork processing industry local equity participation is prescribed at 50 percent at the minimum.

At the other end of the spectrum, if an invested enterprise is 100 percent foreign owned, the ROC Government may require the transfer to local people of a designated percentage of equity ownership after a limited number of years. When such dilution of foreign equity ownership is required, the percentage of capital stock to be transferred and the time limit within which the transfer should take place are invariably prescribed in the investment approval granted by the ISC.

Joint Ventures with Local Partners

Most American investors seem to prefer wholly owned subsidiaries to joint ventures with local partners, largely out of a desire to run their business without interference from any non-governmental third parties. Where a wholly owned subsidiary is impermissible and joint venture the only answer, the negotiation and drafting of a joint venture agreement becomes vital to the interests of the foreign investor. In this connection, the local lawyer will have an important role to play. As a law practitioner specialized in foreign investment, the writer wishes to offer the following for the consideration of American investors interested in joint ventures in the ROC:

1. In the absence of a required percentage of local equity ownership, it will be a distinct advantage for the American investor to own 51 percent or more of the total equity of the invested enterprise. In the first place, his investment will then be guaranteed by law (Art. 15 of the SIFN) against government requisition or expropriation within 20 years from the date of commencement of operation of the invested enterprise as long as he maintains a minimum ownership of 51 percent of the total capital stock. Secondly, he will have a majority vote — thus a bigger voice — at the stockholders meeting. Because the stockholders are the ultimate authority and controlling body of a company limited by shares under the Company Law, this will in turn assure him of firm, if not absolute, control of the business.

2. How many persons each party can nominate and have elected to the board of directors is vitally important for corporate decision making, for resolutions at board meetings are adopted by a majority vote in number of the directors, each director, as noted before, being entitled to one vote regardless of the amount of stock owned by him. The number of directors controlled by each party becomes all the more important in the appointment of the president of the company, which is legally effectual only by the

concurrence of a majority of the directors. It is quite common for joint venture partners to agree upon and set forth in their joint venture agreement the respective numbers of directors they each shall be entitled to nominate and have elected to the board as well as the party which shall have the right to nominate the president. Most American investors also like to reserve to themselves the right to nominate the plant manager and the controller because of the importance of these positions to the success of their ventures. A suitable provision to this effect in the joint venture agreement will prevent possible controversies over the issue from arising between the partners.

3. The partners should agree upon the place or places where stockholders and board meetings are to be held. As non-indigenous investors and their nominated non-indigenous co-investors cannot visit the ROC too often, a provision in the joint venture agreement that such meetings may, if requested, be held outside the ROC should be of advantage to them. To ensure full compliance by local partners with such a provision, it is desirable to have it written into the articles of incorporation.

4. The mode of settling possible controversies between the partners is one aspect deserving the closest attention of the American investor. Joint ventures are usually business undertakings of long duration, and there is no guarantee that the American investor and his local partner or partners will see eye to eye on everything with respect to the business and operations of the joint venture. To provide in the joint venture agreement how differences or controversies arising between the parties out of, or relating to how their joint venture should be settled, ought to be a prudent and necessary step. Largely due to their cultural background, local people are loath to fight legal battles whether in ROC or foreign courts. Their centuries-old preferred dispute-settling methods are reconciliation and arbitration. In recent years there has been witnessed a growing tendency among American investors favoring arbitration in the United States or a third country in accordance with the rules of the American Arbitration Association or the rules of conciliation and arbitration of the International Chamber of Commerce at Paris, and this is permissible under the ROC law if the local partner or partners agree. Under Article 8 of the Statute for Technical Cooperation, where a dispute should arise out of technical cooperation, it shall be settled in accordance with the arbitration method as agreed upon between the parties. Thus, if a certain foreign investment has a licensing arrangement, *i.e.*, supply by the foreign investor of

technical know-how to the invested enterprise on a royalty basis, the inclusion of an arbitration clause in the licensing agreement is mandatory.

