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US PRIVATE EQUITY INVESTMENT IN EMERGING ECONOMIES

*Kelly Fisher** *& Sophie Smyth***

I. INTRODUCTION

The 2008 turmoil in the global credit market has increased investor interest in private equity funding. Private equity funding may take a number of forms; the acquisition of a private company with the intent of providing it with the capital needed to improve or scale up its operations; the acquisition of a division of a large company, with the purpose of offering the newly-independent business the management focus and resources needed to develop as a successful stand-alone enterprise; or "privatizing" a public company in an effort to undertake improvements that would be difficult to achieve given the short-term earnings focus of the public markets.

In short, private equity firms' investment strategy is to identify underperforming companies with hidden potential. They select companies they believe can be turned around by changing the business model, investing new capital, or injecting new managerial talent. Private equity firms can implement changes and policies that publicly traded companies fear. They are more resilient to dips in earnings because they don't have to worry about shareholder dissatisfaction, stock sell-offs, and the risk that a short term dip, weathered for a long term gain, will precipitate a damaging drop in enterprise value.

U.S. private equity investors present both a challenge and an opportunity for emerging economies. They often provide the funding necessary to bridge a local financing gap, but all forms of private equity make demands on developing countries' legal systems. As global competition intensifies, local policies, regulations, and business practices become increasingly important in attracting investment. Private equity investors are sensitive to location-specific problems and distinguish countries based on criteria such as the protection of shareholder rights, tax treatment of capital gains, and securities markets development.

This Article identifies the key areas of legal regulation that U.S. private equity investors challenge. It compares how three of the major emerging economic powers in the developing world, Brazil, China, and India, address these challenges; and draws some general lessons for how emerging economies can strike a reasonable balance between enticing private equity investors and managing the risks they present.

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II. CHALLENGES CREATED BY UNITED STATES PRIVATE EQUITY INVESTMENTS

1. Private Equity Fund Structure

The U.S. private equity fund structure poses particular challenges for the countries in which they invest. Emerging markets must understand the nature of private equity investments in order to protect their tax base, continue to promote local businesses, and protect local laborers. At the same time the emerging markets face the challenge of attempting to attract investments from those they seek to regulate.

Though U.S. private equity investment structures vary, most are structured as funds. Typically, an investment professional (or group of professionals) known as a *sponsor* organizes groups of investors to infuse capital into a fund with a view to acquiring equity positions in companies. The targeted investor groups include institutional investors, domestic and foreign pension funds, insurance companies, individuals, governmental entities, charities, foundations, and occasionally other private equity funds.[1] Private equity funds focus on a variety of investment strategies, and their targets range from start-up companies to mature businesses in sectors including financial services, technology, and biochemical companies. Some of the sectors targeted by U.S. private equity funds are considered "sensitive" and governments strictly regulate foreign ownership.

Private equity funds are typically managed by professional management companies that are compensated for their efforts in the form of an asset-based fee, plus an interest in the private equity fund representing a share of the Fund's profits (the carried interest). In addition to the management company, institutional investors such as pension funds, as well as individuals, make direct investments in the private equity fund.[2]

Funds typically hold investments between eight to ten years. The goal is to improve performance of the respective businesses and sell at a profit. Since the private equity fund is typically structured as a pass-through entity, tax efficiency is extremely important at both the fund and investor levels. In cross border structures, the sponsor must consider the U.S and foreign tax implications before structuring the fund.

Because most private equity funds end through either a public offering or sale to a strategic purchaser within eight to ten years of the funds' creation, constraints that interfere with that type of exit process could drive away foreign investors. So a host government's understanding of the domestic and foreign legal process for exit is critical.

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[1] NORA JORDAN ET AL., ADVISING PRIVATE FUNDS: A COMPREHENSIVE GUIDE TO REPRESENTING HEDGE FUNDS, PRIVATE EQUITY FUNDS AND THEIR ADVISERS § 1:1 (2012). Most U.S. private equity funds are "sold to investors in such a way that (i) the investment fund is not required to register as an investment company under the Investment Company Act of 1940 (the Investment Company Act), and (ii) the offering of interests in the investment fund is exempt from registration under the Securities Act of 1933 (the Securities Act) pursuant to a private placement exemption." *Id.*

[2] "Hedge funds generally pay the fund's manager both a management fee and a performance fee or allocation. When a fund is formed as a partnership, ordinarily the general partner receives the performance allocation and the management company receives the management fee. Whereas management fees are commonly calculated as a percentage of a fund's net asset value or aggregate capital account balance, performance fees or allocations are calculated as a percentage of profits usually on an investor-by-investor basis or, if a fund is unitized or issues shares, on a series-by-series basis." *Id.* at § 20:14.

2. Cross-Border Private Equity Investment: Emerging Sectors

The investment strategies of private equity funds constrain a country's ability to effectively regulate them. Today, more than half of the biggest private equity firms are active across multiple asset classes and more than eighty percent invest in regions beyond their home base.[3] Though fund investment strategies vary, it is clear that two of the primary investment drivers for private equity firms are sector and geography.

Rising energy costs and increased global focus on carbon emissions reduction[4] will increase investment opportunities in the energy sector. Between the need for new capacity in developing markets, and the replacements and upgrades needed in developed nations, the sector is poised for a surge in global infrastructure spending. These demands (especially the demand that will be generated by the recently created Green Climate Fund),[5] combined with the emergence of new technologies, will drive up demand for private equity capital and trigger greater interest among limited partners, sovereign wealth funds, and other capital providers.

Sectors experiencing disruptive changes are also inherently attractive to private equity investors, and the healthcare segment is expected to remain volatile for the next few years. Healthcare sector opportunities include: companies that handle billings and collections, firms that manage physician practices, contract researchers and manufacturers, distributors, healthcare information technology companies, and developers of clinical decision–support systems. In addition to the sector's dynamism, these businesses do not always have obvious strategic acquirers, making them attractive to private equity investors.

Brazil, China, and India are predicted to be among the fastest growing countries in the world over the next decade.[6] Their status as emerging growth countries with extensive opportunities in the energy and healthcare sectors contribute to their investment attractiveness.

a. Brazil

Brazil is expected to invest heavily in infrastructure improvements in anticipation of hosting two major sporting events, the 2014 FIFA World Cup and the 2016 Rio de Janeiro Olympic Games. Brazil's high environmental standards drive infrastructure improvements and new sustainable development technologies. The required infrastructure upgrades and added focus on green technology are expected to draw significant interest from foreign private equity investors.

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[3] *See generally* BAIN & COMPANY, GLOBAL PRIVATE EQUITY REPORT 2010 (2010), *available at* http://www.bain.com/ Images/Global_PE_Report_2010_PR.pdf.

[4] *See, e.g.* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf. The Kyoto Protocol is an international agreement between countries, worldwide, to limit emissions of greenhouse gases.

[5] *See generally* GREEN CLIMATE FUND, http://gcfund.net/home.html (last visited May 13, 2013).

[6] *See generally* OECD, GLOBALISATION AND EMERGING ECONOMIES: BRAZIL, RUSSIA, INDIA, INDONESIA, CHINA AND SOUTH AFRICA (OECD Publishing ed. 2009).

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b. *China*

China is aggressively making investment and policy decisions aimed at positioning itself as the world's leader in the invention and production of clean energy technologies.[7] "In 2009, China manufactured and installed more wind turbines than any other country and now ranks third in aggregate installed wind capacity."[8] Over the next decade, "China will build out the densest network of ultra high-voltage grid transmission and . . . high-speed passenger rail."[9] The Chinese government has developed a long term clean energy development plan, setting exacting targets for energy and resource efficiency across two dozen specific industrial sectors and equipment types.[10] China has also identified ten priority energy conservation projects in coal, petroleum, buildings, lighting, transportation, and other areas, which are attracting significant private sector investment.[11]

c. *India*

> The Indian healthcare sector is expected to become a US$ 280 billion industry by 2020, with spending on health estimated to grow [fourteen] percent annually. 'Healthcare has emerged as one of the most progressive and largest service sectors in India with an expected GDP spend of [eight] per cent by 2012 from [five and a half] per cent in 2009. It is believed to be the next big thing after IT and predicted to become a US$ 280 billion industry by 2020.[12]

A recent study by Ernst & Young indicates that India will require another 1.75 million hospital beds by the end of 2025,[13] and the public sector is likely to contribute only fifteen to twenty per cent of the required US$ 86 billion investment.[14] The needs and potential of the Indian market have already attracted a number of private equity investments, and that trend is expected to continue over the next decade.

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[7] Ucilia Wang, *China: The Epicenter of Clean Energy Investments*, FORBES (April 17, 2013, 3:39 AM), http://www.forbes.com/sites/uciliawang/2013/04/17/china-japan-lure-big-clean-energy-investments/. China uses fiscal and policy approaches to promote green-technology markets, including tax exemptions to promote environmental and green-tech activities. The government also directly subsidizes green-technology providers in areas like new energy vehicles, building-integrated solar photovoltaic systems, and wind turbines. Provincial and regional governments support green-technology development in their jurisdictions, by granting tax holidays, discounted office rates, direct financing, assisting with capital markets financing, and reimbursements for employee training. Julian L. Wong, THE CHALLENGE OF CHINA'S GREEN TECHNOLOGY POLICY AND OHIO'S RESPONSE, Written Testimony Before The U.S.-China Economic and Security Review Commission (July 14, 2010), *available at* http://www.americanprogressaction.org/wp-content/uploads/issues/2010/07/pdf/wong_green_china_testimony.pdf.

[8] Wong, *supra* note 7, at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Healthcare: Sector Structure/Market Size, INDIA BRAND EQUITY FOUNDATION, http://www.ibef.org/artdispview.aspx?art_id=27385&cat_id=119&in=29 (last visited May 30, 2013)[hereinafter Healthcare: Sector Structure/Market Size].

[13] ERNST & YOUNG INDIA, DOING BUSINESS IN INDIA 41 (2010), *available at* http://www2.eycom.ch/publications/ items/india/2010_doing_business_in_india/2010_EY_Doing_business_in_India.pdf.

[14] Healthcare: Sector Structure/Market Sizes, *supra* note 12.

In sum, private equity investment in the energy and healthcare sectors has risen over the last six years, and significant levels of investment in the sectors are expected to continue further driving interest in Brazil, China, and India.[15]

III. THE CHALLENGES PRIVATE EQUITY INVESTMENTS POSE FOR HOST COUNTRIES

Private equity investments pose particular challenges to host countries in several key areas. To balance the pros and cons of private equity investments host countries need to consider investment and exchange controls, industrial property rights, labor laws, antitrust regulations, and their financial reporting regime.

1. Foreign Investment Controls

Foreign direct investment can pose risks to a host country's economic policy, and to domestic investors in the host country. For example, a host country government has to guard against over-dependence on foreign investment in sectors that are critical to its economy. It must also protect domestic investors; tax payers whose prosperity is key to the country's prosperity. The controls a host country puts in place to achieve these goals seek a delicate balance between national protection and removing all incentives in foreign investors to invest.

a. Brazil

According to the World Bank, Brazil ranks eighth in the world in terms of gross domestic product.[16] It is one of the fastest growing countries in the world, which is why private equity investors are drawn to opportunities in Brazil. Though Brazil ranks 130th out of 185 countries in the world in terms of ease of doing business, placing it among the lowest one-third of countries in the world,[17] it received a ranking of 82 in terms of investor protection,[18] a key consideration for private equity investment. Brazil's relatively low ranking is attributable to its historically complex legal, accounting and tax regimes, as well as the bureaucratic issues foreign investors face, however, this ranking is based on Brazil's general foreign investment regime and does not consider the concessions provided to private equity funds which eliminate some of the barriers traditional investors face.

Despite its ranking, Brazil is still considered "foreign investment friendly." Under Brazil's Federal Constitution, foreign capital investments must be regulated by law in accordance with national interests, including the encouragement of reinvestment.[19] Capital is

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[15] *See* BAIN & CO., GLOBAL PRIVATE EQUITY REPORT 2010 *supra* note 3, at 21.

[16] WORLD BANK, GROSS DOMESTIC PRODUCT 2011 (April 15, 2013), http://databank.worldbank.org/data/download/ GDP.pdf.

[17] *Doing Business 2012*, INT'L FINANCE CORP. WORLD BANK GROUP, http://www.doingbusiness.org/rankings (last updated June 2012). These numbers are subject to change.

[18] *Protecting Investors 2012*, INT'L FINANCE CORP. WORLD BANK GROUP, http://www.doingbusiness.org/data/exploretopics/protecting-investors (last updated June 2012). These numbers are subject to change.

[19] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 172 (Braz.).

considered to be foreign when it is remitted to Brazil by an individual or a legal entity that is resident, domiciled, or has its principal office abroad.[20]

In Brazil, the Central Bank is charged with registering and monitoring foreign investments. All foreign capital remitted to Brazil must be registered with the Central Bank of Brazil in order for the holder to make capital investments, profit remittances, and repatriation of foreign capital without any prior authorization.

