



# Asia Pacific Forum

NEWSLETTER

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## CO-CHAIR'S REPORT

# E-commerce in the Asia Pacific

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The Forum's membership continues to grow. We now have about 3,400 members. With the recovery and growth which we are beginning to see in the economies of the countries in the Asia Pacific, the demand for legal services in this area can only increase.

Members of the Forum have two events to look forward to this year. The first is the Forum's lunch at the IBA Biennial Conference in Amsterdam which will be held on Thursday, 21 September. We hope to have a prominent speaker to deliver the luncheon address. The second is the third in the series of the Forum's Financial Law Conferences. This year's Conference will be held in Sydney - the host city for the Olympics - between 18 and 21 November.

The Conference's overriding theme will be the impact of e-commerce and the internet on international financial transactions in the Asia Pacific region and the topics planned include an international and regional stocktake of the legal/tax impediments to the use of e-commerce and the internet in

financial transactions and recent initiatives to promote the conduct of financial transactions using the internet. On e-capital, we hope to have papers presented on the following: a regulator's perspective, the new opportunities for classes of securities, a regional case study of multi-jurisdictional offering of debt securities using the internet, the role of stock exchanges and national and international securities depositories and clearing systems in an electronic world. And to round the Conference off, there will be a session on the role of arbitration in the resolution of disputes in the context of securities and financial market transactions undertaken and entered into using the internet.

Papers will be presented by leading practitioners in these areas. It is certainly an event that should not be missed!

Finally, I hope you will find this edition of the Forum's Newsletter as informative, educational and interesting as the last and I look forward to seeing you at the Forum's lunch in Amsterdam and the Financial Law Conference in Sydney.

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conventions. In December 1994, the National Commission for Environmental Affairs released Myanmar's National Environmental Policy which stated:

'The wealth of a nation is its people, its cultural heritage, its environment and its natural resources. The objective of Myanmar's environment policy is aimed at achieving harmony and balance between these through the integration of environmental considerations into the development process to enhance the quality of the life of all citizens. Every nation has the sovereign right to utilize its natural resources in accordance with its environmental policies; but great care must be taken not to exceed its jurisdiction or infringe upon the interests of other nations. It is the responsibility of the State and every citizen to preserve its natural resources in the interests of present and future generations. Environmental protection should always be the primary objective in seeking development.'

The Protection of Wild Life and Wild Plants and Conservation of Natural Areas Law enacted in 1994 is the closest the Government has come to achieving a generally applicable environmental protection law.<sup>5</sup> In addition to prohibiting the hunting and the destruction of Myanmar fauna and flora, it imposes penalties on persons or organisations that pollute or dispose of contaminants in natural areas or cause water or air pollution. Penalties include imprisonment for up to three years and/or a fine of 10,000 Kyats.

In addition, investments permitted under the Foreign Investment Law are subject to conditions for the implementation of environmental controls in and around the project site. All permitted investments must install sewage treatment plants, industrial waste water treatment plants and other pollution control procedures, as well as abide by the sanitation and hygiene rules and regulations set by the authorities concerned. Finally, the Myanmar Insurance Law provides that an entrepreneur or organisation operating an enterprise which may cause pollution to the environment must take out compulsory general liability insurance with Myanmar Insurance.

#### Notes

- 1 Depending on the offence committed.
- 2 For a fuller discussion of compulsory acquisition under Myanmar law, see A Christie and S Smith, *Foreign Direct Investment in Myanmar* (Sweet & Maxwell Asia, 1997), Chap 4.
- 3 Depending on the offence committed.
- 4 For a detailed description of Myanmar's environmental protection regime, see Christie and Smith, n 2 above.
- 5 Care should be taken to also review any relevant sector-specific laws providing for environmental protection for the specific industry to ensure compliance.

# Foreign Direct Investment

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The Government of Nepal initiated the process of economic liberalisation in 1992. Several policies were implemented to adopt free market oriented liberal economic policy. The Government started the process of privatising state-owned corporations and encourages private sector participation in industrial and commercial operations.

In order to attract foreign direct investment (FDI) in Nepal, the Government introduced a series of policies, such as the Foreign Investment and One-Window Policy (FIOWP), Industrial Policy (INP), Trade Policy (TP) and Hydro Power Development Policy (HPDP) in 1992. New legislation such as the Foreign Investment and Technology Transfer Act (FITTA) and Industrial Enterprises Act (IEA) and other relevant legislation has also been enacted in line with the above policies.

#### Forms of investment

A foreign investor can invest in Nepal in the following forms:

- an investment made in shares (either in cash or in terms of capital assets such as plant, machinery and equipment);
- reinvestments of the income received from shares; or
- an investment made in the form of a loan or credit facilities.

#### Process of investment

A broad area is open for FDI permitting foreign investors in equity participation up to 100 per cent in almost all industries. However, a few industries are listed in the negative list such as individual services, arms and ammunition, tobacco and alcohol industries, etc, where the FDI is restricted. Nevertheless, technology transfer is permitted in those sectors.

A foreign investor wishing to engage in an FDI in Nepal, whether in the form of a wholly-owned foreign venture or a joint venture, has to obtain permission from the Department of Industries (DOI) which is the sole agency for administering and implementing FDIs in Nepal. There are two kinds of approval process for an FDI. A venture with fixed assets worth no more than Rs500 million (approximately US\$7.3 million) shall be reviewed and approved directly by the Director-General of the DOI. A venture with fixed assets worth more than Rs500 million shall be reviewed and approved by the Industrial Promotion Board (IPB) headed by the Minister of Industries.