Whether arbitration awards rendered outside the ROC will be honored by ROC courts is surely a matter of deep concern for the American investor. There is no precise legal provision, nor do there exist any precedents, on this point. The law on the enforceability of foreign judgments may, however, provide some assistance in ascertaining the possible judicial attitude with respect thereto. Under Article 402 of the Code of Civil Procedure, the validity of a judgment of a foreign court will not be recognized by ROC courts if one of the following elements is present: (i) such judgment is not *res judicata*; (ii) according to the laws of the ROC the foreign court rendering the judgment did not have a valid basis for exercising jurisdiction over the case; (iii) such judgment is considered incompatible with the public order and good morals of the Republic; and (iv) judgments of courts of the ROC are not reciprocally recognized by the foreign court rendering the judgment. It is believed that when a foreign investor applies to an ROC court for execution on a foreign arbitral award the court will probably refrain from subjecting the award to a review on its merits, but that the possibility of the court applying some of the criteria applicable to foreign judgments cannot be totally ruled out.

5. The American investor and his local partner or partners are free to agree upon a law governing their legal relationship under their joint venture agreement. Under Article 6 of the Law Governing Application of Laws in Cases Involving Foreign Persons, contracting parties are permitted to choose any applicable law to govern their contracts. Most American investors wish to choose laws of the State of New York as governing law, and this is acceptable to the ROC authorities provided the choice is not imposed upon the local partner or partners against their free will and provided, further, that none of the provisions of the joint venture agreement are against ROC laws or public policy.

6. Joint venture agreements may be written in the English language. The ROC authorities, including the ISC and other regulatory agencies, will accept English language agreements if Chinese translations are attached thereto. It should, however, be brought to the attention of the American investor that if he signs a joint venture agreement in the United States, his signature must be notarized at the nearest ROC Consulate in order for the instrument to be effectual in the ROC. The signatures of signers of

joint venture agreements executed elsewhere other than in the ROC must likewise be notarized either at an ROC Consulate or by an ROC representative if there exists no ROC Consulate in the area.

Tax Benefits

It has become an established practice for developing countries to offer certain benefits to investors as an incentive to investment. The ROC follows this practice. Of the many benefits granted to domestic and foreign investors under the SEI, the following are worthy of particular mention.

A productive enterprise newly established and eligible for encouragement in accordance with the "Categories and Criteria" prescribed by the government, as referred to above, is entitled to apply for a five-year income tax exemption starting from the date of the first sale of its products or the date services were first rendered, as the case may be, or for accelerated depreciation of the fixed assets of its plant, which must be either imported or entirely new. In his investment application the investor must state what his choice is as between these two options. If his election is accelerated depreciation, the useful lives of fixed assets for the stated purposes shall be determined as follows: (i) for machinery and equipment, if the useful lives prescribed by the tax authorities are 10 years or more, they may be accelerated to 5 years; if the prescribed useful lives are less than 10 years, they may be reduced to one half of the prescribed number of years; and (ii) for buildings, installations, or communication or transportation equipment, their useful lives may be reduced to one-third of the prescribed number of years.

When an existing productive enterprise eligible for encouragement expands its productive equipment to increase the quantity of its products or capacity of its services, it is entitled to apply for a four-year income tax exemption or accelerated depreciation of the fixed assets of its plant, which, also, must be imported or entirely new. Only that portion of the income which is derived from the production of expanded plant facilities is tax exempt and only expanded plant facilities can be depreciated on an accelerated basis. The same useful lives of originally acquired fixed assets for accelerated purposes apply to expanded plant facilities.

Under the SEI, as last amended December 30, 1974* maximum rates of business income tax payable by productive

* See Editors' Note p. 84 *supra*.

enterprises not eligible for tax holiday or after termination of tax holiday are as follows:

Categories of Enterprises	Maximum Income Tax Rates (Percentage of Total Annual Income)
(a) Productive enterprises in general which started operation on or before December 31, 1973, or which were approved on or before December 31, 1973, but started operation before December 31, 1975, or at a government approved later date	25%
(b) Productive enterprises employing more advanced technology, using more durable equipment and running greater business risks with delayed profit expectancies, which started operation on or before December 31, 1973, or which were approved on or before that date and started operation before December 31, 1975, or at a government approved later date	22%
(c) Productive enterprises in general, approved after January 1, 1974	30%
(d) Productive enterprises engaged in the manufacture of basic metals or heavy machinery, petrochemical industries, and capital- or technology-intensive industries, approved after January 1, 1974	22%

By comparison, the present rate of business income tax for ordinary profit-seeking enterprises, that is, enterprises not eligible for encouragement, is 35 percent of the excess of taxable income over NT\$500,000.