Brazil's law allows foreign persons to invest in any and all activities not expressly restricted under the Federal Constitution. Currently, restricted activities include: banking, state monopolies,[21] mineral resources, newspaper and broadcasting companies, rural property, transport, privatization, and health care. Though foreign investment is now permitted in several sectors previously closed to foreign capital, such as oil and gas, telecommunications and mining and energy, acquisitions involving regulated industries such as energy and telecommunications, still require the consent of the applicable Brazilian governmental authority.

The Fundos de Investimento em Participações (FIP) is the most common private equity structure utilized in Brazil. FIPs are regulated by Comissão de Valores Mobiliários (CVM) Regulation No. 391/2003. To maintain strong central government control over private equity investors, Brazil requires that all FIPs register their articles of incorporation[22] with the Registry of Titles and Deeds Office (Cartório de Registro de Títulos e Documentos) of the city where the FIP has its head offices. As long as the FIP's quotas are not publicly traded, the CVM grants automatic registration upon the presentation of certain documents.[23]

Brazil allows considerable flexibility in structuring ownership rights in a FIP, a flexibility which is not available to other Brazilian investment funds.[24] FIPS are authorized to issue different classes of quotas,[25] which can carry different management rights and

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[20] Lei No. 4.131/62, de 3 de Setembro de 1962, art. 1 (Braz.). Foreign capital is defined as property, machinery or equipment that enters the country as the capital contribution of a foreign investor, as well as financial and monetary resources remitted to Brazil by foreign investors. *Id.*

[21] Section 177 of the Federal Constitution of Brazil sets aside the following activities as Federal Government monopolies: (i) prospecting for and exploitation of deposits of oil, natural gas, and other fluid hydrocarbons; (ii) refining of oil of any origin; (iii) import and export of products or byproducts resulting from oil, natural gas, and other fluid hydrocarbons; (iv) maritime transportation of locally produced crude oil and basic oil byproducts produced in Brazil, and pipeline transportation of crude oil, its byproducts, and natural gas of any origin; and (v) prospecting for, and the exploitation, enrichment, reprocessing, industrialization and trading of nuclear mineral ores and minerals and their byproducts. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 177 (Braz.).

[22] The incorporation acts should include: the FIP's Regulation, which establishes the basic rules applicable to the operation and administration of the fund; and the appointment of the fund's administrator, together with a written statement in which the administrator accepts his or her appointment and declares acknowledgement of the responsibilities arising there from. Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários – CVM), CVM Instruction No. 391/03 (July 14, 2003), *available at* http://www.cvm.gov.br/ingl/indexing.asp [hereinafter CVM Instruction No. 391/03].

[23] The required documents include: incorporation documents and the FIP Regulation; a statement from the administrator confirming that the agreements to retain a financial institution for purposes of the activities mentioned above were executed (if the administrator is not a financial institution); a statement listing the independent auditor; the minimum and maximum number of quotas to be issued, the issuance price and costs incurred and other relevant information on the distribution; marketing material, including offering memorandum, if any; and a brief description of the qualifications and professional experience of the administrator's and manager's personnel. *Id.*

[24] *Id.*

[25] Quotas are the Brazilian equivalent of U.S. shares or stock.

performance fee rights. However, in the interest of limiting risk, Brazil does not allow equity holders in a FIP to have limited liability protection.[26] If the fund has a negative net worth, its equity holders must generally cover the negative amounts.[27]

Brazil requires that FIPs take part in determining strategic and management policies of the companies in which they invest.[28] It not only ensures FIP investors have representation rights in the targeted investment companies, it also forces foreign investors to take a personal stake in the success of the companies in which they invest, and encourages self-policing. In addition, in allowing FIPs to hold controlling blocks of stock in other companies, Brazil permits them to enter into stock holder agreements providing them management control and oversight, and other agreements needed to guarantee the FIP's influence or control over strategic plans and management policies of the companies in which it invests.[29] Another FIP provision designed to ensure that FIP investors retain an incentive to make the FIP a meaningful investment that will contribute to the economy of Brazil prohibits U.S. investors from redeeming their shares.[30] Therefore, to exit the investment before the expiration of the term of the FIP, the investors must sell their interest to other investors.

Brazil offsets the disincentives created by its need to regulate foreign investment by granting special tax benefits in the form of zero income tax rates as long as certain requirements are met.[31] Tax efficiency is a primary goal for private equity investors, so incentives aimed at reducing or eliminating taxation are extremely attractive to U.S. private equity investors. Investment in a FIP is limited to "qualified investors" who subscribe a minimum R$100,000.[32] Foreign investors must appoint an in-country representative.[33]

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[26] Marcos Rafael Flesch & Marina da Silva Prado, *Private Equity/Venture Capital Funds in Brazil (Fundos De Investimento Em Participações-Fips), in* INTERNATIONAL BUSINESS TRANSACTIONS WITH BRAZIL 81 (Juris Publishing, Inc. eds., 2008).

[27] *Id.*

[28] CVM Instruction No. 391/03 requires the FIP to participate in the decision-making process of the target company. The FIP shall effectively take part in the definition of the company's strategy and management policy by means of appointing a member of the Board of Directors. CVM Instruction No. 391/03, *supra* note 22, at sec. 2.

[29] Luiz Leonardo Cantidiano, Otto Eduardo Fonseca Lobo & Danial Kalansky, *Distressed Investments in Brazil: The Role of Private Equity Funds, in* THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 2008/2009 242-43, *available at* http://www.americasrestructuring.com/08_LA/p242-243%20Distressed%20 investments%20in%20Bra zil.pdf.

[30] CVM Instruction No. 391/2003 provides that a FIP shall be created as a closed-end condominium, which means that its investors cannot request the redemption of shares. CVM Instruction No. 391/03, *supra* note 22, at sec. 2.

[31] Lei No. 11.312/06, de 27 de Junho de 2006, art. 3 (Braz.). The earnings from the investments held by nonresidents are subject to an income tax rate of 0.0%, as long as: the investment has been done in compliance with rules issued by and under the conditions set forth by the Brazilian National Monetary Council; the investor does not hold, alone or together, with a related individual or company, forty percent or more of the shares of the Fund; the investor is not entitled to, alone or together, with a related individual or company forty percent or more of the FIPs total earnings; the Fund does not have in its portfolio debt securities of five percent or more of its total assets (except for debentures convertible into shares or warrants); and the investor is not resident in a tax haven country as it is defined under the Brazilian Law. *Id.*

[32] Flesch & da Silva Prado, *supra* note 26. Qualified investors include: financial institutions, insurance and capitalization companies, private pension funds, individuals or corporations which own investments of at least R$300,000, investments funds designed exclusively to qualified investors, portfolio managers and securities consultants licensed by the CVM, and authorized employees or partners of managing institutions. *Id.*

[33] Registration requires completion of a standardized form prescribed by Resolution 2,689, and potential investors must obtain a registration with the CVM in accordance with CVM Regulation 325/2000 before their

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Brazil's FIP regime is a focused approach to attracting private equity investment. By granting flexibility in equity structure, and providing preferential tax regimes, Brazil incentivizes private equity investors. It balances these concessions by limiting access to the FIP structure to "qualified investors," a term utilized throughout the world, including the U.S., to differentiate investors based on criteria such as sophistication and wealth.

b. China

China's gross domestic product in 2012 was nearly $7.3 billion dollars, or 11.77% of the world economy.[34] In 2010, China surpassed Japan as the world's second-largest economy.[35] Foreign investors are attracted to China not only because of the sheer size of its domestic economy but also its manufacturing strength and historically inexpensive labor force. China's expansive resources make the country particularly vulnerable to exploitation from foreign investors, prompting China to strictly regulate the inflow of foreign capital.

Despite achieving an ease of doing business rank of 91st (placing it in the top half of countries listed), China ranks close to the bottom, at 151, in terms of ease of starting a business.[36] Part of the difficulty of establishing a business in China is that every project, foreign investment enterprise (FIE), and every transfer of capital into or out of China is subject to a government review and approval process. A vast bureaucracy supervises the foreign investment regulations, with each major agency playing a different role. China's lack of a business infrastructure, especially in the legal and banking sectors, adds to the complexities of operating in China, as do the rapidly changing rules, which often vary region to region.

China both wants and fears private equity investment. As an overreaching policy, therefore, it divides industries and types of investment into encouraged, restricted, and prohibited categories.[37] The Provisions on Guiding Foreign Investment Direction[38] specify how the different categories are treated and what approval formalities are necessary. Encouraged projects receive the most favorable treatment and are the easiest to get approved.

investment in the FIP is recognized. According to CVM Regulation 325, foreign investors shall obtain a registration with the CVM through his or her representative, who must send to the CVM, by electronic means, the information of the attachment to Resolution 2,689. The CVM shall make a statement regarding the registration within 24 hours. Additionally, the investor must execute an agreement regarding the custody of the negotiated securities with an entity authorized by the CVM to perform such services. In addition to the obtaining of the aforementioned registration, the funds subject to Resolution 2,689 are subject to registration with the Central Bank of Brazil, as set forth by the regulation in force. Securities and Exchange Commission of Brazil, CVM Instruction No. 325/00 (Jan. 27, 2000), *available at* http://www.cvm.gov.br/ingl/indexing.asp.

[34] *China GDP*, WWW.TRADINGECONOMICS.COM, http://www.tradingeconomics.com/china/gdp (last visited June 3, 2013).

[35] R.A. Washington, China Second in Line, THE ECONOMIST (Aug. 16, 2010, 1:26 P.M.), http://www.econo mist. com/blogs/freeexchange/2010/08/china_0.

[36] *Doing Business 2012*, *supra* note 17.

[37] The first source of information to answer this question is the Catalogue for Guidance on Investment in Industry. Catalogue for the Guidance of Foreign Investment Industries (Jointly Promulgated by the National Development and Reform Commission and Ministry of Commerce of the People's Republic of China, Dec. 24, 2011, effective Jan. 30, 2012), *available at* http://www.fdi.gov.cn/1800000121_39_1925_0_7.html. The Catalogue is the sixth since 1995 adjusting the industries that China encourages, permits, restricts and prohibits.

[38] Provisions on Guiding Foreign Investment Direction (Promulgated by State Council, Feb. 11, 2002, effective Apr. 1, 2002) (China), *available at* http://ww.bizchina.chinadaily.com.cn/guide/law/law37.htm.

Restricted projects, depending on how they are classified, receive fewer benefits and generally require a higher level of approval.

China requires that all foreign investments be submitted for project verification with "the National Development and Reform Commission (NDRC), or the provincial or local Development and Reform Commissions, depending on the sector and value of the investment."[39] Project verification "includes assessing the project's compliance with China's laws and regulations, its national security implications, and its economic development ramifications."[40] Once project verification is complete, the Ministry of Commerce (MOFCOM) conducts an "enterprise establishment verification," which certifies that the contract establishing the foreign investment conforms to China's laws and regulations. "Foreign investors [then] apply for a business license from the State Administration of Industry and Commerce (SAIC), which allows the firm to operate."[41]

Traditionally, foreign investment enterprises in the People's Republic of China (PRC) took three main forms: equity joint ventures (EJVs),[42] cooperative joint ventures (CJVs),[43] and wholly foreign-owned enterprises (WFOEs).[44] However, China recently changed its laws to increase interest in entities referred to as Renminbi funds (RMB funds). RMB funds lower foreign exchange controls, allow funds to raise funds from local investors, and impose fewer foreign investment approvals, speeding transaction time significantly. China's rapidly developing sectors benefit from the increased capital, and the governance restrictions imposed on RMB funds balance the risks China faces by allowing foreign investment in profitable sectors.

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[39] U.S. DEP'T OF STATE, DOING BUSINESS IN CHINA 2012, COUNTRY COMMERCIAL GUIDE FOR U.S. COS. 85 (2012), http://export.gov/china/build/groups/public/@eg_cn/documents/webcontent/eg_cn_025684.pdf [hereinafter DOING BUSINESS IN CHINA 2012].

