



Appendix E—Response to Questions taken on Notice: DFAT and Austrade

Japan

Japan's inward stock of FDI was only 3 per cent of GDP, the lowest in the OECD according to the OECD's 2011 *Economic Survey of Japan*.¹ Foreign-controlled affiliates accounted for only 3.1 per cent of Japan's total turnover in manufacturing, and 1.4 per cent in services, both the lowest in the OECD. According to the OECD's FDI restrictiveness index, Japan is the fourth-most restrictive country in the OECD (behind Iceland, Russia and New Zealand).² Japan also has the strongest restrictions on foreign-equity investments, though other types of restrictions are less onerous, such as on the appointment of foreign managers.

The Japanese government acknowledges many of the restrictions facing foreign investors in Japan. The Expert Committee on FDI Promotion, established in 2008 under the Minister of Economic and Fiscal Policy in the Cabinet Office, identified in its final report issued in May 2008³ a wide range of barriers and disincentives to FDI in Japan:

- regulatory and administrative procedures;
- strong resistance to FDI from the corporate sector;
- high corporate tax rates;

1 <http://www.oecd.org/dataoecd/16/57/48693414.pdf>;
http://www.oecd.org/document/62/0,3746,en_2649_34569_47651390_1_1_1_1,00.html.

2 Australia currently ranks seventh.

3 See http://www.invest-japan.go.jp/pdf/jp/committee/recommendations_2_20080519.pdf.

- lack of transparency on tax treatment for complex transactions;
- limited information on regional markets;
- insufficient capacity in the regions to deal with FDI; and
- language barriers.

Regarding the regulatory and administrative barriers facing potential foreign investors in Japan, the Expert Committee concluded that:

- deregulation has not progressed as completely or as fast as necessary to promote significant growth in foreign investment;
- administrative guidance remains difficult to understand;
- the time required for administrative procedures is lengthy and unpredictable;
- the forms to be completed are numerous and complicated;
- implementation of regulation lacks transparency, consistency and predictability;
- verbal guidance during informal discussions with government officials is more prevalent than public comments and written responses such as no-action letters;
- complex regulatory and administrative procedures result in high regulatory compliance costs, which add to business costs;
- mergers and acquisition (M&A) takeover rules remain unclear, largely owing to the lack of accumulation of precedents and judicial reviews;
- despite new rules allowing triangular mergers, actual transactions are difficult to conclude owing to complex procedures.

Many of these restrictions apply equally to domestic companies, according to the Expert Committee. But corporate management in Japan displays an adversarial attitude to foreign investors. Japanese firms actively discourage foreign investment through cross-shareholdings and the use of defensive measures such as poison-pill takeover measures.

To address some of these issues, the Japanese government implemented the Inward Investment Promotion Program in 2010, cutting the corporate tax rate, deregulating investment procedures, and offering incentives such as preferential tax treatment and subsidies. But many of these measures are yet to come into effect.

There are very few cases of the Japanese government failing to approve foreign investment applications; only one foreign-investment request has been declined in the last thirty years.⁴

Japan's legal framework for foreign investment

Japan does not have a screening process for inward FDI *per se*, requiring in most cases only notification after the fact. But in certain industries, advance notice is still required. The laws governing such cases, as well as the foreign ownership thresholds that apply in each case, are discussed below.

Foreign investment in Japan is regulated primarily by the *Foreign Exchange and Foreign Trade Act (FEFTA)*⁵, supplemented by the Cabinet Order on Inward Direct Investment (IDI)⁶ and the Ministerial Ordinance on IDI⁷. In 1979, when the *FEFTA* replaced the previous law governing FDI (the *Act on Foreign Capital*), the system's operating principle switched from one requiring advance permission to one requiring advance notification.

In addition to the *FEFTA*, foreign investment is also subject to the *Prohibition of Private Monopolisation and Maintenance of Fair Trade Act* (hereafter, the *Anti-Monopoly Act*).⁸ Section 9 of the *Anti-Monopoly Act* prohibits the establishment or transformation of a company which constitutes an "excessive concentration of economic power" by the acquisition or possession of shares (including those of employees) of a Japanese company.⁹ But this law applies equally to domestic and foreign companies.

