Establishment of a representative office

According to the Alien Business Law, the activity of a representative office which is a non-trading business falls under Category C since it is deemed to be a servicing business. Thus, an application for establishing a representative office must be filed with the Commercial Registration Department, Ministry of Commerce.

The objective of a representative office is to provide the mother company with information on general business in Thailand, ie conducting research; analysing markets, raw materials, labour, technological progress and development. A representative office cannot earn income.

In short the differences between a branch office and a representative office can be outlined as follows:

(a) a branch office in Thailand must have exactly the same objectives as those of the mother company;

(b) the objectives of a representative office are to provide the mother company with various information concerning Thailand;

(c) a branch office may earn income and accounts and books must be maintained in the same manner as a limited company under the Thai law, a representative office cannot earn income;

(d) a representative and a branch office are alike in terms that each does not have the status of a juristic entity according to the laws of Thailand; the laws in respect of principal/agent are applicable. For a representative office, after a licence to operate is obtained, some standard conditions are also prescribed, such as:

- total debt financing used in the business shall not exceed seven times the capital owned by the shareholders, partners and proprietors of the business;
- money remitted from abroad for the business project being applied shall not be less than Baht 5,000,000. At least Baht 2,000,000 shall be required to be remitted in the first year and Baht 1,000,000 for each subsequent year. This capital investment shall not be the loans which must be remitted out of the country under obligations;
- at least one person who is responsible for operating the permitted business must have a domicile in Thailand;

(e) the advantage of a representative office is that it will not be liable for corporate income tax or business tax.

Doing Business in India

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Background

India was in crisis in mid-1991. Her foreign exchange reserves were down to almost zero. The newly elected Congress Party did not get an absolute majority in the parliament. It was able to form a government only with the help of smaller left-wing regional parties. Inflation was running at double digits. The Indian government sought an emergency loan from the International Monetary Fund (IMF) for the first time in July 1991.

The most pressing problem was the balance of payment crisis. The crisis had two (unanticipated) causes: (1) the Gulf War leading to a large exodus of Indian workers from the Middle East back to India, depriving the country of substantial invisible exports. Indian inflation also rose further because of higher oil prices. (2) Collapse of India's main trading partner, the Soviet Union.

With substantial encouragement (and arm-twisting) from the World Bank and the IMF, the Indian government decided to embark on the (risky) path of economic reform. The reform process has opened India up for foreign investment in its huge market for goods and services.

There are three main directions of reform: (1) deregulation within the economy to reduce business regulations; (2) reduction of business taxes; (3) increased external trade and investment by exchange rate reforms and dismantling of tariffs and quotas. These changes have created trade and investment opportunities for foreign companies. For broad economic background of India, we present important statistics for the Indian economy in Table 1. In this article, we will explore the issues involved in trading with and investing in India.

Investment into India

Foreign investment traditionally requires two sets of approvals in India: first from the Reserve Bank of

Table 1 Economic Indicators of India

Gross Domestic Product (GDP)	US$1062 billion (PPP adjusted)
GDP growth rate	1993: 5.5% 1994: 6.0%
Foreign Debt (December 1993)	US$73.5 billion
Short term interest rate	18%
Market Capitalisation	US$130 billion
Listed companies	over 7000
Population	902 million
Middle Class population	150–200 million
English speaking	50 million
Investors	25–30 million
Life expentancy (at birth)	61 years
Literacy rate	53%

Sources: *The Economist*, January 15, 1994, and *Asiaweek*, 2 February, 1994

India (RBI); second from the Foreign Investment Promotion Board (FIPB). The Government of India has created a list of 34 'priority industries' for foreign investors in 1991 (see Appendix A). For items in this category, there is automatic approval of 51 per cent foreign equity. The record of approval during the past three years has been outstanding (see below under 'Regulation'). In addition, for export-oriented manufacturing, 100 per cent ownership is also available.

In the non-priority sectors (which includes most consumer goods), foreign direct investment is approved on a case-by-case basis provided foreign exchange benefits to India can be demonstrated. In domestic aviation, 40 per cent foreign ownership has been approved. In mining, 51 per cent foreign ownership has been approved in some areas.