[40] *Id.* "In some cases, NDRC solicits the opinions of relevant Chinese industrial regulators and "consulting agencies," which may include industry associations that represent domestic firms. The State Council also weighs in during the verification stage for high-value projects in "restricted" sectors." *Id.*

[41] *Id.*

[42] Law of the People of China on Chinese-Foreign Equity Joint Ventures, National People's Congress (July 1, 1979, revised Apr. 4 1990 and Mar. 15, 2001), *available at* http://www.china.org.cn/english/DAT/214773/htm. An EJV is a Chinese limited liability company, established by means of a joint venture contract and Articles of Association entered into between the foreign and Chinese partners, subject to the approval of the relevant Chinese governmental authorities. Equity ownership of an EJV is based strictly on the valuation of the contributions made to the registered capital of the company and dividends are distributed to the owners in accordance with the ratio of their capital contributions. The management of an EJV is also supposed to follow the ratio of equity ownership. *See id.*

[43] Law of the People of China on Foreign Capital Enterprises, National People's Congress (Apr. 13, 1988, revised Oct. 31, 2000), *available at* http://www.china.org.cn/english/features/investment/36754.htm. A CJV is almost always a Chinese legal person with limited liability, but is not required to be. A CJV is established by means of a cooperative joint venture contract and Articles of Association entered into between the foreign and Chinese partners, subject to the approval of the relevant Chinese governmental authorities. The CJV structure allows considerable flexibility in the contribution of equity, the distribution of profits, and management structures. *See id.*

[44] Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (Apr. 12, 1986, as amended Oct. 31, 2000), *available at* http://chinalegalservice.net/index_topic.php?did=39942&didpath=/37634/37636/39942. A WFOE is a Chinese limited liability company owned entirely by a foreign investor or investors. A WFOE is established by means of Articles of Association drafted by the foreign investor, subject to the approval of the relevant Chinese governmental authorities. The liability of the foreign investor is limited to the amount of registered capital paid in by the foreign investor. The Articles of Association determine the organizational structure of a WFOE. *See id.*

Foreign-invested RMB funds are funds denominated in Renminbi raised by foreign private equity firms within China and abroad, investing through an onshore structure in the private equity of PRC entities. Traditionally, foreign-invested RMB funds were established under the Measures on Administration of Foreign-Invested Venture Capital Investment Enterprises (FIVCIE Measures), which were promulgated on January 30, 2003 and became effective on March 1, 2003.[45]

The FIVCIE were intended to encourage equity investments in Chinese start-up companies in the high-tech sector,[46] and previously, China limited these funds to require that they be set up as either "limited liability companies" or "non-legal-person entities."[47] This limitation ensured that MOFCOM could continue to regulate investment and ensure foreign enterprises were not thinly capitalizing Chinese entities.[48]

In an RMB Fund, the fund itself and its management entities must all be established within China.[49] However, going forward, the typical structure of foreign-invested RMB funds is poised to change. In November of 2009 the State Council[50] issued Measures for Administration of Establishment of Partnership Enterprises by Foreign Enterprises or Individuals in China (the FIP Measures),[51] and in January 2010 the State Administration of Industry and Commerce of the PRC promulgated the Administrative Rules for Registration of

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[45] Administration of Foreign-Invested Venture Capital Investment Enterprises Provisions (promulgated Jan. 30, 2003, effective March 1, 2003) (China), *available at* http://www.englishcn.com/zh/vocations/laws/200 70810/ 9454.html (last visited June 5, 2013).

[46] One noteworthy feature of a foreign-invested RMB fund is that the fund may invest only in unlisted high-technology companies (although such funds may continue to hold securities after the company has become listed). Additionally, there are borrowing and other investment restrictions, so funds with a flexible investment strategy may find it difficult to cope with the regulatory restrictions.

[47] Steven Wei Su, *Forming a Foreign-invested RMB Fund in China: Legal Options after Foreign-invested Limited Partnership Becomes Possible*, GUO LIAN PRC LAWYERS 8 (2010), http://www.guolian.com.cn/abcde /Editor/UploadFile/20106711229834.pdf.

[48]

> If a FIVCIE is incorporated with legal person status, the FIVCIE is required to have at least US$5 million as the registered capital, and there must be, among other things, at least one qualified "mandatory investor" contributing no less than thirty percent of the total registered capital. If a FIVCIE is set up as an entity with "non-legal-person," US$10 million is required as the minimum registered capital.

Id.

All registered capital must be contributed within five years. "FIVCIE must have at least one mandatory investor undertaking to contribute no less than one percent of the registered capital and assuming joint liabilities with FIVCIE." *Id.*

[49]

> Broadly speaking, fund sponsors or mangers currently have three legal options in structuring an onshore RMB Fund and its management enterprise[:] set up a [foreign-invested venture capital investment enterprise (FIVCIE)] and/or FIVCIE management enterprises, a foreign invested enterprise (FIE) or partnership with onshore FIE as [general partner] and its management enterprise, [or] a [Foreign Invested Limited Partner] without onshore [general partner] and its management enterprise [in China].

Id.

[50] The State Council is the highest organ of state power and administration. The State Council is composed of the Premier, Vice-Premiers, State Councilors, Ministers in charge of ministries, Ministers in charge of commissions, the Auditor-General, and the Secretary-General.

[51] Measures for the Administration of the Establishment of Partnership Business by Foreign Enterprises or Individuals in China (promulgated by the St. Council of the PRC, Nov. 25, 2009, effective March 1, 2010), *available at* http://english.mofcom.gov .cn/aarticle/policyrelease/announcement/200912/20091206704070.html.

Foreign-Invested Partnerships (FIP Registration Rules)[52] in furtherance of the FIP Measures. Both came into effect on March 1, 2010.

The new rules, though lacking the detail needed for widespread acceptance by U.S. investors,[53] "open the door for foreign investors to invest directly in partnership entities in China through new investment vehicles called "foreign invested partnerships" (FIPs)."[54] The significance of the new legislation is that "neither the FIVCIE rules, nor the various local rules expressly granted authorization for foreign sponsors to set up limited liability partnerships (LLP), . . . the structure of choice for equity funds outside [China]. In fact, until the 2007 amendment to the PRC's Partnership Law, there was not even a legally recognized LLP concept under the Chinese legal regime[,] only general partnerships were permitted."[55]

> Although the 2007 amendment to the partnership law represented a significant advance by officially recognizing the form of the LLP, it still did not contemplate the establishment of any partnership in China by foreign entities or individuals. The 2007 amendments did, however, expressly authorize the State Council to issue special administrative rules applicable to FIPs.[56]

The FIP Measures therefore represent a significant turning point in China's willingness to set a different point of balance between the risks of allowing private equity investment and the risk of losing some control over its economy.

c. *India*

According to the World Bank, India is one of the forty most improved economies in the world over the past five years.[57] In this time, India focused on easing business rules and making significant changes to its regulations in an attempt to ease operational challenges faced by businesses. Since 2005, India has implemented eighteen business regulation reforms in seven areas, with a particular focus on technology, "implementing electronic business registration, electronic filing for taxes, an electronic collateral registry, and online submission of customs forms and payments."[58] Despite the improvements, the World Bank ranks India at 132nd out of 185 countries in the ease of starting a business,[59] but it is clear that India is

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[52] Administrative Rules for Registration of Foreign-Invested Partnerships (promulgated by the St. Admin. of Indus. & Commerce, Jan. 29, 2010, effective March 1, 2010) (China).

[53] One of the largest uncertainties remaining is how the new rules will be applied to foreign invested partnerships that are established for private equity investment purposes, and whether the new measures will in fact permit foreign private equity sponsors to structure their onshore private equity investment funds as FIPs.

[54] John Fadley & Hong Zhang, *Recent Regulations on Foreign Investments in China's RMB Fund Vehicles*, WEIL, GOTSHAL & MANGES 1 (May 2010), http://www.weil.com/Recent-Regulations-on-Foreign-Investments-in-Chinas-RMB-Fund-Vehicles.

[55] *Id.* at 2.

[56] *Id.*

[57] *Latin America: Climate for Doing Business Improving in Most of the Region*, THE WORLD BANK GROUP (Nov. 4, 2010) http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22754989~menuPK:34460~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[58] *Doing Business 2011: Making a Difference for Entrepreneurs*, THE WORLD BANK GROUP (Nov. 4, 2010), http://www.doingbusiness.org/reports/global-reports/doing-business-2011/.

[59] *Doing Business 2012*, supra note 17.

continuously making changes necessary to reduce barriers to entry and enable it to compete with the other emerging markets around the world.

Over the past few years, India implemented numerous liberalization and economic reform programs aimed at promoting domestic growth. Industrial policy reforms focused on removing most industrial licensing requirements and restrictions on investments and expansion, in addition to granting access to foreign technology and foreign direct investment.[60] India still chooses, however, to closely regulate foreign investors and does so through sector and industry limitations. In those sectors where investment is desperately needed, foreign investments of up to one hundred percent are permitted. These sectors include transportation infrastructure, electricity, and pharmaceuticals. In contrast, India limits foreign investment to as low as twenty-six percent in other sectors such as insurance, defense, and television news channels.[61]

India's legal system is comprised of a mix of federal and state laws, but most laws that govern venture capital investment in India are federal laws, with the primary regulators being the Foreign Investment Promotion Board (FIPB),[62] the Reserve Bank of India (RBI)[63] and the Securities and Exchange Board of India (SEBI).[64] Foreign investment in India is generally governed by either the foreign direct investment regime or the venture capital investment regime. The venture capital regime imposes relaxed regulatory standards and is therefore preferred by foreign investors.

India defines a foreign venture capital investor (FVCI) as an investor incorporated or established outside India which applies to the RBI for permission to invest in an Indian venture capital undertaking (IVCU)[65] or in an Indian venture capital fund (IVCF)[66] registered

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[60] Adil K. Kotwal & Rajiv G. Shah, *Business Operations in India*, 966-3d TAX MGMT. A-1 (Bureau of Nat'l Affiars 2004).

[61] In February 2009, India's Ministry of Commerce and Industry amended certain guidelines for computing foreign direct investment in India by issuing Press Notes 2, 3 and 4 (2009). *See, e.g.* Press Release, Department of Commerce, Government of India, Revision in FDI Regulations, http://www.commerce.nic.in/pressrelease_detail.asp?id=2389. While these amendments significantly increased the ability for foreign direct investment in India through step-down joint ventures, they have been faced with fierce criticism from, among others, the Reserve Bank of India and the Indian Finance Ministry's Department of Economic Affairs, which have raised objections to these Press Notes on the basis that they raise the possibility of "circumventing the definition of ownership and control by downstream investments" in sectors in which FDI is prohibited, government approval is required or sectoral caps are in place. Arun Kumar, *Spotlight on Press Notes*, BUS. STANDARD (May 18, 2009, 01:44 AM), http://www.business-standard.com/article/economy-policy/spotlight-on-press-notes-109051800087_1.html.

[62] The Foreign Investment Promotion Board is a body under the Department of Economic Affair in the Ministry of Finance. The main function of the FIPB is to consider and recommend certain restricted Foreign Direct Investments.

[63] The RBI is the Central Bank of the country and performs a number of functions such as formulating and implementing monetary policy, prescribing the broad parameters of banking operations within which the banking and financial systems are to function, overlooking and regulating the foreign exchange market, and issuing currency.

[64] The SEBI is the Indian counterpart to the Securities Exchange Commission in the U.S. and its main function is that of regulating and developing the securities market in India and of protecting the interests of investors in securities.

[65] IVCU is defined as a company incorporated in India whose shares are not listed on a recognized stock exchange in India and that is not engaged in an activity specified in the negative list issued by the SEBI.

[66] IVCF is defined as a fund established in the form of a trust or a company, including a body corporate, and registered under the Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996 that has

with the SEBI. Although foreign private equity investors and offshore venture capital funds can invest in India directly under the Foreign Direct Investment Regime (the FDI regime), the SEBI grants certain benefits to those investors who register themselves under the FVCI Regulations. The streamlined regulatory framework attracts foreign investors while allowing India to maintain control over issues such as investor qualifications and debt to equity ratios.[67]

Once approved, an FVCI may purchase equity, equity-linked instruments, debt, debt instruments or debentures through an initial public offering, private placement, or in units of schemes or funds set up by an IVCF.[68] In order to support its monetary policy and monitor the supply of foreign and domestic currencies, Indian law requires that the amount of consideration for investment in IVCFs/IVCUs be paid out of inward remittance from abroad through normal banking channels or out of funds held in an account maintained with the designated branch of an authorized dealer in India.

India restricts the manner in which an FVCI may use its funds,[69] but an FVCI is permitted to use all of its funds to invest in a domestic venture capital fund, which can in turn, invest up to two-thirds of its funds in unlisted companies. While the FDI Scheme does not apply to FVCIs, if an investment by an FVCI in a listed company or in a special purpose vehicle does not fall under the definition of a VCU or a VCF, the investment would have to be reviewed under the FDI regime.[70] Should this occur, the investment would be subject to

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a dedicated pool of capital raised in a manner specified under the Regulations and that invests in IVCUs in accordance with the Regulations.

[67] *See* Sec. & Exch. Bd. of India (Foreign Venture Capital Investors) Regs., 2000, Cha. II, ¶ 4, http://www.sebi.gov.in/acts/fvcregu.pdf. When considering an FVCI application, the SEBI reviews the applicant's track record, professional competence, financial soundness, experience, general reputation, and whether the applicant is regulated by an appropriate foreign regulatory authority or is an income tax payer, amongst other factors. *Id.* After reviewing the application, the SEBI forwards its approval to the RBI, which then grants its approval.