Following the 1991 revision of the *Foreign Exchange and Foreign Trade Act (FEFTA)*, most foreign investment transactions became subject to post-transaction reporting only. But prior notification is still required for certain inward direct investment in sensitive industries, defence and utilities. The Cabinet Order on IDI¹⁰ also requires prior notification of inward direct investment in companies that have technologies which could be converted to military use. Notification must be made to both the minister with jurisdiction over the business in question and the Minister of

4 In April 2008 the Children's Investment Fund, a UK-based hedge fund, was denied permission to raise its stake in J-Power, an electricity utility, from 9.9 to 20 per cent, on the grounds of national security.

5 Act No. 228 of 1 December, 1949.

6 Cabinet Order No. 261 of 11 October, 1980.

7 Ordinance of Cabinet Office, Ministry of Finance, Ministry of Education, Ministry of Welfare, Ministry of Agriculture and Fishery, Ministry of International Trade and Industry, Ministry of Transportation, Ministry of Postal Services, Ministry of Labour, Ministry of Construction No. 1 of November 20, 1980.

8 Act No.54 of April 14 1947.

9 http://www.jftc.go.jp/en/legislation_guidelines/ama/amended_ama09/04.html.

10 Cabinet Order No. 261 of 11 October, 1980.

Finance. In practice, documents are delivered to the Bank of Japan for formal acceptance, as affairs concerning the *FEFTA* are delegated to the Bank of Japan. Under Article 27 of the *FEFTA*, certain foreign investments are subject to pre-transaction notification and require government approval. Under this category, the government may exercise the power to recommend or order a change or discontinuation of the proposed investment.

Two factors determine the need for pre-transaction notification filing. The first is the nationality of the foreign investor. Pre-transaction notification filing is required for inward direct investment from countries with which Japan does not have a reciprocal investment agreement. The second is the sensitivity of the business/industry in which the investment is proposed. The investor must notify the government if the proposed investment has a risk of causing one of the following conditions:

- (i) impairing of national security;
- (ii) disturbing public order;
- (iii) hindering public safety; or
- (iv) significant harm to the smooth management of the Japanese economy.

Examples of businesses/industries that fall under each of these categories include:

- (i) aircraft, weapons, nuclear power, space development, gunpowder;
- (ii) electricity, gas, heat supply, communications, broadcasting, water services, railways, passenger transportation;
- (iii) biological chemicals, guard services; or
- (iv) primary industries relating to agriculture, forestry and fisheries, oil, leather and leather product manufacturing, air transport and maritime transport.

In principle, the foreign investor has to make a judgment on whether the target company is subject to pre-transaction filing or not, based on public information and direct inquiries to the target company. But in cases where it remains unclear whether the target company is engaged in a business that requires pre-transaction filing, the investor may make an inquiry to the ministry having jurisdiction. This requirement could act as a potential disincentive to foreign investment in these sectors.

Foreign investment in a number of industries is also regulated by various sectoral laws. These laws generally limit the voting rights held by foreign investors or deny business licences to foreign investors. As such, the purchase of shares does not necessarily guarantee voting rights because the transfer of shareholder registration may be refused. These sectoral laws are as follows:

Nippon Telegraph and Telecommunications Company Law¹¹

Under the *Nippon Telegraph and Telecommunications Company Law* (the *NTT Law*), the transfer of shareholder registration is prohibited if such a transfer results in holdings by “foreigners, etc” of one-third or more of voting rights. “Foreigners, etc” refers to:

- (i) an individual who is not a Japanese national¹²;
- (ii) a foreign government or its representative;
- (iii) a foreign firm or organisation; or
- (iv) a firm or organisation in which 10 per cent or more of voting rights are held by (i), (ii) or (iii) above.

Radio Law¹³

The *Radio Law* prohibits the issuance of the wireless radio licences to the following (Article 5-4):

- (i) an individual who is not a Japanese national;
- (ii) a foreign government or its representative;
- (iii) a foreign firm or organisation;
- (iv) a firm or organisation in which 20 per cent or more of voting rights are held directly or indirectly by (i), (ii) or (iii) above¹⁴; or
- (v) a firm or organisation which has a director whose radio license was cancelled within the last two years.