Agents and Distributors: agent-principal relations are governed by sections 182 to 238 of the India Contract Act. The types of commercial agents recognised under Indian law are brokers, auctioneers, *del credere* agents, and insurance agents. Premature revocation or termination of an agreement by the principal without just cause requires that compensation be paid to the agent. Agent-principal relations may be terminated prematurely if the agent is guilty of misconduct in the discharge of duties. Depending on the agent-principal contract, the agreement may be terminated upon: expiration of the contract term; death or incapacity of the agent; death or incapacity of the principal; completion of the business; impossibility of execution by reason of law or destruction of the subject matter.

India has started negotiation on bilateral investment protection and promotion (IPP) with a number of its large trading partners. IPP deals have been signed with UK, US and Australia. India also ratified its membership of the Multilateral Investment Guarantee Agency (MIGA). Although India has allowed repatriation of profit from export from India, transactions in the capital account are still restricted. Therefore, it is not possible for foreign companies to convert profit made in India to other hard currencies.

Figures for foreign direct investment released by the Government of India show that, unlike some other Asian countries (such as China), the US has taken a lead in investment in India.

■ Trading with India

Imports

As with other countries in the world, India has separate import and export policies. Capital goods, raw materials, intermediate components, spares, parts, accessories, instruments and a few other items can be freely imported into India. The exception is the list of items in the Negative List of Imports. The Negative List includes items that are prohibited, restricted or canalised (see Appendix B).

Even within an allowable area, import duties are imposed. For example, import of machinery for agriculture, horticulture and forestry can still attract a 25 per cent import duty. This number is flexible because the applicable rate depends on the exact circumstance of import. The rates have come down considerably over the past three years. For example, this category attracted a 80 per cent import duty in 1991.

Redistributing import duties has created incentives and disincentives for smuggling activities. Before July 1991, gold was one of the major items of smuggling from the Middle-East through Bombay. With the abolition of restrictions on the moving of gold into India and a reduction in the tax on gold, gold smuggling has become unprofitable. Smuggling of computer chips is now very profitable. The 'Pentium Chip' weighs 20 grams. It costs US$1,800 – five times the price of gold of the same weight. An estimated 100,000 computer chips were smuggled into India in 1993 alone.

Table 2 Investment in India by countries (in millions of US$) up to 1993

Country	Investment	% of total
United States	1300	46.20
Switzerland	360	12.79
Japan	287	10.20
UK	241	8.56
Oman	169	6.01
Netherlands	148	5.26
UAE	129	4.58
Others	180	6.40
Total	2814	100.00

Source: US Embassy Briefing (1994)

Exports

If goods are imported for re-export, then they do not attract any duty. Generally, exports are looked at favourably by the government. Most goods can be freely exported from India. However, there is a Negative List of Exports. Items that are of religious or environmental or cultural significance cannot be legally exported out of India. Many items in the Negative List can be exported after obtaining a licence from the Director General of Foreign Trade on a case by case basis. There are special zones set up for export (see below under 'Setting Up Shop in India').

Exporting can be facilitated by choosing an agent in India. The Agent-Principal relations are governed by sections 182 to 238 of the India Contract Act. The agents can be brokers, auctioneers, *del credere* agents and insurance agents. Experienced foreign companies find it useful for practical reasons to have agents with offices in New Delhi area. Up-to-date information from changes in rules is most readily available in New Delhi.[1]

■ Setting up shop in India

For foreign companies, the advantages of setting up shop in India do not lie in the access to the domestic market. The advantage lies in the export of goods from India to other parts of South Asia (in some cases, to the rest of the world, eg software exports). There are a number of tax and non-tax incentives given to businesses that promote exports from India and development in less developed parts of the country: (1) Tax depreciation allowances, investment allowances and tax holidays for projects undertaken in specified under-developed areas. (2) In the hotel and shipping industries, tax holidays of up to 10 years anywhere in India. (3) Full 100 per cent tax relief for export-oriented industries. (4) Five year tax holiday for industrial undertakings in free trade and export processing zones. These areas also have exemption from licensing requirements, excise taxes, custom duties, and sales tax. (5) Land available on concessional terms from various state governments.

Export Processing Zones and Export Oriented Units

There are several Export Processing Zones (EPZs) in India: Kandla (Gujarat), Santa Cruz (Maharashtra), Noida (Uttar Pradesh), Madras (Tamil Nadu), Cochin (Kerala), Falta (West Bengal) and Vishakhapatnam (Andhra Pradesh). Export Oriented Units (EOUs) can be set up in any place if it facilitates trade due to proximity to raw materials, availability of skilled labour and various other factors.