[68] *See id.* at Cha. III, ¶ 11.

[69] *See id.* All investments to be made by foreign venture capital investors are subject to the following conditions: (i) the investor must disclose its investment strategy to the SEBI; (ii) an FVCI can invest all of its funds in a domestic VCF; (iii) an FCVI would have to make its investments in the following manner: (a) At least 66.67% (two thirds) of its funds would have to be invested in unlisted equity shares or equity linked instruments of VCUs, (b) The remaining 33.33% could be invested as follows: Subscription in the initial public offering of a VCU whose shares are proposed to be listed; in debt or debt-related securities of a VCU in which the FVCI has already made an investment by way of equity; by way of a preferential allotment of equity shares of a listed company, subject to a lock-up period of one year; investment by subscription or purchase in the equity shares or equity-linked securities of a financially weak listed company or industrial listed company; or investment by subscription or purchase in an SPV. *Id.*

[70] FDI in India may follow either the "automatic route" or the "government route". Under the automatic route, for all activities/sectors specified in the Government of India issued Consolidated FDI Policy, FDI is allowed without need for the prior approval of either the Government of India or the Reserve Bank of India. For sectors/activities not covered under the automatic route, prior approval of the Government is required. Proposals for such approval are considered by the Foreign Investment Promotion Board ("FIPB"), Department of Economic Affairs of the Ministry of Finance ("MOF"), and the Cabinet Committee on Economic Affairs ("CCEA"). The MOF, which is in charge of FIPB, considers the recommendations of the FIPB on proposals with total foreign equity inflow of Rupees 1200 crores and below, whereas the recommendations of FIPB on proposals with total foreign equity inflow of more than Rupees 1200 crores are placed before the CCEA. The CCEA may additionally consider such proposals as referred to it by the FIPB or the MOF. *See Consolidated FDI Policy*, Dep't of Indus. Policy & Promotion, Ministry of Commerce & Indus., Gov't of India, http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (last visited Jul. 16, 2013); Foreign Inv. Promotion Bd., Dep't of Econ. Affairs, Ministry of Fin., Gov't of India, http://www.fipbindia.com/ (last visited

the sectoral caps and other limitations on investment that apply under the FDI scheme, unless special permission is obtained from the RBI for investing beyond the sectoral caps or waiving any of the other limitations under the FDI regime. The creation of the FVCI was a direct response to the finding of a 1999 committee hearing headed by K.B. Chandrasekhar, an Indian entrepreneur from Silicon Valley, who determined that private equity and venture capital funds avoided India because of their unfriendly policy and regulatory framework.[71]

> While registration under the FVCI Regulations is not compulsory, the Indian Government has sought to [encourage] registration by conferring certain benefits upon those institutions that have registered, including:
>
> 1. Other than a registered FVCI investment, all other non-resident investments are subject to a condition that subsequent investments require the Government's approval, where the non-resident has an existing joint venture, technology transfer agreement or trademark agreement in the same field in India.
>
> 2. FVCIs are exempt from the usual practice of valuing the shares on the basis of their listed price or on the basis of their net asset value (in the case of an unlisted company) in any investment or M&A transaction. This [is an advantage] when an FVCI is looking to exit its investment from an unlisted company. . . [I]nstead of paying a price based on the net asset value of the investee company, it could pay the negotiated price.
>
> 3. The provisions of the SEBI's Substantial Acquisitions of Shares and Takeover Regulations . . . do not apply to shares transferred from an FVCI to the promoters of the company or to the company itself, if effected in accordance with a pre-existing agreement between the FVCI and the promoters of the company. This ensures that in the event the promoters decide to buy back the shares from the FVCI, they will not be required to comply with the public offering requirements, . . . which would otherwise require that an offer be made to the other shareholders of the company for up to twenty percent (20%) of the outstanding share capital.
>
> 4. The shares acquired by a FVCI in an unlisted company are not subject to the one year lock-up period upon the Initial Public Offering ('IPO') of the shares of the company, [allowing the FVCI] to exit its

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Jul. 16, 2013); Frequently Asked Questions regarding foreign investments in India, Reserve Bank of India,http://rbi.org.in/scripts/FAQView.aspx?Id=26 (last updated Jun. 26, 2013).

[71] *See* Report of K.B. Chandrasekhar, Committee on Venture Capital, SEC. & EXCH. BD. OF INDIA 2 (1999), *available at* http://www.sebi.gov.in/commreport/venture.pdf.

> investment . . . after listing . . . without waiting for the completion of the lock-up period.[72]

All told, the benefits conferred under the venture capital regime incentivize foreign investors to structure transactions to conform to its regulations and choose it as the investment vehicle private equity investments.

In sum, Brazil, China and India have each devised complex systems to control foreign investment in critical sectors and to protect domestic investors, while seeking, simultaneously to stimulate rather than stymie foreign investment.

2. National Monetary Policy

Concerned about the prospects of massive outflows of funds which de-stabilize their monetary policy, host countries impose stringent control on foreign investors and outflows. The sudden or excessive withdrawal of funds from emerging economies could not only cause instability in the local economic market but could also impact the value of the country's currency around the world.

a. Brazil

"The [R]eal (R$) has been Brazil's currency since July 1994."[73] Historically, Brazil has experienced high inflation rates, which adds to the risk of investing in Brazil. "In an attempt to control inflation, the Executive Branch launched an Economic Plan by means of Law No. 8880, of May 27, 1994. Since its introduction, the plan has been effective in maintaining inflation at low levels, contributing to the stability of the economy as a whole."[74] The plan did not introduce a price control system, but the law "grants powers to the Executive Branch (through the Ministry of Finance) to request justifying information when there is unwarranted distortion in the prices of sectors of high economic concentration or charges for public services in general."[75]

Through adoption of the Economic Plan, Brazil made exchange rates for selling and purchasing foreign currencies freely negotiable, although it limited operations in foreign currency which may be conducted only through financial institutions authorized to deal in currency exchange.[76]

Brazil allows individuals and legal entities residing or domiciled outside Brazil to open and operate bank accounts in Brazil (in Real), "with banks authorized to operate in currency exchange."[77] Brazil does not generally permit accounts in foreign currency, "with the exception of certain accounts such as those held by companies involved in energy-related projects, by insurance companies, and by international freight companies."[78] The Central

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[72] Sajai Singh, *Venture Capital Investment in the Indian Market*, A.B.A. BUS. L. SEC. ENEWSLETTER 5-6 (2006), http://www.abanet.org/buslaw/committees/CL930000pub/newsletter/200603/singh.pdf.
[73] Syllas Tozzini, Josè Luis de Salles Freire & Renato Berger, *Business Operations in Brazil*, 954-3d TAX MGMT. A-3 (Bureau of Nat'l Affairs 2007).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

Bank of Brazil supervises remittance of funds outside Brazil which is generally freely authorized.[79] "License fees and royalties may be paid abroad only on approval of the agreement by the National Institute of Industrial Property, or *Instituto Nacional da Propriedade Industrial* (INPI), and by the Central Bank of Brazil."[80]

> The Brazilian National Monetary Council approved on March 4, 2005, new regulations governing the Brazilian foreign exchange market.
>
> The rules, which aim mainly at simplifying the maze of foreign exchange regulations that prevailed in Brazil, created a new and unified Foreign Exchange Market to replace the existing Commercial Rate Foreign Exchange Market and the Floating Rate Foreign Exchange Market.
>
> Since then, all foreign exchange transactions are made through the Foreign Exchange Market by means of foreign exchange contracts signed with local institutions authorized to deal in foreign exchange. . . .
>
> [In] the Foreign Exchange Market, Brazilian legal entities and individuals may purchase and sell foreign currency in transactions of any nature without any amount limitations, subject to the legality of the transaction and in accordance with the economic basis of the transactions and the obligations set forth in the respective documentation.[81]

b. China

The People's Republic of China and State Administration of Foreign Exchange (SAFE) "regulate the flow of foreign exchange in and out of the country and set exchange rates through a 'managed float' system."[82]

> To open and maintain foreign exchange accounts, foreign-invested enterprises must apply to China's [SAFE]. SAFE determines the amount of foreign exchange the firm needs. Enterprises authorized to conduct current account transactions can retain foreign exchange equal to [fifty] percent of export earnings. Deposits above the limit SAFE sets must be converted to local currency.
>
> Foreign exchange transactions on China's capital account require a case-by-case review, and approvals are tightly regulated. During the first part of 2009, SAFE reportedly refused to allow some American companies to repatriate their earnings[, but] [t]hese restrictions eased in the second half of the year. Several foreign firms have [experienced] difficulties in

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[79] *Id.*

[80] *Id.*

[81] *Id.* "Implementing Regulations of the Foreign Exchange Market were established by the Central Bank by means of Circular 3280, enacted on March 9, 2005, as adjusted by subsequent Central Bank Circulars enacted from time to time." *Id.*

[82] U.S. DEP'T OF STATE, DOING BUSINESS IN CHINA 2010, COUNTRY COMMERCIAL GUIDE FOR U.S. COS. 125 (2010), http://www.mwtc.org/uploadedFiles/Doing%20Business%20in%20China%202010.pdf. *See* Owen D. Nee, Jr., Esq., *Business Operations in the People's Republic of China,* 957-3d TAX MGMT. A-12-13 (Bureau of Nat'l Affairs 2008).

> receiving government approval to bring in foreign capital to expand their businesses.
>
> The Chinese government registers all commercial foreign debt, and limits foreign firms' accumulated medium and long term debt from abroad to the difference between total investment and registered capital. Foreign firms must report their foreign exchange balance twice per year. [83]

Since October 2008, companies must report to SAFE any overseas payments with a term over 90 days no matter the amount, or they are not permitted to arrange the overseas payment.[84] "The accumulated reported overpayment amount in one calendar year can't exceed [ten] percent of total importation amount of the last year."[85]

c. *India*

India's banking system is controlled by the Reserve Bank of India. It is the sole authority for issuing bank notes and is the supervisory body responsible for banking operations in India. "The functions of the Reserve Bank are divided into two separate departments: (i) the issue department, which looks after the issue of currency; and (ii) the banking department, which regulates and supervises Indian banking."[86] The Reserve Bank of India (RBI) also sets India's exchange-control policy and administers foreign exchange regulations in consultation with the government. India's foreign exchange control regime is governed by the FEMA (Foreign Exchange Management Act), enacted with the objective of facilitating external trade and payments, and for promoting the orderly development and maintenance of foreign exchange market in India, and to give effect to the liberalization announced in the economic policies.

The kinds of capital controls imposed by Brazil, China and India adversely affect their attractiveness as target areas for private equity. A country's monetary policy can have a huge impact on a private equity fund's success. The ability to freely transfer foreign currencies is critical to the investment strategies of private equity funds. In addition to being able to withdraw funds from a foreign country, private equity investors are concerned about the volatility of foreign currencies, as it may impact key operational decisions ranging from the purchase price of target companies to the currency denominations for which the contract payment terms call. Emerging economies must balance foreign investors' legitimate concerns in this area against their equally legitimate need to prevent the outflow of excessive funds from the country by way of huge profits made by the foreign companies.

3. Antitrust Regulations: Protecting Local Business

Protecting small and developing local industries from the competition of large well established foreign businesses is a key concern for developing countries. In an attempt to protect local consumers and small businesses, antitrust laws often prohibit monopolies, and unfair business practices. The antitrust and merger regulations of the countries in which they

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[83] *Id.* at 102.
[84] *Id.* at 125.
[85] *Id.*
[86] Kotwal & Shah, *supra* note 60, at A-1.

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contemplate investing are an important consideration for private equity investors. Antitrust regulations may limit the ability of a private equity fund to expand a target company's business, and may limit potential acquirers if the fund's exit strategy is sale to a strategic partner.

a. Brazil

The Brazilian Antitrust Act, Law No. 8.884 of 1994, is the main statute governing competition issues in Brazil. The governmental agency responsible for the administration of the Act is the Administrative Council for Economic Defense (CADE).[87] CADE is assisted by two secretariats: the Secretariat of Economic Law (SDE), reporting to the Ministry of Justice, and the Secretariat of Economic Monitoring (SEAE), reporting to the Ministry of Finance.[88]

The Act applies to all individuals and legal entities that carry out business within Brazilian territory and also to those abroad, to the extent that their conduct may produce "effects" in the Brazilian market and provided that any of the two thresholds contained in the Competition Law are verified.[89] "Effects," for purposes of Brazilian merger notification, are defined very broadly to include deals in which any of the parties has revenues originating in Brazil, even if only through exports and in very small amounts. The legal thresholds are either a combined market share of twenty percent or a turnover in Brazil by any of the parties in excess of R$400 million.[90] Any transaction which meets at least one of the two thresholds must be filed with the antitrust authorities.[91]

Even if the transaction restrains free competition, CADE may approve it if the action is taken in the public interest or otherwise required for the benefit of the Brazilian economy, provided no damages are caused to end-consumers or users.

b. China

China's first anti-monopoly law was promulgated on August 30, 2007 and became effective on August 1, 2008.[92] In drafting the legislation, the Chinese government considered international and global norms, and solicited comments and feedback from the international

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[87] CADE is a federal independent agency linked to the Ministry of Justice.