But category (iv) does not prevent foreign investors purchasing shares to acquire 20 per cent or more of voting rights in a company which already owns a wireless radio license.

Japan Broadcasting Law¹⁵

Under the *Japan Broadcasting Law*, the transfer of shareholder registration may be denied if such a transfer results in holdings by “foreigners, etc” of 20 per cent or more of voting rights, provided that the shares are listed on an exchange (Article 52-8). “Foreigners, etc” refers to:

- (i) an individual who is not a Japanese national;
- (ii) a foreign government or its representative;

11 Law No. 85 of 1984.

12 Unlike FEFTA, which specifically uses the term “resident”, these industry laws use the term “nationals”. As such, Japanese nationals who are non-residents would not be considered foreigners.

13 Law No. 131 of 2 May 1950.

14 Includes a firm or organisation in which (i), (ii) or (iii) holds a position of managing executive officer.

15 Law No. 132 of 2 May 1950.

- (iii) a foreign firm or organisation; or
- (iv) a firm or organisation in which 20 per cent or more of voting rights are held directly or indirectly by (i), (ii) or (iii) above.¹⁶

Aviation Law¹⁷

The *Aviation Law* prohibits the following from entering the air transport business (Article 101-9):

- (i) an individual who is not a Japanese national;
- (ii) a foreign country or a foreign public entity and similar institution;
- (iii) a firm established under a foreign law; or
- (iv) a firm or other organisation in which one-third or more of voting rights are held by (i), (ii) or (iii) above.

But clause (iv) does not prevent the purchase of shares by foreigners to acquire one-third or more of voting rights in a company that has already been approved to conduct air transport business. To respond to such cases, Article 120-2 of the *Aviation Law* states that an air transport company or its holding company may deny transfer of shareholder registration if such a transfer results in holdings by “foreigners, etc” of one-third or more of voting rights, provided that the shares are listed on an exchange.

Other

The *Freight Transport Law*¹⁸ limits holding of voting rights by foreigners to less than one-third in freight transport companies.

The *Mining Law*¹⁹ prohibits foreigners from acquiring mining rights. Although investments in certain sectors of the mining industry are permitted, these are not equivalent to mining rights. Article 17 of the *Mining Law* permits only Japanese nationals and Japanese firms to hold mining rights. Prior notification regarding investment is required only for the sub-sectors listed in Annex 5 and 7, as well as the sub-sectors that do not appear in Annex 8.

The *Financial Instruments and Exchange Act*²⁰ limits holding of voting rights by any person, whether foreign or Japanese, to less than 20 per cent in any securities exchange in Japan (for example, the Tokyo Securities Exchange or the Osaka Securities Exchange).

16 Includes a firm or organisation in which (i), (ii) or (iii) holds a position of managing executive officer.

17 Law No. 231 of 15 July 1952.

18 Law No. 82 of 9 December 1989.

19 Law No. 289 of 20 December 1950.

20 Act No. 25 of 1948.

Republic of Korea

ROK policy is to welcome foreign direct investment. In particular, the ROK implemented a number of FDI-friendly policies after the Asian Financial Crisis in 1998. There are now few formal restrictions on foreign investment, most investment notifications are automatically approved and the process is transparent with a negative list of proscribed areas.

But challenges remain for investors in the ROK which explain its low levels of inbound foreign investment. The cost of doing business can be high. Some sectors are highly-regulated, and some labour unions have a reputation for militancy. Some Korean business practices can also be difficult to internationalise. For example, Standard Chartered bank's attempts to introduce performance-related promotions resulted in a long-standing union-led strike to retain the Korean practice of promotion based on length of service.

To encourage foreign investment, the ROK has appointed an ombudsman for foreign-investment concerns and a formal regulation-review process to determine if new regulations are required or could be improved. It also provides some incentives to attract foreign investment, such as tax concessions and cash grants.