The investor may also benefit from certain provisions with respect to import duties on machinery and equipment used for his plant. Under Article 27, paragraph 2, of the SEI, a limited number of approved productive enterprises (such as steel, aluminum refining, copper refining, electrical engineering, electronics, machine making, shipbuilding, chemical, textile dyeing and finishing, coal mining, and garbage treatment), if they meet the "Categories and Criteria" referred to above, may apply for duty-free importation of machinery and equipment used for their plants under an investment project or a subsequent expansion project approved by the government. Machinery and equipment for which

a duty exemption may be granted are limited to those which cannot be supplied by domestic manufacturers.

Less favorable than free importation is five-year deferred payment of import duties on machinery and equipment. Under Article 27 of the Customs Duty Law, a 100 percent export-oriented invested enterprise organized as a company limited by shares which makes substantial contributions to domestic economic development or applies advanced technology is permitted to defer the payment of import duties on machinery and equipment used for its plant under a government approved project for five years, subject to a satisfactory guarantee for the deferred payment being furnished to the customs authorities. As of the present, only the following industries are eligible for such benefits: steel, aluminum and copper, electrical engineering, electronics, machine making, automobiles and parts, shipbuilding, chemical, petroleum, mining, precision instruments, metal processing, lumber processing, rubber, and food. Most American invested electronics companies in the ROC took advantage of this benefit, which in its net effect is a five-year non-interest-bearing loan from the government to the investor.

If a productive enterprise importing machinery and equipment for its plant qualifies neither for duty exemption nor five-year duty deferral, it may well seek an installment payment of import duties under Article 27, paragraph 1, of the SEI. Depending upon the amount levied, the importer may normally pay import duties in 12 to 30 equal monthly installments, secured by a satisfactory guarantee. The first installment payment is due one year from the date of commencement of operation or the date that services were first rendered.

The Regulations Governing Tax Rebates of Export Products provide benefits to export factories by way of exemption of import duties and commodity tax on raw materials used for export products. Briefly stated, the exemption may be realized through one of the following arrangements:

a. If duties, surtax, harbor dues and commodity tax (wherever applicable) have been paid on raw materials at the time of importation, a refund may be claimed when processed products are re-exported;

b. Duties, surtax and harbor dues may be owed on credit, to be offset against the raw material content of the processed products re-exported with a prescribed time;

c. Imported raw materials may be stored in a bonded warehouse inside the importer's factory; and

d. Imported raw materials may be stored in the importer's bonded factory under the supervision of either a designated bonding agency or the customs authorities.

Other Privileges and Benefits

In addition to the above, foreign investors are entitled to a number of other privileges and benefits which are not granted to nationals. Under Article 12 of the SIFN, two years after completion of his investment project, the foreign investor may apply for necessary foreign exchange to repatriate, on an annual basis, 15 percent of his invested capital. Repatriation must be applied for not later than the end of June of the year immediately succeeding the year in which the privilege accrues. The investor may, however, with the permission of the Central Bank of China (CBC), the nation's foreign exchange controlling agency, postpone a particular repatriation for one year if funds are needed by his invested enterprise as working capital, but other than this the repatriation privilege is non-cumulative.

Under the same Article, profit earned from investment may be remitted by the foreign investor out of the country yearly with no limitation of amount. Applications for such remittance must be submitted to the CBC within six months from the date tax liabilities of the invested enterprise were determined by the tax office. Like capital repatriation, the foreign investor may, with the permission of the CBC, keep the profit as working capital for the invested enterprise for one year, beyond which his privilege for that particular remittance will lapse.