[88] Together these three agencies constitute the Brazilian System of Competition Defense ("SBDC").

[89] Flesch & da Silva Prado, *supra* note 26.

[90] José Antonio Batista De Moura Ziebarth, *The New Competition Law in Brazil: Challenges Ahead*, COMPETITION POL'Y INT'L, INC. 4 (Nov. 2011), *available at* http://www.academia.edu/1515230/The_New_Competition_Law_in_Brazil_Challenges_Ahead.

[91] The parties to the transaction must file the relevant documentation together with a questionnaire that includes information about their activities, competitors, customers, and suppliers contact details and market information. The filing must be made prior to the transaction, and CADE must make a final decision within four months of the filing. Lei No. 8884, de 11 Junho de 1994, Diário Oficial Uniao [D.O.U.]: art. 54, ¶ 6, de 13.12.1994 (Braz.). However, this period of time may be suspended if the antitrust agencies need additional questions answered. (CADE may take one of the following decisions (majority vote): (i) clear the transaction without restrictions, (ii) clear the transaction under certain conditions, or (iii) reject the transaction.) *See generally id.*

[92] Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?*, 3 CHINA L. REP. (ABA Section of Int'l Law: China Comm), Sept. 2007, at 1, http://meetings.abanet.org/webupload/comm upload/IC860000/newsletterpubs/CLRsep2007.pdf.

community.[93] The purpose of the new law, as outlined in Article 1, includes preventing and prohibiting monopolistic conduct, protecting fair market competition, improving the efficiency of economic operations, safeguarding consumer and public interests, and promoting the healthy development of the "socialist market" economy.[94] It is clear from the language of the legislation that the new provisions apply not only to domestic entities, but extend to foreign enterprises if their activities impact economic activities within China.[95]

Under the new law, businesses may voluntarily, and through fair competition, combine to expand scale and increase their competitiveness.[96] The anti-monopoly law established a pre-merger notification system, requiring transactions above a size threshold set by the State Council, to notify MOFCOM and undergo a pre-closing waiting period.[97]

During its review, the Ministry of Finance (MOFCOM) considers factors including the parties' market shares, market concentration, and the impact of the transaction on market access, technological advance, consumers, other interested businesses, and national economic development.[98] Transactions that will or may eliminate or restrict competition will be prohibited. If, however, the pre-competitive effects of the transaction outweigh its adverse effects, or if the transaction benefits the public interest, MOFCOM may decide not to prohibit the transaction.[99]

c. *India*

The Competition Act of 2002 is India's anti-monopoly law.[100] The new legislation shifted the focus of Indian law away from curbing monopolies, and instead focused on promoting and sustaining competition and ensuring freedom of trade.[101] The Competition Act addresses abuse of dominance, cartels, and predatory pricing.

The Competition Commission of India (CCI) was established by the central government of India, and is the body responsible for eliminating "practices having an adverse

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[93] *See id.* (highlighting that parts of China's Anti-Monopoly Law is based on laws of western countries and that China considered international feedback to its drafts).

[94] *Id.* at 4.

[95] Anti-Monopoly Law (promulgated by the Standing Comm. of the 10th Nat'l People's Cong, Aug. 30, 2007, effective Aug. 1, 2008), art. 2 (China), http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf (explicitly stating that the new law is applicable not only to "monopolistic conduct in economic activities within the People's Republic of China," but also to "conducts outside of the territory of the People's Republic of China if they eliminate or have restrictive effect" on domestic market competition in China) [hereinafter China Anti-Monopoly Law].

[96] Jones, *supra* note 92, at 4-5.

[97] *Id.* at 8. Transactions within a corporate family are exempt. The law established a three-phase review period of thirty, ninety, and sixty days. China Anti-Monopoly Law, *supra* note 95, at art. 25-26. If MOFCOM does not act by the end of a phase, the transaction is deemed approved. China Anti-Monopoly Law, *supra* note 95, at art. 25-26.The waiting period begins when MOFCOM accepts a notification. China Anti-Monopoly Law, *supra* note 95, at art. 25. Consummation of a transaction in violation of the regulations may result in a divestiture order, a fine of up to RMB $500,000 or other orders. China Anti-Monopoly Law, *supra* note 95, at cha. VII.

[98] Jones, *supra* note 92, at 9.

[99] *Id.*

[100] The Competition Act, 2002, No. 12 of 2003, INDIA CODE, *amended by* the Competition (Amendment) Act, 2007 (India), http://www.cci.gov.in/images/media/competition_act/act2002.pdf.

[101] *See* Shri Yashwant Sinha, Minister of Finance, Gov't of India, Speech on Budget 1999-2000 (Feb. 27, 1999) ¶ 24 (indicating a need to shift away from impeding monopolies in order to focus on promoting competition), *available at* http://indiabudget.nic.in/bspeech/bs19992000.pdf.

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effect on competition, promot[ing] and sustain[ing] competition, protect[ing] the interests of consumers, and ensur[ing] freedom of trade carried on by other participants, in markets in India."[102] Similar to China's new legislations, CCI can review anti-competitive behavior, which originates outside of India but has an appreciable adverse effect on competition in the relevant market in India.[103]

CCI has authority to investigate alleged violations on its own, on receipt of information from any person or consumer, or by a reference made by the Government.[104] CCI has the power to levy penalties for violations of its orders, making of false statements, or refusal to furnish material information.[105] Though the CCI was set up in 2003, the substantive provisions of the Competition Act relating to anti-competitive agreements and abuse of dominance did not become effective until May 2009.

The Competition Act renders void any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services, which causes, or is likely to cause, an appreciable adverse effect on competition within India, prohibits abuse of dominant positions which has an appreciable adverse effect on competition[106] and seeks to regulate combinations which may have an adverse effect on competition in India.[107]

Unlike the prior competition law, the 2009 Act does not condemn or contain a blanket ban on achieving a dominant position.[108] Instead, it focuses on the effect the dominant position has on competition in India.[109] If, after inquiry, the CCI finds that an agreement or action of an enterprise in a dominant position violates the Act, it may impose a penalty, or order the cessation of the agreement or abuse of a dominant position.[110]

The Competition Act also seeks to regulate combinations which may have an adverse effect on competition in India.[111] Combinations include mergers, amalgamations and acquisition of control, shares, voting rights, or assets.[112] Under current regulations, every proposed combination must be notified to the CCI.[113] The notice is required to be given

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[102] The Competition Act, 2002, §18.

[103] Kotwal & Shah, *supra* note 60, at A-20.

[104] *Id.* at A-21.

[105] The Competition Act, 2002, §42.

[106] Kotwal & Shah, *supra* note 60, at A-20-21.

[107] *See* The Competition Act, 2002, § 5.

[108] Under the predecessor to the Competition Law, the Monopolies and Restrictive Trade Practices Act (MRTP), defined dominant position was in terms of market share only, while under the Competition Act, dominant position also implies the ability of an enterprise to "(i) operate independently of competitive forces prevailing in the relevant market, or (ii) affect its competitors or consumers or the relevant market in its favor." The Competition Act, 2002, § 4. The relevant market may be determined with reference to the relevant geographic or product market or both. *Id.* at § 2.

[109] The Competition Act identifies a variety of factors that should be considered in determining dominance. While market share remains an important factor under the new law, other factors such as size and resources of the enterprise and the competitors, economic power of the enterprise including commercial advantages over competitors, dependence of consumers, entry barriers, market structure, etc. are also to be considered. The Competition Act, 2002, § 19.

[110] *See id.* § 28.

[111] *See id.* § 29.

[112] *See id.* § 5.

[113] *See* Procedure in Regard to the Transaction of Business Relating to Combinations (as Amended up to 14 April, 2013) Regulations, 2011 (India), § 5(1), http://www.cci.gov.in/images/media/Regulations/CCI-Combination %20Regulations%20asat%20040413.pdf.

within thirty days of execution of any agreement or other document for acquisition.[114] A combination cannot take effect until 90 days from the date of publication of the notice required.[115]

In sum, host countries aim to enact laws that protect local businesses, while stopping short of stifling growth and innovation through unduly strict antitrust regulations.

4. Industrial Property Rights: Protecting Local Innovation

Private equity funds frequently invest in intellectual property-heavy sectors. Private equity funds are interested in the duration of property protection, costs of obtaining protection, and the strength of regulatory oversight so that they can accurately quantify the costs and inherent risks associated with investing in each country. At the same time, developing countries need to promote local innovation, and protect local entrepreneurs from unknowingly ceding protectable rights to foreign investors for less than fair consideration.

a. Brazil

Industrial property rights in Brazil cover trade and service marks, certification and collective marks, patents of invention and utility model patents, technology transfer, industrial designs, franchising, technical and scientific services, protection of unfair competition, and other rights following the definition of "industrial property" introduced by the Paris Convention.[116]

Industrial property is mainly regulated by the Brazilian Industrial Property Law (Law No. 9279 of 1996),[117] the Paris Convention, and by several norms issued by the National Institute of Industrial Property (*Instituto Nacional de Propriedade Industrial* - INPI),[118] and the Central Bank of Brazil. Brazil is a signatory to the Paris Convention (protection of patents and trademarks) and the Berne Convention (protection of copyrights).[119] Brazil also signed the Universal Convention on Copyrights,[120] which protects works of literature. Article 5 of the Federal Constitution guarantees the right to private property,[121] and the Civil Code guarantees its use and enjoyment.[122]

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[114] *Id.* § 8(3).

[115] COMPETITION COMM'N OF INDIA, COMPETITION ACT 2002: PROVISIONS RELATING TO COMBINATIONS, 5 (2012), *available at* http://www.cci.gov.in/images/media/Advocacy/Combinations2012.pdf.The date of publication is 30 days after the date of notice under § 29 of the Competition Act. *See* The Competition Act, 2002, § 29.

[116] Paris Convention for the Protection of Industrial Property, art. 1, Mar. 20, 1883, 828 U.N.T.S. 305.

[117] *See* Lei da Propriedade Industrial No. 9.279/96, de 14 de Maio de 1996 (Braz.), http://www.wipo .int/wipolex/ en/text.jsp?file_id=125397 (consolidating the various rules governing the subject and introducing changes to the current protection of industrial property rights in Brazil).

[118] The INPI is Brazil's Federal agency in charge of regulating and registering patents and trademarks, as well as of approving licensing agreements and any other agreements involving industrial property rights.

[119] Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, 1161 U.N.T.S. 31.

[120] Universal Copyright Convention, Sept. 6, 1952, U.N.T.S. 2937 (listing Brazil as one of the signatory parties).

[121] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

[122] *See* Lei No. 10.406/02, de 10 de Janeiro de 2002 (Braz.).

Brazil requires trademarks to be registered to guarantee the protection of ownership rights. The protection of trademarks in Brazil is obtained by registering the trademark with the INPI.[123] In addition, the owner must use the trademark, as lack of use for an uninterrupted five-year period will cause the registration to lapse.[124] The owner may appeal against the cancellation of a trademark within sixty days of receiving notice.[125] A registration is valid for ten years and is renewable for successive ten-year periods.[126] Trademarks may be the subject of a licensing agreement if they are duly registered or in the process of registration with the INPI in the name of a licensor.[127]

> Trade names in Brazil are not governed by the Industrial Property Law, and therefore are not subject to registration with the INPI. Trade names are regulated by the Paris Convention, which grants protection to the owner of a trade name in all signatory countries, without filing or registration obligation, as well as by specific regulations issued by the National Department of Commerce Registry (*Departamento Nacional do Registro do Comércio)* which require the registration of trade names with the Commercial Registry.[128]

Registration at the Commercial Registry grants protection at state level.[129] If protection is required for the entire country, application for registration in each state will be required.[130]

All license contracts must be registered at the INPI.[131] Even though franchising agreements are not subject to the same statutory rules as trademarks, patents and transfer of technology, these contracts are also subject to review and approval by the INPI.[132]

Patent protection is obtained by registering the patent with the INPI. The registration is valid for a period of twenty years if related to inventions, or fifteen years if related to utility models, both as of the filing date of the patent.[133]

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[123] Lei da Propriedade Industrial, *supra* note 117, arts. 155-157. *See also* U.S. COMMERCIAL SERV., U.S. DEP'T OF COMMERCE, DOING BUSINESS IN BRAZIL: 2011 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 67 (2011), http://export.gov/brazil/static/CC_BR_CCG_FullDocument_Latest_eg_br_034878.pdf. Law 9279, however, introduced an exception to this rule: for well-known trademarks, including service marks. Special protection is granted for well-known trademarks, regardless of whether or not they have been registered in Brazil. Lei da Propriedade Industrial, art. 126 (Braz.). This provision is aimed at protecting from piracy holders of well-known trademarks that are registered outside of Brazil, but not in Brazil.