The ROK's legal framework for foreign investment

Regulation of foreign investment in the ROK falls under the Foreign Investment Promotion Act (FIPA). Foreign investors may establish a wholly-owned company or joint venture company. Both the minimum amount of the foreign investment and the stock ratio are prescribed in the FIPA:

- Minimum Foreign Investment Amount (the threshold): KRW100 million (A\$85,000)
- Foreign Investment Ratio: 10 per cent or more of the voting stocks or total invested capital

Foreign Investment needs to be notified the Korean Trade-Investment Promotion Authority (KOTRA) or to a commercial bank. If it does not fall into a restricted category, it is automatically approved.

According to Invest Korea, out of a total of 1,145 categories of business under the Korean Standard Industrial Classification (KSIC), foreign investment is not permitted in 60 categories of business, as set out under the Regulations on Foreign Investment and Technology Introduction and the Consolidated Public Notice for Foreign Investment.

Business categories in which foreign investment is not permitted include:

- Public administration, diplomacy, and national defence
- Postal services, central banking, individual mutual-aid organizations, pension funding, administration of financial markets, activities auxiliary to financial service activities.

- Legislative, judiciary, administrative bodies, foreign embassies, extra-territorial organizations and bodies.
- Education (pre-primary, primary, secondary, higher education, universities, graduate schools, schools for the handicapped, etc.)
- Artists, religious, business, professional, environmental advocacy, political, and labour organizations.

In addition, foreign investment is restricted in a further 29 categories of business. In principle, foreign investment is not permitted in these restricted categories, except in certain circumstances, known as “standards for permission”. These categories are set out in the table below:

ROK: Business categories in which foreign investment is restricted

Category of Business (KSIC)	Standards for Permission
Growing of cereal crops and other crops for food (01110)	- Growing of rice and barley is prohibited
Farming of beef cattle (01212)	- Permitted where the foreign investment ratio is less than 50 per cent
Inshore and coastal fishing (03112)	
Manufacture of other basic inorganic chemicals (20129)	- Permitted with the exception of manufacture and distribution of nuclear fuel
Manufacture of other smelting, refining and alloys of non-ferrous metals (24219)	
Nuclear power generation (35111)	- Prohibited
Hydroelectric power generation (35112) Fire power generation (35113) Other power generation (35119)	- The sum of power-plant facilities purchased by foreigners from Korea Electric Power Corporation (KEPCO) must not surpass 30 per cent of the total domestic power plant facilities

Transmission and distribution of electric power (35120)	<ul style="list-style-type: none"> - The foreign investment ratio must be less than 50 per cent - Voting stocks owned by foreign investors must be less than dominant stocks held by Korean nationals
Disposal of radioactive waste (38240)	- Radioactive waste management business is prohibited under Article 82 of the Electric Utility Act
Wholesale of meat (46312)	- Permitted where the foreign investment ratio is less than 50 per cent
Coastal water passenger transport (50121) Coastal water freight transport (50122)	<ul style="list-style-type: none"> - Permitted: Transport of passengers or freight between South and North Korea; - Joint venture with a shipping company of the Republic of Korea; - The foreign investment ratio is less than 50 per cent
Scheduled air transport (51100) Non-scheduled air transport (51200)	- Permitted where the foreign investment ratio is less than 50 per cent
Publishing of newspapers (58121)	- Permitted where the foreign investment ratio is less than 30 per cent
Publishing of magazines and periodicals (58122)	- Permitted where the foreign investment ratio is less than 50 per cent
Radio broadcasting (60100)	Prohibited
Over-the-air broadcasting (60210)	Prohibited
Program distribution (60221)	<ul style="list-style-type: none"> - Permitted where the foreign investment ratio is 49 per cent or less (* General programming channel and specialized news channel businesses are prohibited.) * Program distribution refers to program providing business under the Broadcasting Act
Cable networks (60222)	- CATV broadcasting business is permitted where foreign investment ratio is 49 per cent or less (* CATV relay