EPZs provide basic infrastructure facilities: developed land, roads, power, water, prefabricated factory sheds etc. These areas are promoted by the State Governments. The State Government might allow for additional fiscal and regulatory incentives.

The Santa Cruz EPZ has been very successful in processing electronic, precious and semi-precious stones. The Kandla EPZ had problems recently after the market in the Soviet Union collapsed. Noida had some success in manufacturing goods. Falta has remained very small despite existing for 10 years. It is finally getting a boost from a promotion by the West Bengal State Government. Cochin EPZ is considered one of the best-equipped in India. Despite its recent origin, it is expanding rapidly.

Obviously, it is not enough to declare an area to be an EPZ without proper infrastructure development. Gujarat, Andhra Pradesh, Kerala and Maharashtra have a high degree of development in infrastructure. Vishakhapatnam, Kandla, Cochin and Santa Cruz have port facilities. The others have not been flooded with demand for facilities. Hence, their value as EPZs remains to be seen.

■ Regulatory environment

The Office of the Chief Controller of Imports and Exports (CCI&E) in the Ministry of Commerce issues import licences. It is the first stop for any deals about imports and exports.

Foreign Investment Promotion Board (FIPB)

The first point of contact for foreign investors is the Foreign Investment Promotion Board (FIPB). There are four permanent members of the FIPB: (1) the Principal Secretary to the Prime Minister; (2) the Finance Secretary; (3) the Commerce Secretary and Secretary of Industrial Development (Note: The meaning of the term Secretary in a Ministry in India is different from the term's use in the US. In India, the Secretaries are bureaucrats who stay on regardless of who is in power). The purpose of the FIPB is to consider foreign investment proposals not eligible for automatic approval 'free from pre-determined parameters or procedures'. It has the power to approve proposals that exceed normal foreign equity limits or which fall in sectors technically reserved for domestic firms.

Thus, the FIPB has enormous power to approve any project it deems desirable. The committee meets every Saturday to discuss proposals.

To assist, the FIPB has an advisory group consisting of: (1) the President of the Confederation of Indian Industries; (2) the President of the Associated Chamber of Commerce and Industry; (3)

the President of the Federation of Association of Small Industries in India; (4) the Chairman of the Industrial Credit and Investment Corporation of India; (5) the Chairman of the Industrial Development Bank of India; (6) the Chairman of the Industrial Financial Corporation of India; and (7) the Chairman of the Export-Import Bank. It is not known how much influence the Advisory Group has on the FIPB.

Between July 1991 and April 1994, the FIPB had 1,222 cases before it. It approved 900 cases. Another 257 were withdrawn or referred. Only 65 were denied approval. This gives a denial rate of 5.3 per cent. From the cases that were denied the objections mainly stemmed from political, environmental, public health, safety or welfare grounds. On the basis of approvals so far, Western experts believe that projects that: (1) include transfer of technology; (2) add new skills to India; (3) help to increase exports from India; and (4) share future profits with Indian equity partners are likely to succeed. Before the submission of the actual formal proposal, informal discussions with the members of the Committee also helps smooth the passage of proposals.

Environmental concerns

Recognition of the need to protect the environment has come relatively recently to India. New investment proposals need clearances in accordance with the following Acts: (1) the Environment (Protection) Act 1986; (2) the Water (Prevention and Control of Pollution) Act 1974; and (3) the Air (Prevention and Control of Pollution) Act 1981.

Employment Regulations

There are standard regulations for hours worked (35 to 40 hours), minimum wages, statutory holidays, health and safety, equal opportunity etc. There are regulations that control non-wage benefits for employees. These benefits typically are: (1) annual bonuses; (2) pension benefits; (3) termination benefits; and, in some states, (4) workers' rent allowances. These benefits can add up to 60 per cent of wages. For newly established firms, contributions to the pension fund of the workers is not mandatory.

India has labour laws that prevent management firing workers from a company simply because the company is incurring losses. Companies seeking to reduce the numbers of employees have to resort to voluntary early retirement schemes, natural attrition and the National Renewal Fund (NRF). The NRF is a Government operated scheme for redeploying redundant workers.