[124] Lei da Propriedade Industrial, *supra* note 117, art. 126.

[125] *Id.* at art. 143II(2).

[126] *Id.* at art. 133.

[127] *Id.* at art. 139.

[128] Isabel C. Franco, *Trademarks Brazil* (June 1999), http://apps.americanbar.org/intlaw/committees/regional_comparative/latin_america_caribbean/june1999.html (response to the question "What Steps are Required to Register a Trademark or Tradename Locally?").

[129] Andrew Bellingall, *Intellectual Property – Brazil: The Hidden Threat of Trade Names*, INT'L L. OFFICE (Feb. 4, 2008), www.internationallawoffice.com/newsletters/detail.aspx?g=c9346071-9b97-4d5f-a021-f483d75b6656.

[130] *See id.*

[131] Lei da Propriedade Industrial, *supra* note 117, art. 140.

[132] Luiz Henrique do Amaral, et. al., *Guidelines for the Recordal of Franchise Agreements in Brazil*, BRAZILIAN FRANCHISE ASS'N 5 (Jan. 2011), *available at* http://www.franchise.org/uploadedFiles/Guidelines FranchiseAgree ments_January%202011.pdf.

b. China

The Patent Administration Department, which is controlled by the State Council, administers the registration of patents. Registration is governed on a priority basis. Chinese patent law encompasses not only patents for inventions, but also for unique utility models and designs.[134] Patents may not be granted for scientific discoveries, methods of diagnosing or treating diseases, rules and methods for thought processes, animal and plant varieties, and substances obtained by means of nuclear transformation.[135] Patents protect inventions for a term of twenty years from the date of filing the patent application.[136] Patents protect utility models and designs for a term of ten years.[137]

> In relation to the Patent Law, the Chinese government has placed a clear emphasis on the need for greater Chinese innovation, [implementing measures] such as the . . . requirement whereby any patents developed in China (whether partly or otherwise) need to be filed with the [State Intellectual Property Office], before any applications related to the same patent are made overseas.[138]

The Trademark Office of China is responsible for the registration and administration of trademarks.[139] The right of priority governs the registration of trademarks. Registered trademarks include trademarks, service marks, collective marks, and certification marks that have been approved and registered with the Trademark Office.[140] Trademarks must be so distinctive as to be distinguishable.[141] Marks do not qualify for registration if they are generic in nature, lack distinctive features, or have direct reference to the physical characteristics of the goods the trademark is representing.[142] A registered trademark is valid for a term of ten years from the date the registration is approved.[143] A registration may be renewed for an additional ten-year period by filing a renewal application within six months of the trademark's expiration.[144] If registration of the same trademark has been filed in a foreign country, documents concerning its examination overseas must be submitted when applying for registration in China.[145]

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133 *Id.* at art. 40.

134 Lei Fang, *China Patent System and Its Enforcement*, SUTHERLAND, ASBILL & BRENNAN, LLP 2 (2005), www.sutherland.com/files/Publication/.../Chinese%20Patent.doc.

135 *Id.* at 3.

136 *Id.* at 7.

137 *Id.*

138 Lui Yang, *BCCC Cautiously Optimistic Over Impact on FDI of New Anti-Monopoly Law*, CHINA IP (reprinting portions of an interview with Raymond Moroney, Consultant to the British Chamber of Commerce on Nov. 17, 2004), http://www.chinaipmagazine.com/en/journal-show.asp?id=401 (last visited June 12, 2013).

139 Trademark Law of the People's Republic of China, art. 2 (promulgated by the Nat'l People's Cong., Aug. 23, 1982, effective March 1, 1983, revised Oct. 27, 2001), http://www.wipo.int/wipolex/en/text.jsp?file_id =131395.

140 *Id.* at art. 3.

141 *Id.* at art. 9.

142 *Id.* at art. 11.

143 *Id.* at art. 37.

144 *Id.* at art. 38.

145 *See id.* at art. 24.

China is a signatory of the WTO, Berne Convention, Copyright Treaty, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.[146] Copyright of any individual or entity of another member country is protected in China.[147] Ownership of the copyright of a work is granted to Chinese nationals upon completion of the work, no registration is required.[148] For foreign copyright owners to qualify for protection, they must meet one of the following requirements: their works must first be published in China prior to publication in other jurisdictions, or the author must be a national or a resident of a jurisdiction, which is in accordance with an international treaty or an agreement, of which both countries are the signatories, or where a foreign work is first published in a member country of a treaty to which China is also a member.[149] Generally, the term of protection of publication rights and other copyrights is the life of the author plus fifty years.[150]

Despite the protections afforded by China's intellectual property laws, in 2007 the United States brought a case before the World Trade Organization on "measures affecting the protection and enforcement of intellectual property rights" against China, accusing them of "lax enforcement of IP rights and therefore failure to comply with several laws under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement."[151]

In January 2009, a panel released its decision and "agreed in part with the United States, saying that China had not met its obligation to have laws allowing effective action against, and remedies for infringing material, and to provide the same IP protection to foreign IP holders as to domestic owners."[152] The decision was not appealed by either party, and in June 2009 a deadline for China to implement the changes was set for March 20, 2010.[153] At the March 19, 2010 meeting of the WTO's Dispute Settlement Body (DSB) China introduced its latest status report on implementation of trade-related aspects of its intellectual property rights case. China

> stated that on [February 26], 2010 the Standing Committee of the 11th National People's Congress had approved the amendments of the Chinese Copyright Law and that on [March 17], 2010 the State Council had adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights. Thus, concluded China, it had completed all

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[146] *Resources: China*, WORLD INTELLECTUAL PROPERTY ORG., (April 27, 2013) http://www.wipo.int/wipolex/en/profile.jsp?code=CN (listing all treaties which the People's Republic of China is a party to).

[147] Copyright Law of the People's Republic of China, art. 2 (promulgated by the Nat'l People's Cong., Sept. 7 1990, effective June 1, 1991, revised April 1, 2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=186569.

[148] *Id.*

[149] *Id.*

[150] *Id.* at art. 21.

[151] Kaitlin Mara, *China Tells WTO: Obligations Fulfilled on IPO Dispute Case*, INTELLECTUAL PROPERTY WATCH (March 3, 2010, 1:59 PM) http://www.ip-watch.org/weblog/2010/03/22/china-tells-wto-obligations-fulfilled-on-ip-dispute-case/.

[152] *Id. See also* Kaitlin Mara & William New, *WTO Issues Final Decision on US-China Copyright Dispute*, INTELLECTUAL PROPERTY WATCH (January 26, 2009, 7:20 PM), http://www.ip-watch.org/2009/01/26/wto-issues-decision-on-us-china-copyright-dispute/.

[153] Catherine Saez, *WTO Adopts Appellate Body Report On US-China Film Distribution Dispute*, INTELLECTUAL PROPERTY WATCH (January 19, 2010, 10:23 PM), http://www.ip-watch.org/2010/01/19/wto-adopts-appellate-body-report-on-us-china-film-distribution-dispute/.

> necessary domestic legislative procedures for implementing the DSB's rulings.[154]

The United States "responded that it was not yet in a position to share China's claim that it had implemented the DSB's rulings [and] . . . requested China to provide official copies of the amendments to its Copyright Law and Customs regulations or to direct members to the appropriate Chinese government website."[155]

"Despite stronger statutory protection, China continues to be a haven for counterfeiters. . . . [T]he piracy rate in China remains one of the highest in the world (over ninety percent), and U.S. companies lose over one billion dollars in legitimate business each year to piracy. On average, twenty percent of all consumer products in the Chinese market are counterfeit."[156] Given the importance of IP enforcement, China's enforcement measures must expand and improve if foreign direct investment is to thrive.[157]

c. *India*

India's patent system is governed by the amended Patents Act.[158] The Patent Office, under the Department of Industrial Policy & Promotion, Ministry of Commerce and Industry, performs the statutory duties in connection with the grant of patents for new inventions and registration of industrial designs.[159] India patent law is a first to file system, so among persons having filed for the same invention, the first one to file is granted a patent, regardless of who created first. Patentable inventions include new products or processes which involve an inventive step and are capable of being made or used in an industry. The term of every patent is twenty years from the date of filing of patent application, irrespective of whether it is filed with provisional or complete specification.[160]

Patent law in India, particularly in the healthcare sector, has attracted much attention over the past few years. In 2010, global drug companies pressured the Commerce, Health and Chemicals Ministries of India to change key provisions of India's patent laws. The global pharmaceutical companies sought amendments to Section 3(d) of the Patent Act,[161] which

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[154] *China Reports on Implementation in Intellectual Property Case*, WORLD TRADE ORG. (March 19, 2010), http://www.wto.org/english/news_e/news10_e/dsb_19mar10_e.htm.

[155] *Id.*

[156] *Intellectual Property Rights: IPR Toolkit*, U.S. EMBASSY, BEIJING, CHINA, http://beijing.usembassy-china.org.cn/ protecting_ipr.html (last visited June 12, 2013).

[157] *Id.*

[158] The Patents Act, No. 39 of 1970, India Code (1998); The Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005 (India); Patents (Amendment) Rules, 2006, Gazette of India (May 5, 2006). The latest amendment in the year 2005 was made in order to bring the patent law in India into compliance with the TRIPS Agreement and to introduce patents for drugs, medicines and food products, to remove transitional provision to exclusive marketing rights and to rationalize and reduce the timeline for processing patent applications. The provisions of patentability under Section 3(d) and the new disclosure requirements were introduced under this legislation. *See id.*

[159] *See id.*

[160] *Id.* at art. 53.

[161] Section 3 is the key section on "patent eligibility" and lists out what are not "inventions" under the Indian Patents Act. Section 3 (d) lists out one such non eligible patentable subject matter. The Patents (Amendment) Act, 2005, No. 15 sec. 3(d).

regulated patentability of modified drugs.[162] "The Department of Industrial Policy and Promotion, the . . . agency responsible for dealing with patents under the commerce ministry, [maintained that] section 3(d) was fully compliant with the [World Trade Organization's] TRIPS and that there [was] 'absolutely no need to tinker or tweak' it in any manner."[163] The governmental agencies refused to amend the provision, maintaining that the alterations proposed would restrict entry of generic drugs in India, and adversely impact public health.[164]

> India also provides trademark protection for marks of goods and services, collective marks, certification trademarks and well-known marks under the Trademarks Act 1999. Application for registration of a trademark should be filed with the trademark registry. . . Registration, though not a statutory obligation, is mandatory for taking action against infringement. Registration is valid for an initial period of ten years but is renewable for an additional ten years. Pirated and counterfeit products are liable to seizure even without warrant. Penalties ranging from six months to three years in addition to fines have been prescribed in the Act for trademarks violations.[165]

"India's copyright law, laid down in the Indian Copyright Act 1957 as amended by Copyright (Amendment) Act 1999, fully reflects the Berne Convention on Copyrights, to which India is a party."[166]

> In accord[ance] with international norms and the Berne Convention, it is not necessary to register a copyright; protection is vested with the original creator as soon as the work has been created and has been recorded in a material form. However, it is advisable to do so as its registration serves as *prima facie* evidence of the information contained in the registration in case of a dispute.
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> Copyright in a work of nationals of countries who are members of the Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Convention and the TRIPS Agreement are protected in India. These rights are protected in India through the International Copyright Order.[167]

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[162] Under Indian patent law, modifications or new uses for existing substances are not grounds for a patent unless they significantly increase its effectiveness. *Id.*

[163] Khomba Singh, *Demand for Changes in Patent Law Rejected*, ECON. TIMES (Dec. 1 2010, 5:20 AM), http://articles.economictimes.indiatimes.com/2010-12-01/news/27616154_1_indian-patent-laws-patent-claims-data-exclusivity.

[164] *Id.*

[165] *Doing Business in India*, PKF SANDS 46, http://www.wipfli.com/Resources/Images/13746.pdf (last visited June 19, 2013). *See also* The Trademarks Act, No. 47 of 1999, Acts of Parliament 1999 (India), http://www.wipo.int/wipolex /en/text. jsp?file_id=128108.

[166] *Id.* "India is also a party to the Geneva Convention for the Protection of Rights of Producers of Phonograms and to the Universal Copyright Convention." *Id.*

[167] *Copyrights -IPR Toolkit India*, U.S. EMBASSY, NEW DELHI, INDIA, http://newdelhi.usembassy.gov/iprcopyrights.html (last visited June 19, 2013).