One thing must not slip from the foreign investor's notice. Although one's invested enterprise may enjoy a tax holiday, he himself remains subject to personal income tax as a non-resident on the dividend earned from his investment. While an ordinary non-resident is taxed at the rate of 35 percent on dividends or other profit distributions received from ROC sources, favorable treatment is accorded the foreign investor. According to Article 17 of the SEI, the withholding tax rate is 15 percent for those foreign investors whose investment applications were approved by the government on or before December 31, 1973, and 20 percent for those foreign investors who received government approval of their investment applications on or after January 1, 1974. As for the latter, the non-resident taxpayer is entitled to claim a refund in

the event he cannot make use of the entire 20 percent paid as a tax credit in the country of his domicile. The refundable amount, nevertheless, is limited to the excess of the 20 percent tax over 15 percent, or the excess over the rate which can be claimed as tax credit in the country of his domicile, whichever is smaller in amount.

Statutory protection is given to foreign investment from government requisition or expropriation. Under Article 14 of the SIFN, if the total amount of foreign equity investment of an enterprise is less than 51 percent of its total registered capital, the enterprise cannot be requisitioned or expropriated except where it is required by national defense and then only with payment of reasonable compensation. The government is obligated to make available the necessary foreign exchange to the foreign investor at any time desired by him for remitting such compensation out of the country.

As already mentioned before, as long as the foreign investor's equity investment in his invested enterprise is maintained at 51 percent or more of its total registered capital, there can be no requisition or expropriation of the enterprise by the government on any ground whatsoever. As this is a statutory guarantee, the government is legally bound to honor its commitment.

Incidentally, the ROC is a signatory to the International Convention for the Settlement of Investment Disputes. Legislative action has been taken by the ROC government for the implementation of the said convention in the ROC. Under a statute passed by the Legislative Yuan, which is the ROC's national legislative body, and promulgated by the President on December 21, 1968, ROC courts are required to grant compulsory execution on any arbitral awards rendered in accordance with the provisions of the said convention.

Investment Procedures

Any foreign investor desirous of making an investment in the ROC should file a Foreign Nationals Investment Application (FNIA) with the ISC, except for the establishment of an export enterprise in one of the Export Processing Zones, in which case an application should be filed with the MOEA's Export Processing Zones Administration. Application forms are obtainable from the Chinese Investment and Trade Office in New York City (515 Madison Avenue) or any ROC Consulate in the United States.

One oft-asked question is how long it will take to get an investment application approved by the screening agency. Under Article 7 of the SIFN, if an application submitted by the foreign investor is complete in every respect and accompanied by all required supporting documents, such as the certificate of legal personality or certificate of nationality of the applicant, the certificates of nationality of natural-person co-investors, and power of attorney for the local lawyer, all duly consularized, the screening agency must act upon it and make a decision not later than four months from the date of its filing. In actual fact, if the foreign investor hires a competent local lawyer who is capable of writing a legally correct and comprehensive application, it is not impossible to obtain a decision in less than two months.

The approval of the screening agency, in its net value, is an approval in principle with six months validity only. In other words, the government by its approval merely grants the investor the privilege to apply for establishment of his proposed enterprise within a six-month period. During the period, the investor must take necessary steps to cause the approved capital to be remitted into the country, to organize and register his invested company, to apply for importation of capital equipment and raw materials, and to commence the construction of his plant. In the event he fails to take all these steps within this six month period, the government may, if it sees fit, revoke its prior approval. Such being the case, if the investor anticipates that he will be unable to implement his approved investment plans within six months from the date of the government approval, and he does not want to forfeit his privilege of investment either, he should apply to the original screening agency for an extension of the investment implementation period well in advance of its expiration. Such application for extension will normally be granted on good cause shown. But, unless circumstances are exceptional, no more than two extensions will be granted in one single case. Thus, all told, the investor has a total of 18 months at his disposal to implement his investment plans.

A word on the power of attorney granted to the local lawyer by the foreign investor. It should be a general power of attorney, granting him authority and powers to do any and all acts and to make and submit any and all applications to all relevant governmental agencies, whether at the central, provincial or local level, on behalf of the investor in connection with his proposed investment in the ROC. Moreover, it should include a substitution

clause, as this will give the appointed local attorney the power to appoint a substitute or substitutes in case of necessity.