Land policy

Companies with a sizeable amount of land may find it difficult to sell when they want to wind up business. Central and State Government legislation makes it difficult, if not impossible, to sell a piece of land that has a factory on it. Legal experts are advising potential investors to lease land to set up shops instead of buying them outright to circumvent this problem.[2]

■ Taxing questions

There are corporate and personal income taxes in India. There are sales and other kinds of taxes imposed on various goods. In the past, the tax rates were very high. After the 'rationalisation' of the tax system, the tax rates have come down considerably.

Corporate taxes

The highest tax rate for Indian public limited companies have been reduced to 40 per cent. For branches of foreign companies, the tax rate is 55 per cent. However, with a number of tax incentives available to companies, most companies do not pay 35 per cent of their income in taxes.

There is a 25 per cent tax on dividend to non-resident corporate bodies and 30 per cent for unincorporated non-resident bodies. Tax on interest is 25 per cent. Royalties are taxed at 30 per cent.

For companies investing in agri-business, there are a number of additional incentives provided by the Government of India.

Individual income taxes

The highest personal income tax rate is now set at 40 per cent. However, by Western standards, it kicks in early at Rs 120,000 (under US$4,000). Income up to Rs 35,000 is tax free. The marginal rate between Rs 35,001 and Rs 60,000 is 20 per cent and between Rs 60,001 and 120,000 is 30 per cent. Non-salary benefits such as company-provided housing and cars, generous pension, health care, holiday benefits and the like are not taxed at all. Thus, it is not unusual for people in upper management to have a non-salary benefit package larger than a salary component.

■ Intellectual property rights

Until 1993, India did not give protection to product patents for pharmaceuticals, food or chemicals. For example, Indian pharmaceutical companies produced AZT without licence from the parent US firm and marketed it in India, and in some cases, exported it to other countries. This led the US

Government to take retaliatory measures under Section 301 of the US Trade Act. This measure forced the Indian Government to reconsider its position on intellectual property. In December 1993, the Indian Government accepted the Dunkel proposal of the GATT negotiations. Over a number of years, product patents will eventually be accepted by India.[3]

Patents: patents in India are protected under the Patent Act of 1970. The Act protects foreign companies on the same basis as Indian nationals as long as there is reciprocity of protection. An invention must be original, be the result of ingenuity, and have utility. India's Patent Act grants patent protection for 14 years from the date of filing. Stringent compulsory licensing provisions have the potential to render patent protection virtually meaningless. India's Patent Act prohibits patents for any invention intended or capable of being used as a food, drug or for any substance prepared or produced by chemical processes. The process by which drugs, foods and related items are produced is patentable, but the patent term for these processes is limited to the shorter of five years from the grant of patent or seven years from patent application filing.

Trademarks: trademarks are protected under The Trade and Merchandise Marks Act of 1958 which establishes the rights for the first user of the trademark. Trademarks are registered for seven years with renewal of the registration allowed for an additional seven-year period. Permission from the Reserve Bank of India must be obtained by foreign or Indian companies with 40 per cent or more non-resident interest to use a trademark.

India is a member of the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works. The Copyright Act 1957 provides protection during the author's life, plus 50 years after death.

■ Leading states

For each state, the investment incentives are different. Recently, *Business India* surveyed major foreign/domestic investors to find out which states they prefer. The categories were: (1) political leadership and bureaucracy; (2) corruption; (3) incentives; (4) infrastructure. For good political environment, the leading states were Maharashtra, Madhya Pradesh, Gujarat, Uttar Pradesh, Punjab, Orissa, Tamil Nadu, West Bengal, Rajasthan, and Karnataka. Corruption acts as a hindrance in Tamil Nadu, Uttar Pradesh, Orissa, Kerala and Andhra Pradesh. However, it acts as a lubricant in the system, in the states of Gujarat, Maharashtra, Madhya Pradesh, Karnataka and Haryana. In infrastructure development, the leading states are Punjab, Haryana, Kerala, Tamil Nadu, Gujarat, West Bengal, Maharashtra, Uttar Pradesh, Andhra Pradesh, and Karnataka. In terms of actually getting the investment flowing in, the leading states are Gujarat, Maharashtra and Karnataka.[5]

Table 3 The Leading States in India with Special Features

State	Infrastructure	Leading Areas
Andhra Pradesh	Good	Positive attitude to foreign investment
Gujarat*	Good	Diversified industrial base
Haryana	Fair	Well developed industrial base
Karnataka*	Well developed	Defence-related industry
Kerala	Good transport	No clear direction
Madhya Pradesh	Fair	Potential, not yet developed
Maharashtra*	Well developed	Diversified, includes Bombay
Orissa	Limited	Rich in natural resources
Punjab	Well developed	Agriculture dominant
Tamil Nadu	Fair	Industrial base
Utta Pradesh	Limited	Better around North West
West Bengal	Fair	Major industrial