Typically, the copyright in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author subsists until sixty (60) years from the author's death.[168]

Piracy is an enormous problem for India's efforts to encourage U.S. businesses to operate in India.

> In India, 29% of the potential market for movies produced by major U.S. movie studios is lost to piracy. The [technology] industry is similarly affected, with a recent study revealing that 35% of the software installed in 2006 on personal computers (PCs) worldwide was obtained illegally, amounting to nearly $40 billion in global losses due to software piracy. Although there are various laws in place for battling piracy the enforcement of these laws in India is weak, [169]

This adds dramatically to the risks associated with U.S. developing and utilizing intellectual property in India.

Like their developed world counterparts, therefore, Brazil China and India are struggling to protect the intellectual property needs of domestic innovators and the related financial interests of foreign investors who invest in them.

5. Labor Law: Protecting Local Workers

History indicates that companies targeted by private equity investments do not produce increased earnings simply because of capital infusion. Private equity funds seek to extract value from companies, and a key ingredient for a successful investment is talented management. A management team without local talent will not be successful. Private equity investors look for high quality local managers who are familiar with local business practices and governmental authorities. Private equity investors must be familiar with the labor laws of the investment country not only as an employer, but to determine their obligations to the target company's existing employees. Developing country hosts must ensure their local labor force is protected from wage under-payment, denial of benefits, short-term employment contracts and excessive overtime. While private equity firms generally reduce unemployment, they potentially create the danger of excessive dependence, which hurts the local economy in the long run considering the short term investment strategy of private equity.

a. Brazil

Brazil protects its local labor force from the potential hazards of private equity investments by its immigration laws and its labor laws. A passport and visa are required for U.S. citizens traveling to Brazil for any purpose. "All Brazilian visas, regardless of the length of validity, must initially be used within 90 days of the issuance date or will no longer be

[168] *Id.*
[169] *Id.*

valid."[170] The major types of Brazilian employment visa categories are: Temporary V Visa–Labor Contract for intra-company transferees transferred to an affiliate Brazilian entity or for the local hire of a non-Brazilian worker (specialized knowledge, managerial-level), Temporary V Visa – Technical – for transfer of technical/specialty skilled personnel between related or unrelated companies, and Permanent Visa – for transfer of senior-executive level employees who will exercise Power of Attorney on behalf of a Brazilian company.[171]

Generally, a Brazilian corporate sponsor is required to prepare a work permit application on behalf of the employee.[172] "A permanent visa is granted to an alien wishing to settle in Brazil and complying with the requirements set forth by the National Council of Immigration on the types of labor needed in the country."[173]

Brazilian law does not require that managers of a Brazilian-based company be Brazilian nationals, however, an alien may hold a managerial position only if the alien is a permanent resident of Brazil, holding a permanent visa issued by the Ministry of Labor (except in the case of a member of the Board of Directors of a corporation).[174] A permanent visa is only valid for as long as the alien remains a manager of a Brazilian subsidiary.[175]

> As a general rule, a foreign investor making an investment of at least US$200,000 in a Brazilian subsidiary (meaning a company incorporated under the laws of Brazil and controlled by foreigners) may have the Brazilian subsidiary apply for a permanent visa for any alien who is to hold a managerial position in the company. . . . In addition, a permanent visa application may be filed in the case of a foreign investment of US$50,000 coupled with the obligation to create [ten] new jobs within two years." [176]

Resolution No. 84 of the National Immigration Council, of February 10, 2009, deals with permanent visa applications for individuals making direct investments in Brazil and wishing to come to Brazil to manage their business. In such cases, an investment in the

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170 U.S. COMMERCIAL SERV., U.S. DEP'T OF COMMERCE, DOING BUSINESS IN BRAZIL: 2012 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 119 (2012), http://export.gov/brazil/static/2012%20COMPLETE%20CCG%20BEST%20AND%20FINAL_Latest_eg_br_034878.pdf [hereinafter DOING BUSINESS IN BRAZIL: 2012].

171 *See* Tozzini, Freire & Berger, *supra* note 73, at A-4.

172 *See News & Resources: Brazil*, FRAGOMEN (March 2013), http://www.fragomen.com/newsresources/xprNews DetailFrag.aspx?xpST=CountrySummaries&news=14. The work permit application is filed with the Brazilian Ministry of Labour. Once the work permit application is approved by the Ministry of Labour, the approval is published in the Brazilian legal newspaper (the Diario Oficial) and the approval is sent to the Ministry of Foreign Affairs. *Id.*

173 Tozzini, Freire & Berger, *supra* note 73, at A-4. *See* Lei No. 6.815/80, de 19 de Augusto de 1980, art. 16 (Braz.).

174 Tozzini, Freire & Berger, *supra* note 73, at A-4. *See* Lei No. 10.194/01, de 14 de Fevererio de 2001 (Braz.).

175 Tozzini, Freire & Berger, *supra* note 73, at A-4. "Obtaining a permanent visa may be a long and intricate process. The process may be circumvented, however, by applying for an intercompany transfer visa." *Id.*

176 Tozzini, Freire & Berger, *supra* note 73, at A-4. *See* Resolution of the National Immigration Council No. 62, de 12 de Dezembro de 2004 (Braz.). "For this purpose, a foreign investor's equity investment of at least US$ 200,000 must be registered with the Central Bank of Brazil. The amounts invested as equity in the Brazilian subsidiary may be used for any corporate purpose." Tozzini, Freire & Berger, *supra* note 73, at A-4.

foreign currency equivalent of at least R$150,000 is required or, "in certain circumstances to be analyzed by immigration authorities, a visa may be issued with a lower investment."[177]

Brazil's key method of protecting its labor force is through a comprehensive set of restrictions on the employment relationship. The most significant characteristics of the Brazilian labor system are that the labor laws regulate the details of labor-management relations to a much greater extent than the laws in the United States. Most employees' rights are compiled in what is known as the Consolidation of Labor Laws-CLT (*Consolidação das Leis do Trabalho*).[178] "In firms employing three or more persons, Brazilian nationals must constitute at least two-thirds of all employees and receive at least two-thirds of total payroll. Foreign specialists in fields where Brazilians are unavailable are not counted in calculating the one-third permitted for non-Brazilians." [179]

"Employers and employees may freely negotiate labor contracts, provided, however, that the provisions of the law, the decisions of the competent authorities and the terms and conditions of the relevant collective agreement, if any, are observed."[180] The law also permits collective labor agreements,[181] and though they "are not compulsory, . . . once they are entered into, their terms and conditions prevail over those in individual contracts."[182]

The Brazilian labor laws also govern the legal limit of regular working hours,[183] mandatory vacation,[184] minimum wages,[185] mandatory bonuses,[186] profit participation,[187]

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177 Tozzini, Freire & Berger, *supra* note 73, at A-4. Factors to be considered in the acceptance of such lower investment include the creation of new jobs for Brazilian citizens, the region of Brazil in which the investment is made, the relevant economic sector, and the impact of the investment in productivity increases or assimilation of technology.

178 *See* Consolidação das Leis do Trabalho, [Consolidation of Labor Laws], de 1 de Mayo de 1943 (Braz.) [hereinafter Consolidation of Labor Laws].

179 DOING BUSINESS IN BRAZIL: 2012, *supra* note 170, at 112-113. *See also* Consolidation of Labor Laws, *supra* note 178, art 352.

180 Tozzini, Freire & Berger, *supra* note 73, at A-17. *See* Consolidation of Labor Laws, *supra* note 178, art. 444. "An individual labor contract may be reflected in a written agreement or may be implied in the relationship between an individual and the company to which he or she is rendering services. In the case of a foreign employee coming from abroad, the labor contract must be in writing and must be submitted to the Ministry of Labor and Social Security." Tozzini, Freire & Berger, *supra* note 73, at A-17.

181 Tozzini, Freire & Berger, *supra* note 73, at A-17. "Collective labor agreements are agreements executed between the employers' and employees' unions, or between the employees' union and a specific company, for purposes of establishing general and normative rules which govern the relationship of a given category of employers and employees." *Id.*

182 *Id.*

183 The Brazilian Legislation provides that the working hours limit in Brazil is 44 hours per week or eight hours per day, unless provided otherwise through a convention or an agreement entered into with the relevant labor union. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 7, XIII (Braz.).

184 Upon completion of each twelve months of work, employees are entitled to a paid vacation of up to thirty calendar days. Consolidation of Labor Laws, *supra* note 178, art. 130.

185 "Employees in Brazil are entitled to mandatory minimum wages, which is annually adjusted by the Brazilian Government." *Legal Aspects of Doing Business in Brazil: A Brief Summary*, DEMAREST & ALMEIDA ADVOGADOS 11 (Feb. 2006), http://www.mittlerer-niederrhein.ihk.de/media/brasilien/pdf/legal_aspects_060201.pdf [hereinafter *A Brief Summary*]. *See* Consolidation of Labor Laws, *supra* note 178, art. 76.

186 Known as the13th salary ("*13° salário*"), employees in Brazil are entitled to an annual gratification, "usually paid at the end of the year, on the basis of 1/12 of December remuneration for each month worked in that given year." *A Brief Summary*, *supra* note 185, at 11.

187 "Employees in Brazil are entitled to participation in the profits/results of the company, implemented by a specific program negotiated between employers and employees, as ruled by Federal Law 10.101/00." *Id.*

overtime pay,[188] maternity leave,[189] paternity leave,[190] prior notice period,[191] and weekly-remunerated rest.[192]

b. China

China also relies on a combination of immigration control and labor regulation to protect its work force from exploitation by foreign investors. A valid passport and visa are required to enter China and must be obtained from Chinese Embassies and Consulates before traveling to China.[193] "Chinese authorities have recently tightened their visa issuance policy, in some cases requiring personal interviews of American citizens and regularly issuing one or two entry visas valid for short periods only."[194]

Historically, foreign companies were drawn to China for its abundantly inexpensive labor force. However, on June 29, 2007, the Standing Committee of the PRC National People's Congress adopted the PRC Labor Contract Law.[195] The Labor Contract Law came

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[188] "Employees in Brazil are entitled to overtime pay of at least 50% of the hourly rate." *Id.*

[189] "Employees in Brazil are entitled to paid maternity leave of 120 days (reimbursed to the employer through Social Security)." *Id.*

[190] "Employees in Brazil are entitled to paternity leave of five days." *Id.*

[191] "In cases of dismissal without cause, the employer must grant the employee a prior notice period of dismissal of at least thirty days, which may be worked by the employee or indemnified by the employer." *Id.*

[192] "Employees in Brazil are entitled to a 24-hours rest for each week of work, preferably on Sundays. There are, of course, certain economic activities which are authorized to work on Sundays, depending on their specific activities. Such authorization is granted by the Labor Ministry." *Id.*

[193] DOING BUSINESS IN CHINA 2012, *supra* note 39, at 105.

[194] *Id.* The major types of Chinese employment visas are the business visa or F visa, the working visa or Z visa, and the resident visa or D visa. *See Chinese Visa*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.S.A., http://www.china-embassy.org/eng/ywzn/lsyw/vpna/rap/t900567.htm (last visited June 22, 2013). The F visa is issued to aliens who are invited to China for business, cultural, professional or educational affairs for no longer than 6 months. *Id.* Visitors may apply for a single-entry or multiple-entry visa, which may be valid for up to 24 months, provided they pay the appropriate fee. *Id.* Typically, the visa permits stays of up to 30 days. *Business (F) Visa*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.S.A. (April 23, 2009), http://www.china-embassy.org/eng/hzqz/zgqz/t84247.htm. For stays longer than 30 days, ask for the visa officer's approval. *Business (F) Visa*, *supra*. The Z visa is issued to aliens who seek entry, along with their family members, into China for employment purposes. *Employment/Work (Z) Visa*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.S.A. (Sept. 19, 2008), http://www.china-embassy.org/eng/hzqz/zgqz/t84245.htm. Along with the visa application form and passport photo, aliens should provide the visa notification issued by an authorized Chinese unit or proof of kinship (i.e., marriage certificate or birth certificate) and either a photocopy of and the original Work Permit for Aliens issued by the Chinese Labor Ministry or the original copy of the Foreign Expert's License issued by the Chinese Foreign Expert Bureau. *Employment/Work (Z) Visa*, *supra*. The D visa is issued to aliens who seek permanent residence in China. *Resident (D) Visa*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.S.A. (Sept. 19, 2008), http://www.china-embassy.org/eng/hzqz/zgqz/t162609.htm. Aliens must submit the visa application form, passport photo and the Residence Approval Certificate issued by the Chinese public security bureau. *Resident (D) Visa*, *supra*. According to the embassy website, the applicant may entrust his relatives within China to apply for the Residence Approval Certificate. *Resident (D) Visa*, *supra*.