	broadcasting business is prohibited)
Broadcasting via satellite and other broadcasting (60229)	- Permitted where foreign investment ratio is 33 per cent or less (* Internet multimedia broadcasting business is permitted where the foreign investment ratio is 49 per cent or less)
Wired telecommunications (61210)	- Permitted where the sum of shares (limited to voting shares, including depositary receipt (DR) and other share equivalents and equity interests) held by a foreign government or a foreigner (including fictitious corporation of foreigners) is 49 per cent or less of the total issued shares of the company (Foreigners are not allowed to become a majority shareholder of KT. But, they may invest in KT where they own less than 5 per cent of the total shares.)
Mobile communications (61220)	
Satellite communications (61230)	* Fictitious corporation of foreigners: a corporation whose largest shareholder is a foreign government or a foreigner (including a specially-related person as referred to in Article 9 (1) 1 of the Financial Investment Services and Capital Markets Act), and not less than 15/100 of the gross number of whose issued stocks are owned by the said foreign government or foreigner.
Other electronic communications (61299)	- Telecommunications resellers business (61282) is permitted - Supplementary communications business is not restricted
News agency activities (63910)	- Permitted where the foreign investment ratio is less than 25 per cent
Domestic commercial bank (64121)	- Permission is limited to commercial banks and local banks (*Foreign investment in specialised banks, and agricultural/fisheries/livestock cooperative banking activities are prohibited.)

Data on foreign investment from Japan and the ROK by industry

The Foreign Investment Review Board (FIRB) publishes data on FIRB-approved foreign investment by industry sector. The most recent data for Japan and the ROK are attached on page 13. This data only captures those proposed investments that fall within the scope of the Foreign Acquisitions and Takeovers Act 1975 and Australia's Foreign Investment Policy, and therefore is not a measure of actual or total foreign investment. For example, FIRB statistics measure only direct investment, not portfolio or other investment. Nor do they measure when (or if) an approved investment is realised, or any subsequent withdrawal of direct investment from Australia.

The Australian Bureau of Statistics' (ABS) publishes data on foreign investment into Australia by country (see table below), but it does not routinely release data disaggregated by industry for individual countries. In part, this is because such disaggregated data may not accurately reflect the end use of the funds. For example, Australian banks and financial intermediaries may on-lend investment funds sourced from overseas to clients in a range of other industries. Another problem is that significant parts of the data cannot be published because of confidentiality requirements under the Census and Statistics Act of 1905. In response to a DFAT request, the ABS provided a customised product, attached on page 14, containing some limited data on foreign investment from Japan and the ROK in 2008 (the latest the ABS was able to provide).

Total foreign investment in Australia – top 10 sources* (A\$ billion, 2010 – most recent currently available)

	2009	2010	Rank in 2010	%share 2010	%change 2009 to 2010
Total	1,907	1,968		100.0	3.2
United States	515	550	1	27.9	6.8
United Kingdom	499	473	2	24.0	-5.3
Japan	103	118	3	6.0	14.7
Singapore	41	44	4	2.2	6.5
Netherlands	43	42	5	2.2	-2.3
Hong Kong (SAR of China)	43	41	6	2.1	-5.6
Germany	38	41	7	2.1	6.6
Switzerland	32	41	8	2.1	26.4
New Zealand	32	34	9	1.7	6.6
France	23	24	10	1.2	3.9
China	17	20	12	1.0	17.4

Based on ABS catalogue 5352.0.

*The ROK's total stock of investment in Australia as at the end of 2010 was \$9.4 billion, making it Australia's then sixteenth-largest source of foreign investment.

Foreign Investment Review Board foreign investment approvals by country of investor in 2010-11 – industry sector