V. TRADE

Trade is a much simpler subject than foreign investment. Notwithstanding her diplomatic reverses in recent years, trade is being carried on presently by the ROC with over 100 members of the international community. Among the ROC's major trading partners, the United States not only maintains diplomatic relations with her but is also a close ally. The two countries have a Treaty of Friendship, Commerce and Navigation between themselves, signed in Nanking on November 4, 1946, which contains a provision permitting citizens of each country to carry on trade throughout the whole extent of the territory of the other (Art. II). By contrast, Japan, Canada, West Germany and Hong Kong have no diplomatic relations with the ROC, but the absence thereof does not seem to have had any negative effect on the trade activities between one territorial unit and the other. Indeed, to the amazement of many, since the ROC's termination of diplomatic relations with Japan, trade volume between the two countries has been steadily on the increase. Just to give some idea of their expanding trade volume, in 1976 the ROC exported US\$1,090 million worth of goods to Japan and imported from her US\$2,442 million worth, with an unfavorable balance of US\$1,352 million. ROC trade with the United States in the same year fared much better than with Japan, with sales at US\$3,010.7 million and purchases at US\$1,802.3 million, thus leaving a balance of US\$1,208.4 million in the ROC's favor. A fair guess is that as her economy steadily grows, the ROC will buy more from the United States in the years ahead.

Modes of Trade Operation

Two principal modes are generally used by Americans or other foreign nationals for carrying on trade in the ROC. One is the establishment of a company limited by shares under the Company Law with some participation of ROC nationals. To form such a company, which will be one of ROC nationality, no Foreign Nationals Investment Application is required to be filed with the ISC, for such investment — if it can be called investment at all — is not a foreign investment within the definition of the SIFN. The minimum capital requirement for this type of company varies with its business, the highest being NT\$500,000,000 and the

lowest NT\$500,000. If the capitalization of a company is NT\$20,000,000 or more, the application for incorporation should be filed with the MOEA. If it is below NT\$20,000,000, the application should be filed with the Bureau of Reconstruction of the city or county where the principal business office of the company is located.

At the risk of being repetitious, let it be mentioned here that a company limited by shares must have at least seven incorporators, three directors, and one supervisor, all of whom must own at least one share of stock. It must also have a chairman of its board of directors elected from among the directors. Whereas the SIFN expressly waives the nationality and residence requirements for board chairman and the residence requirement for incorporators and executive directors of foreign investment companies, there are no such waivers in the case of companies organized by foreign nationals for trading purposes. At least one half of the incorporators and the supervisor, or one of the supervisors if the company has more than one supervisor, must be domiciled in the ROC. If the company has executive directors, at least one half of them must also have their domiciles in the ROC.

Through the vehicle of nominees, the minimum number of seven incorporators can be easily met. Until now the government's liberal policy with respect to local participation for companies engaged in trade remains unchanged. There is no hard and fast rule concerning a minimum percentage of capital stock that must be owned by ROC nationals. The government will license a company if there is more than nominal local capital participation.

Companies so formed will be ROC companies and, as such, will be entitled to the same treatment as is accorded to any ROC companies organized and existing under the Company Law. They will, however, not be entitled to repatriation of capital, remittance of profit, and the other privileges and benefits under the SIFN. In spite of this, some Americans still look with favor upon this form of organization because it has the distinct advantage of insulating the parent company from liabilities that might arise out of doing business in the ROC.

The other method is for a foreign corporation to establish a branch in the ROC. In such case, it is legally identified as a branch of a foreign company. Several conditions, enumerated below, must be fulfilled before the branch can open for business.

1. The foreign corporation must adopt a Chinese corporate name, normally a literal translation of its English name or name

in another language, which must not only indicate the type of business organization but also the nationality of the corporation.

2. The foreign corporation must first apply to the MOEA for recognition of its foreign corporate personality and obtain a certificate of recognition. This certificate will entitle the recognized foreign corporation to act within the ROC boundaries.