*Denotes the leading states in actually attracting investment

Notes

1 Ministry of Commerce, *Export and Import Policy*, 1 April 1993–31 March 1997. New Delhi, India. This is the main source of information about import and export regulations in India. This is available at various consular offices of India around the world.
2 Ministry of Commerce, *Handbook of Procedures*, 1 May 1992–31 March 1997. New Delhi, India. Detailed documentation of various procedures for business with India. It is also a good source of business regulations.
3 Price Waterhouse, *Doing Business in India*, 1992, New York. This is the India edition of the popular series produced by Price Waterhouse. It provides a useful checklist for setting up business.
4 International Business Practices — India, Produced by the Department of Commerce, National Trade Data Bank CD ROM. Last update 29 November 1993. Useful as a starting point.
5 *Business India*, Issue No 424, 6 June 1994. This issue discusses the 10 best states for domestic and foreign investment.

Appendix A: Priority Industries for Automatic Approval of 51 per cent Foreign Equity

(1) metallurgical industries;
(2) boilers and steam generating plants;
(3) prime movers other than electrical generators;
(4) electrical equipment;
(5) transportation equipment;
(6) industrial machinery and equipment;
(7) machine tools and industrial robots;
(8) agricultural machinery;

(9) earth-moving machinery;
(10) industrial instruments;
(11) scientific and medical instruments;
(12) fertilisers;
(13) chemicals;
(14) drugs and pharmaceuticals;
(15) papers and laminates;
(16) heavy-duty rubberised and plastic products;
(17) plate glass;
(18) ceramics for industrial use;
(19) cement;
(20) high-technology reproduction equipment;
(21) carbon and carbon products;
(22) high-pressure RCC pipes;
(23) printing machinery;
(24) welding electrodes;
(25) industrial synthetic diamonds;
(26) biological products;
(27) prefabricated building materials;
(28) soya products;
(29) high-yield plant products;
(30) food processing;
(31) packaging;
(32) hotels and tourism;
(33) software development;
(34) rubber machinery.

Appendix B: Negative List of Imports

Prohibited Items
Tallow, margarine and ivory.

Licence Required
(A) consumer goods — consumer electronic goods, telecommunication equipment, watches, fabrics, concentrate of alcoholic beverages, wines, saffron, cloves, sports goods, some gift of consumer goods;
(B) precious and semi-precious stones;
(C) safety and security items;
(D) seeds, plants and animals;
(E) insecticides and pesticides;
(F) electronic items (including industrial);
(G) drugs and pharmaceuticals;
(H) chemicals;
(I) items for small scale sector;
(J) miscellaneous items.

Infrastructure Privatisation in Asia

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As you will appreciate, Asia is rather a large area to cover in a short article. What I therefore propose to do is to discuss briefly some of the legal issues which have arisen in a number of Asian jurisdictions in relation to infrastructure privatisation. I believe it might then be possible to identify a number of issues, almost irrespective of the nature of the government or the development of the country. Again, as Asia is so large, I will concentrate on those jurisdictions which have a reasonably developed infrastructure privatisation programme and of which my firm has had some relevant experience.

Accordingly, we will be taking a quick spin through South East-Asia – Malaysia, Indonesia, the Philippines and Thailand – before taking look at China and Hong Kong; we will drop in on India and Pakistan and pay a quick visit to Indochina and Myanmar. Again, as the power and transportation sectors are perhaps the most advanced, I will concentrate on these. I am of course indebted to my professional colleagues in other jurisdictions who have provided information for this article and in particular to Michelle Cutler in Hong Kong. I apologise to any Australians reading for not including Australia as part of Asia.

■ Malaysia

As Malaysia is perhaps the most advanced country in Asia in terms of infrastructure privatisation it would seem a sensible place to start.

The Malaysian privatisation policy was first announced in mid-1983. The Government published a General Guideline in January 1985 with the Privatisation Master Plan released in 1991. The Government has implemented a process of asset disposal undertaken through corporatisation of public utilities and their subsequent disposal by the public listing of those corporations. However, this article concentrates on the development of