Country(a)	Number of approvals(e)	Agriculture forestry & fishing \$m	Finance & insurance \$m	Manufacturing \$m	Mineral exploration & development \$m	Real estate \$m	Resource processing \$m	Services \$m	Tourism \$m	Total \$m
US	190	38	1,017	4,337	1,808	3,404	-	17,015	-	27,620
UK	1,005	106	1,679	644	5,551	4,610	25	2,734	-	15,349
China(b)	5,033	4	558	416	9,758	4,093	132	16	-	14,976
Canada	112	104	-	-	9,317	807	-	4,651	-	14,879
India	320	-	-	2,000	8,929	163	-	168	-	11,260
Singapore	535	-	3,606	1,639	688	1,727	1,750	59	76	9,545
Japan	123	-	1,335	1,251	4,893	598	-	590	-	8,666
Spain	19	-	-	-	2,344	407	600	4,398	-	7,750
Switzerland	53	300	-	-	711	455	-	6,089	-	7,555
Germany	126	-	376	1,865	232	1,128	-	1,048	-	4,649
France	82	-	-	1,270	911	45	-	1,149	-	3,376
Thailand	33	-	-	250	2,566	13	82	-	63	2,973
Russia	65	-	-	-	2,561	245	-	-	-	2,806
Malaysia	896	-	-	355	461	1,863	2	103	-	2,784
Sth Korea	90	-	420	-	1,445	497	-	-	-	2,362
Netherlands	62	-	27	-	-	1,691	-	571	-	2,289
New Zealand	32	-	-	757	1,110	64	-	163	6	2,100
Hong Kong	98	97	-	-	1,383	404	-	-	-	1,884
United Arab Emirates	9	-	-	-	-	1,088	-	392	-	1,480
South Africa	347	-	-	-	372	826	-	-	-	1,198
Other(c)	1,341	124	286	-	1,425	10,684	-	1,622	-	14,141
<i>Sub-total</i>	<i>10,571</i>	<i>773</i>	<i>9,304</i>	<i>14,783</i>	<i>56,465</i>	<i>34,815</i>	<i>2,591</i>	<i>40,769</i>	<i>145</i>	<i>159,644</i>
Australia(d)	177	758	4,435	230	1,439	5,750	-	6,732	-	19,345
Total	10,748	1,531	13,739	15,013	57,904	40,564	2,591	47,501	145	178,989

Note: Totals may not add due to rounding.
 '-' indicates a figure of zero.

Source: Foreign Investment Review Board Annual Report 2010-11

Japanese and South Korean Investment by industry division (2008 - latest available)

All data in \$AUD millions.

"n.p." denotes not published due to confidentiality rules under the Census and Statistics Act of 1905

Country	Data Item	Industry division											
		Agriculture, forestry and fishing	Mining	Manufacturing	Electricity, gas and water	Construction	Wholesale & Retail trade	Accommodation, cafes and restaurants	Transport & Communication	Finance and insurance	Property and business services	Other Services	Unallocated
South Korea	Direct Investment Abroad	-	-	n.p.	-	-	0.1	-	-	n.p.	n.p.	-	-
	Direct Investment Abroad: Equity Capital and Reinvested Earnings	-	-	n.p.	-	-	-	-	-	n.p.	-	-	-
	Direct Investment Abroad: Other Capital	-	-	n.p.	-	-	0.1	-	-	-	n.p.	-	-
	Direct Investment in Australia	-	n.p.	n.p.	-	-	n.p.	-	-	n.p.	-	-	n.p.
	Direct Investment in Australia: Equity Capital and Reinvested Earnings	-	n.p.	n.p.	-	-	n.p.	-	-	n.p.	-	-	-
	Direct Investment in Australia: Other Capital	-	n.p.	n.p.	-	-	n.p.	-	-	n.p.	-	-	n.p.
Japan	Direct Investment Abroad	-	223.8	362.3	-	-	234.6	n.p.	n.p.	1,047.2	n.p.	-	n.p.
	Direct Investment Abroad: Equity Capital and Reinvested Earnings	-	n.p.	n.p.	-	-	n.p.	n.p.	n.p.	n.p.	n.p.	-	-
	Direct Investment Abroad: Other Capital	-	n.p.	n.p.	-	-	n.p.	-	-	n.p.	n.p.	-	n.p.
	Direct Investment in Australia	-	19,318.0	8,910.6	n.p.	-	5,802.2	n.p.	n.p.	1,917.0	n.p.	-	210.7
	Direct Investment in Australia: Equity Capital and Reinvested Earnings	-	n.p.	n.p.	n.p.	-	4,379.8	-	n.p.	n.p.	n.p.	-	n.p.
	Direct Investment in Australia: Other Capital	-	n.p.	n.p.	n.p.	-	1,422.4	n.p.	n.p.	n.p.	n.p.	-	n.p.

Source: Australian Bureau of Statistics. Please see explanatory note on page 12.