3. The foreign corporation must remit into the ROC at the time of establishment of its branch a minimum amount of NT\$500,000 as the branch's operating funds. At no time during its existence will the branch be permitted to solicit from the public subscriptions to the stock or float bonds or other securities of the foreign corporation.

4. The foreign corporation must appoint an ROC national or resident foreigner as its attorney in fact and legal representative in the ROC to represent it in litigations and non-litigious matters and to receive service of legal process on its behalf.

Only when all the above conditions have been fully met will the foreign corporation be permitted to establish its branch and commence business operations in the ROC. Within 15 days of the date of its establishment, the branch must apply to the MOEA for a corporate license. It may only carry on such businesses in the ROC as are registered with and specified in the corporate license granted by the MOEA. The branch may be headed by a foreign national, subject to the requirement that he maintain a residence in the ROC.

A branch of a foreign corporation is permitted under Article 19 of the Land Law to purchase and own land in the ROC to the extent necessary for the carrying out of its business objectives. This legal provision, however, is governed in its actual operation by the principle of reciprocity. That is to say, only branches of foreign corporations whose own States of incorporation permit ROC nationals to purchase and own land in their own territory may be granted the same privileges in the ROC.

A foreign corporation having a branch in the ROC has no privilege to repatriate the operating funds it remitted in at the time of establishment of its branch. Furthermore, profit earned by the branch cannot be remitted out of the country. This is, nevertheless, offset to some degree by an established practice whereby the tax office, on application, will permit branches of foreign corporations to remit abroad, on a yearly basis, an approved amount of foreign exchange to contribute to the overhead of their head offices.

Import and Export Control

Import and export in the ROC are under government control. Within the MOEA there have been established a policy-making body called the International Trade Commission (ITC) and an administrative body called the Board of Foreign Trade (BOFT), which has been mentioned previously. These two agencies are charged with the important responsibilities of trade development and administration of foreign trade.

Succinctly stated, imports and exports are classified into three main categories: (i) permissible items, (ii) controlled items and (iii) prohibited items. Depending upon domestic production and international market conditions, classification of import and export merchandise is subject to constant review and adjustment by the ITC and the BOFT. Basic rules for imports and exports are provided in the Regulations Governing Classification and Control of Imports and Exports, last amended and published by the MOEA on June 14, 1973, which importers and exporters should familiarize themselves with.

The mere fact that an ROC company or branch of a foreign corporation has come into being does not mean that it can automatically engage itself in import or export business, or both. To be able to do so, it must qualify for and register itself as a Trader and obtain a Trader license from the BOFT. Necessary qualifications for registration of a Trader include the following: (i) having an export performance record of at least US\$200,000 for the year immediately preceding the filing of the application (certain foreign exchange earned by exporters is assignable which the applicant for a Trader license can buy at the prevailing market rate); (ii) having a registered paid-up capital of not less than NT\$2,000,000; and (iii) having a permanent business office of its own. If the paid-up capital of the company is over NT\$100,000,000, the requirement for export performance record may be waived by special approval of the BOFT.

In principle, imports of Traders are limited to permissible items. When they import, licenses must first be obtained from the BOFT. Controlled items may, nevertheless, be imported by Traders when specially authorized by the BOFT.

Traders may export permissible items by applying directly to any of the several government appointed foreign exchange banks. For controlled items, however, prior approval must be obtained from the BOFT. It should be noted here that export of permissible items to countries which enforce import quotas is subject to special regulation by the BOFT.

VI. REPRESENTATIVES OF FOREIGN CORPORATIONS

If a foreign corporation does not intend to make investment or actually engage in trade in the ROC, but only wishes to do certain acts there, such as monitoring trade opportunities, supervising execution of its purchase orders by local manufacturers, advertising its products in local newspapers or through other mass media, or giving technical advice or assistance to local purchasers of its equipment or materials, a most economical and convenient way of achieving these objectives is to send a Representative to the ROC. This is permitted by Article 386 of the Company Law. The foreign corporation may also authorize its Representative to bring suits and receive service of legal process in the ROC on its behalf.