The INP and IEA abolish the licensing system after its enforcement in 1992, with a few exceptions. Only those industries producing cigarettes, tobacco goods and alcohol (and few other industries) are required to obtain an industrial licence from the IPB.

Each application for an FDI will be assessed and evaluated on its merits. While evaluating and approving the FDI, the DOI and IPB give their prime consideration to the financial and technical viability of the project. In order to ensure a speedy process of evaluation, the FITTA has laid down a statutory time limit for the decision-making process in an



the application. No fee is required in submitting an application for an FDI.

### Facilities and concessions

Nepalese legislation offers various unusual lucrative incentives and facilities to foreign investors, which is incomparable in the South Asian region. Various types of tax exemption and concessions are provided for an industry involving FDI. Such tax exemption and concessions include income tax, excise duty, sales tax, export tax, duty draw back facility, etc. In order to provide facilities and concessions from a single spot, a One-Window Committee (OWC) has been constituted headed by the Director-General of the DOI.

### Investment protection and bilateral treaties

For the protection of investment, a statutory provision is laid down in the IEA and INP, which guarantees the non-nationalisation of industry. Moreover, Nepal has ratified the Convention Establishing the Multilateral Investment Guarantee Agency 1985 and has been a member of the Multilateral Investment Guarantee Agency (MIGA) since 1993 which ensures guarantees including coinsurance and reinsurance of foreign investment against non-commercial risks of currency transfer, expropriation, breach of contract and war and civil disturbances.

Nepal has also entered into the bilateral Reciprocal Encouragement and Protection of Investment Agreement with various countries which ensures the protection of foreign investment by guaranteeing equitable and non-discriminatory treatment for use, enjoyment or disposal of investments, compensation for losses and expropriation, free transfer of capital, loans and profits and access to legal remedies. Nepal has also concluded bilateral treaties with various countries for avoidance of double taxation on profits and income earned by foreign investors.

The SAARC member states (Bangladesh, Bhutan, India, Maldives, Nepal and Pakistan) entered into the SAARC Preferential Trading Agreement (SAPTA) which covers all products, manufactures and commodities envisaged for customs duties, indirect taxes and other charges concessions as incorporated in the National Schedule of Concessions of the contracting states. The member states have already declared lists of several goods in their national schedule for the exemption of customs duties. The SAARC member states are in the process of introducing the region as the SAARC Free Trade Area (SAFTA).

Nepal has concluded a bilateral trade treaty with India which ensures especially favourable treatment and allows Nepalese industrial products to gain access to a large Indian market which is free from the licensing or permit system as well as customs duties and quantitative restrictions, with a few exceptions. Foreign investors manufacturing industrial products can take advantage of the bilateral trade treaty to its fullest extent by taking Nepal as the destination for FDI not only for the Nepalese market but also taking into consideration the large Indian market of one billion people.

### Repatriation

A foreign investor will be entitled to repatriate the following amounts:

- the sale of shares;
- the dividend or profits received from the FDI;
- the principal and interest of the foreign loan;
- the fee and royalty received for the technology transfer.

Nepal is well known for its hydropower industry and tourism sector. There is tremendous potential for hydroelectric power in Nepal and capacity is estimated at 83,000 mW which would make it one of the world's largest producers. Fifty per cent of this amount is likely to be available for exploration. Power generation and exploitation would hardly reach 0.5 per cent of the total potential. Nepal is one of the major destinations in South Asia for tourists. The tourism industry is the third largest source of foreign exchange in Nepal. Apart from these sectors, other potential and feasible areas for FDI are telecommunications, air service, agro-based industries, mineral-based industries, financial and service industries. Since the adoption of the liberalised economic policy, FDI is significantly increasing in Nepal and is expected to increase in the coming years.

## THE PHILIPPINES

# Judicial Review of Arbitral Awards: Asset Privatisation Trust Case Reviewed

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An arbitrator's award is subject to judicial review<sup>1</sup> mainly on questions of law and jurisdiction even though the statute itself may be silent in regard to the existence of power. Its purpose is to keep the arbitrator within his jurisdiction and protect parties from arbitrary or unjust adjudication,<sup>2</sup> although such a review is a very limited one.<sup>3</sup> It is not possible to carry out a judicial review of an award which is unreasoned. The award, therefore, should 'contain a statement of the applicable laws and jurisprudence and the tribunal's assessments and conclusions on the case'.<sup>4</sup>

*Asset Privatisation Trust v Court of Appeals*<sup>5</sup> identified the arbitration agreement as the source of an arbitrator's authority to settle a dispute and identified the binding force of the award on the parties as the extent and the manner in which the arbitrator rendered the award in conformity thereto.<sup>6</sup> The Court adopted as a standard for judicial review the 'manifest disregard of the law' formulation in *Wilko v Swan*.<sup>7</sup>

The arbitration proceeding involving Asset Privatisation Trust (APT) started as a stockholders' derivative suit on behalf of a private corporation (MMIC), against the Philippine National Bank (PNB) to annul the foreclosures of the mortgages on assets of MMIC and to direct the bank to honour its commitments under a Financial Restructuring Plan (FRP) and to pay damages. The APT, as successor-in-interest to PBN, entered into an agreement with the plaintiffs to submit the dispute to arbitration on the issue of (1) whether or not the plaintiffs had legal personality to institute the suit and (2) whether the foreclosure of the mortgage of MMIC assets was valid.