A Representative of a foreign corporation is permitted to maintain an office with a limited staff to assist him in the performance of his duties, but he must not carry on business transactions. Business transactions, if any, must be conducted directly between his principal, the foreign corporation which sends him, and the local purchaser. His position is thus very much like that of a business correspondent. Furthermore, he must not receive payments from his principal's local customers. All expenses of his office, including salaries for himself and members of his staff and other necessary expenditures, must be remitted in by his principal from abroad, and he is required to report such remittances to the Bureau of Foreign Exchange of the CBC on a monthly basis for record purposes.

As to tax liabilities, the principal of the Representative is free of any ROC taxes as long as transactions are concluded, contracts signed, and payments made outside the ROC. Every care should therefore be taken by the Representative to see that he does nothing that could possibly be interpreted by the local tax office as constituting doing business in the ROC. The Representative himself and members of his staff are subject to personal income tax as any other residents of the ROC.

The sending of a Representative to the ROC requires an application to be filed with the MOEA, giving the name of the foreign corporation which sends the Representative, the name, nationality and other personal data of the Representative, and the juristic acts and/or the scope of activities he is authorized by his principal to do in the ROC. The application must be accompanied by certain supporting documents, such as the certificate of legal personality of the applicant, a certified transcript of the board resolution authorizing the sending of the Representative, the power of attorney granted to the Representative, and so on. After

a written approval is received from the MOEA, the Representative can officially function and legally do all the authorized acts in the ROC.

A Representative of a foreign corporation need not be a foreign national. If a foreign corporation so wishes, it may appoint a local person as its Representative. American corporations, however, normally prefer to send Americans as their Representatives because of faster entry and exit processing by using the American passport.

VII. CONCLUSIONS

How well a local lawyer can help his American clients structure their investment and trade operations in the ROC depends to a considerable extent upon certain qualities of the lawyer. A prerequisite for him is, of course, an adequate knowledge of the English language, both written and spoken. While interpreters can always provide a bridge, direct communication between the lawyer and the client is considered essential, not only because of the lawyer-and-client privity but also because of the absolute need of meeting of minds in terms of the client's objectives. Unless the lawyer understands fully and clearly what the client wants to do in the ROC, there is no assurance that he can structure the latter's operations satisfactorily. Since much of the communication will be through the telex machine and by letters, written English is even more important than spoken English. The lawyer must have at his command a sufficient vocabulary of both legal and business terms. An additional arsenal of accounting terms is desirable and useful, but not necessary.

It is absolutely essential that the lawyer be thoroughly familiar with the laws and regulations of the ROC applicable to investment and trade, particularly foreign investment. His legal expertise will be put to an acid test when he is initially called upon to prepare a FNIA. A knowledgeable lawyer, after having ascertained the client's objectives, will usually be able to work out an investment plan tailored to the client's needs and then write a flawless application that will ensure its early approval by the ISC. On the other hand, if the legal knowledge of the lawyer in such field is inadequate, chances are that he may miss something in the application, thus either delaying its approval due to the necessity of amendment or causing the loss to the client of a certain benefit or benefits. With regard to the latter, a good case in

point is where the scenario of the client's investment in fact meets the requirements for a five-year deferred payment of import duties on capital equipment, but this benefit is denied to him because of the failure of the lawyer to apply therefor. For a major investment project, this could mean a very large sum of money in terms of loss of interest.

Equally important is the lawyer's experience. In an investment case, the lawyer's professional duties do not end with the submission of the FNIA; unless his arrangement with the client dictates otherwise, he must go on to take care of many other important legal matters including organization of the company, importation of equipment and raw materials, and the obtaining of a factory license for the plant. Even after the plant has been in operation, matters requiring the attention of the lawyer continue to spring up. Although by local practice paper work for the application for tax holiday or accelerated depreciation of fixed assets is within the realm of the CPA's duties, the lawyer's advice may be needed by the client on legal issues pertaining thereto. It is possible that the client may desire to add some new products to the production lines of his plant, thus requiring the lawyer's assistance in preparing and submitting an additional FNIA to the ISC. Also, investment equity may have to be increased as a result of expansion of manufacturing facilities, necessitating approval by the ISC and consequent recapitalization. These are but a few examples demonstrating the wide spectrum of work the lawyer may be called upon to perform. They are, nonetheless, sufficient to bring home to the investor the point that an experienced local lawyer who knows the entire spectrum of the investment process is indeed essential for the successful completion of his investment.

Some background of the investor's business at home will help the lawyer in the performance of his duties, particularly in the initial stage of his employment when investment plans are being worked out by him with data supplied by the investor. As foreign investment in the ROC is, in general, gradually shifting from labor-intensive to technology-oriented products, it is quite likely that in a particular case the local lawyer may know nothing or very little about the investor's business or the products he is going to manufacture in the ROC. If this is the case, it will be desirable for the investor to brief the lawyer along these lines so that the latter will acquire a clear notion of the client's business as well as his investment objectives. The importance of this cannot be overemphasized as the categorization of the investor's products will ultimately affect their eligibility for tax holiday or accelerated

depreciation of fixed assets, which is a major incentive to most investors.

In the actual selection of business form, the lawyer's recommendation will naturally be by and large dictated by the client's objectives. Past record indicates unequivocally that an option favored by the overwhelming majority of Americans seeking business opportunities in the ROC has been foreign investment. This is understandable in view of the many substantial privileges and benefits conferred by the SEI, the SIFN, and the other applicable laws and regulations. With this end in view, if the client is prepared to set up some sort of manufacturing facilities in the ROC through equity investment, the local lawyer should to the extent possible invoke every legal support to structure his venture as a foreign investment, so as to help him maximize his values.

From the standpoint of the host government, large equity investment is perhaps the most welcome, and the reason for this is not far to seek. In his own interest, however, the foreign investor may want to structure his investment with a small equity and a large loan. Loans may be obtained from either domestic or foreign sources, but one aspect deserving special attention is that the ROC government permits foreign investors to make investment in the form of loan to their invested enterprises. This makes it possible for the foreign investor to substitute loan for cash equity with accompanying benefits of interest payment and shorter repatriation period.

A technical and management service agreement between the foreign investor and his invested enterprise providing payment by the latter to the former of a lump-sum fee is another subtle form of accelerated repatriation of capital worthy of exploration. In recent years the host government has adopted a more stringent policy as regards such agreements. It is, nevertheless, one area which the local lawyer should look into in the course of planning investment strategy for the client.

Trade is a lesser and much simpler approach. The establishment of a company or branch of a foreign corporation under the ROC Company Law does not involve much legal complexity insofar as the application process is concerned. Furthermore, the Trader license is also not difficult to obtain provided the prescription of the required US\$200,000 export performance record is duly complied with. Subject to the existing applicable regulations, foreign Traders can import and export commodities as business exigencies call for. It is not uncommon for them to enter

into long-term output/supply contracts with local manufacturers in order to guard against disruption of supplies. Lack of privilege of outbound remittance of profit is a bit annoying. But most foreign Traders do not seem to be overly bothered by this, as they can either use their profit for paying such expenditures as air tickets and hotel bills of visitors, expansion or decoration of business offices and the like, or deposit the same in a bank savings account.

Sending Representatives to the ROC was once a popular approach among foreign corporations because of its distinct merit of tax immunity. Due to abuses by some foreign corporations, the host government has lately tightened supervision over such establishments. American corporations which have sent or intend to send Representatives to the ROC will do themselves a great service by requiring the latter to strictly refrain from any kind of business activity while in the host country. As stated previously, business transactions, if any, must be conducted directly between the local customer and the Representative's principal.

Professor Oldman thanked Dr. Li for his detailed and complete presentation, and introduced the session's third principal speaker, Mr. Myron Solter. Mr. Solter, an attorney in Washington, D.C., spoke on the legal resolution of export trade disputes, a topic that has taken on great significance following the passage of the Trade Act of 1974 and the strengthened role of the U.S. International Trade Commission.

[The following is the text of Mr. Solter's paper.]