[195] Edward J. Epstein, *China's New Labor Contract Law: Overview and Recommended Action Steps for Employers*, TROUTMAN SANDERS 2 (2008), http://www.troutmansanders.com/files/Publication/da0358e9-71d3-4370-82dc-5344756922ba/Presentation/PublicationAttachment/99cc8c35-65ae-4be2-b84e63fec7baa708/TS%20China% 20New%20Labor%20Contract%20Law%20Overview.pdf.

into effect on January 1, 2008 and made sweeping changes to Chinese employment law, removing many pro-employer provisions.[196]

Unlike the U.S. employment-at-will system, the Chinese labor system is a contract employment system. In China, all employees must be engaged pursuant to a written employment contract. An employer's failure to sign a contract within one month of commencement of employment will require payment of double salary, and after one year, will result in a permanent employment.[197] The contracts are fixed term contracts, and in the past, many employers signed employees to short-term terms, such as one or two years.[198] In an effort to curb this practice, the new labor law provides that upon the completion of two fixed term contracts, an employer must conclude an open term contract (permanent employment).[199]

During the term of a contract, it is very difficult to terminate an employee. An employee can only be terminated for cause, and cause must be clearly proved. An employer must notify the labor union in advance of its decision to terminate an employee, and if the labor union believes the termination would be unlawful, it may request the employer not to terminate.[200] This requires that employers maintain a detailed set of rules and regulations (which are not binding unless negotiated and agreed to by the employee representatives) and careful disciplinary records to be able to establish grounds for dismissal. Non-compete agreements are recognized but the non-compete period is limited to three years.[201]

In China, employees are generally not "salaried." The Chinese work week is five days, up to a maximum of forty-four hours a week.[202] An employer may extend the hours of weekly work after consulting with a trade union and the employee, on the condition that overtime pay is provided, and the work does not exceed thirty-six hours per month.[203] Employers are required to pay their employees the "average wage standard" of employees in the same industry in the local area.[204] Additionally, the average wage standard must increase progressively in conjunction with the economic development of the company.[205] A company's board of directors makes wage decisions and is expected to take into consideration the company's productivity rate, economic results, the consumer price index and wage guidelines for the region.[206]

The Chinese labor laws provide that employees are entitled to, and employers are required to provide, social insurance and welfare benefits.[207] Additionally, there is a national social insurance system that includes the following benefits: retirement and pension benefits; worker compensation for job-related injuries and diseases; medical care and disability

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196 *Id.*

197 *Id.* at 3.

198 *See generally id.*

199 *Id.* at 4.

200 *Id.* at 6.

201 *Id.* at 4.

202 Labour Law of the People's Republic of China, art. 36 (promulgated by the 8th Nat'l People's Congress, July 5, 2004, effective Jan. 1, 1995), http://www.china.org.cn/living_in_china/abc/2009-07/15/content_18140508.htm.

203 *Id.* at art. 41. In certain professions and emergency situations, the law stipulates that overtime work may be required of employees. *Id.* at art. 42.

204 *Id.* at art. 48.

205 *Id.* at art. 46.

206 *Id.* at art. 49.

207 *See id.* at cha. 9.

benefits for injuries or diseases that are not employment-related; unemployment benefits; pregnancy and maternity benefits; and death benefits for survivors.[208] The requirements of the Chinese labor law are specific and stringent; Chinese law imposes severe civil and criminal penalties for non-compliance.

c. *India*

India actively encourages foreign investment with hospitable immigration laws but its complex labor law undermines that impact. A passport and visa are required for U.S. citizens traveling to India for any purpose. Although there is a large pool of under-employed educated Indian citizens, the current industrial policy allows the hiring of foreign technicians without prior government approval,[209] and such visas are readily made available, usually within three months of an application. "The visa is generally given for the same period as the employment contract. Once it is obtained, a stay permit is granted, which must be endorsed annually by the state government where the foreign national resides."[210] Further, "[f]oreign nationals . . . have to register with the concerned District Foreigners' Registration Officer/Foreigners' Regional Registration Officer, within 14 days of their arrival in India, if they hold a visa for a period of more than 180 days."[211]

India is a member of the International Labor Organization (ILO) and adheres to a number of conventions protecting worker rights.[212] Industrial relations are governed by the Industrial and Disputes Act of 1947, which curbs unfair labor practices by employers, workers and trade unions.[213] India's expansive labor laws include the: Workmen's Compensation Act,[214] Payment of Wages Act,[215] Industrial Dispute Act,[216] Maternity Benefit

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[208] *Id.* at art. 73.

[209] *India Employment Law*, INDIAN PAKISTAN TRADE UNIT (Oct. 2011) http://www.iptu.co.uk/content/india_employment_law.asp.

> The RBI (Reserve Bank of India) has raised the remittable per-diem rate [from USD $500 to] USD $1000, with an annual ceiling of USD $200,000 for services provided by foreign technicians payable to a foreign firm. Technical personnel can remit up to 75 percent of their monthly net income through authorized exchange dealers. Total duration of employment of a technician is limited to 12 months at a time. Employment in excess of 12 months requires clearance by the Ministry of Home Affairs.

Id.

[210] *Id.*

[211] *Id.* "This registration is required irrespective of whether or not they intend to stay in India for less or more than 180 days-that is, the deciding factor is the period for which the visa has been granted and not the actual length of stay." *Id.*

[212] *Id.*

[213] *Id.*

[214] Workmen's Compensation (Amendment) Act, 2009, No. 45, Acts of Parliament, 2009 (India). The Workmen's Compensation Act provides for compensation to workers for industrial accidents and occupational diseases resulting in disability and death. The minimum compensation for death is one lakh and twenty thousand rupees and for total disability one lakh and forty thousand rupees. *Id.* at art. 4.

[215] Payment of Wages Act, 1936, No. 4, Acts of Parliament, 1936 (India), and the Minimum Wages Act, 1948, No. 11, 1948 (India), call for regular and timely payment of wages, and for industry wage boards to recommend the minimum wage and fix the wage-rate structure for each industry.

[216] Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India) covers layoffs, retrenchment compensation, labor-management disputes and unfair labor practices. The Act also addresses reinstatement of

Act,[217] Payment of Gratuity Act,[218] and an Equal Remuneration Act.[219] Wages and fringe benefits vary considerably by industry, company size and region, and mandated fringe benefits normally add forty to fifty percent to base pay.[220] As detailed by Lalil Bhasin, a distinguishing feature of the Indian labor market is that there are three main categories of employees:

> government employees, employees in government controlled corporate bodies known as Public Sector Undertakings (PSUs) and private sector employees. The rules and regulations governing the employment of government employees stem from the Constitution of India. Accordingly, government employees enjoy protection of tenure, statutory service contentions and automatic annual salary increases. Public sector employees are governed by their own service regulations, which either have statutory force . . . or are based on statutory orders. In the private sector, employees can be classified into two broad categories[:] namely management staff and workers. Managerial, administrative or supervisory employees drawing a salary of Rs.1600 or more per month are considered management staff, and there [are] no statutory provisions relating to their employment. . . . [Their] conditions of employment are governed by their respective [employment contracts,] and their services can be discharged [as long as it is within] the terms of their employment contract. [Employees categorized as workers] are covered under the provisions of the Industrial Disputes Act.[221]

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workers by a labor court or tribunal order that the employer can appeal to a higher court. A reinstated worker is entitled to 100% of wages while the decision of the higher court is pending. *Id.* §17B.

217 Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1962 (India) covers mandatory maternity benefits.

218 Payment of Gratuity Act, 1972, No. 39, Acts of Parliament, 1972 (India) requires employers to pay a gratuity to workers earning less than a certain limit upon termination of service.

219 Equal Remuneration Act, 1976, No. 25, as amended by Act 49 of 1987, (India) prohibits job and wage discrimination based on sex, except for prohibiting or restricting the employment of women in certain categories of work.

220 Mandated fringe benefits include:

> Bonus for workers earning Rs. 3,500 or less per month (minimum of 8.33% and maximum of 20% of annual wages in factories employing ten or more). The minimum bonus payable is Rs. 2,500 and the maximum bonus actually payable is Rs. 6,000; Dearness allowance (based on cost-of-living index) for all levels below management in firms employing 50 or more workers; Provident fund at 10% of wages (12% for a large number of industries and business establishments) for all workers earning Rs. 6,500 or less per month; One day of paid vacation for every 20 days worked (granted to every worker who has worked in a factory for a period of 240 days or more); Health insurance (employer contributes 4.75% of total wage bill) for those who earn Rs. 6,500 or less per month; Severance pay of 15 days of average salary for each complete year of continuous service; Sick leave of seven days annually at full pay; half pay for those covered under the Employees' State Insurance Act; Casual leave of seven to ten days for unforeseen circumstances; and Maternity leave of 12 weeks at full pay.

Sabarivasan, *Wages and Benefits* (Nov. 9, 2010, 9:30 PM), http://realestatesoln.blogspot.com/2010/11/ wages-and-benefits.html.

221 Lalit Bhasin, *Labour and Employment Laws of India*, BHASIN & CO. (Aug. 27, 2007), http://unpan1.un.org /intradocgroups/public/documents/apcity/unpan029043.pdf.

Indian labor laws are designed to promote and protect workers' rights and cover issues such as wages, bonus, retirement benefits, pension claims, and social security measures such as workmen's compensation, insurance, and maternity benefits. Under Indian labor law, normal working hours may not exceed nine hours a day[222] or forty-eight hours a week.[223] Employees are permitted thirty minutes of rest each day, and the period of continuous work should not exceed five hours.[224] Including overtime, a work week may not exceed fifty-four hours, and overtime may not exceed 150 hours a year. Employees are generally entitled to vacation of at least fifteen days after every twelve months of continuous service and are entitled to at least three holidays.[225] The labor laws also provide that employees should be given at least twenty-one days' notice before an employer modifies an employee's wages, allowances, hours of work, rest intervals, and leave.[226]

The laws governing termination of employment in India are protective of workers and distinguish between three different situations: dismissal for misconduct, discharge and retrenchment.[227] Termination of an employee for disciplinary reasons may, in some instances of misconduct, justify dismissal without notice.[228] The concept of discharge at-will is not universally permitted in India, and is generally limited to employees not covered by the Industrial Disputes Act. For employees covered by the Industrial Disputes Act, employers must follow the detailed procedural requirements for retrenchment.[229] Retrenchment is defined as the termination by the employer of a worker's employment for any reason, other than disciplinary, which corresponds broadly to terminations based on economic grounds or related to the employee's capacity.[230] Under the retrenchment provisions, a worker continuously employed for more than one year must give one month's notice or pay in lieu of such notice, and the employer must notify the relevant governmental authority stating the reasons for the proposed retrenchment.[231] If the company employs one hundred workers or more, an employee may not be retrenched unless three months' written notice or payment in lieu of notice is given to the employee.[232] In addition, the employer must seek prior authorization from the relevant governmental authority before the retrenchment can be carried out.[233]

In sum, the governments of Brazil, China and India operate on the basis that increased employment brought by foreign investment is worth encouraging, but not at any

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[222] *See, e.g.* Factories Act, 1948, No. 63, Acts of Parliament, 1948 (India), § 54.

[223] *See, e.g. id.* § 51.

[224] *See, e.g. id.* § 55.

[225] *See, e.g. id.* § 79.

[226] Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India), § 9A.

[227] *See generally* Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India).

[228] Industrial Employment (Standing Orders) Central Rules, 1946, No. L.R. 37, 1946 (India). These rules contain the Model Standing Orders (MSO) which may be adopted or altered by employers. Acts of misconduct which do not require notice to the employee are listed in the MSO and include (§§. 14(2)-(3), MSO): willful insubordination or disobedience; theft, fraud or dishonesty; willful damage or loss of employer's property; bribery; habitual lateness or absence; and striking unlawfully. *Id.*

[229] *See* Industrial Dispute Act, 1947, No. 14, Acts of Parliament, 1947 (India).

[230] *Id.* § 2(oo).

[231] *Id.* §25F.

[232] *Id.* §§ 25K-25N.

[233] *Id.*

price. They do not make concessions that will undermine the fairly robust rights which workers have under their respective domestic legal frameworks.

IV. CONCLUSION

The success of a private equity investment is measured by return on investment. This means that developing countries must consider the economic impact that their laws and regulations have on foreign private equity investors when determining how to regulate foreign direct investment.

Brazil and India have mitigated some of the challenges by enacting investment regimes specifically targeted at private equity investors; incentivizing them through tax holidays and reducing compliance and regulatory restrictions. China also appears to have taken notice. The promulgation of the Foreign-Invested Partnership regime, enacted in 2010, is a big first step forward in encouraging foreign investment.

All three countries are experiencing rapid development. As evidenced by recent public offerings, and the relaxation of foreign investment regulations, a significant source of the necessary funding for this development will come from foreign investors. Therefore, Brazil, India and China will need to continually monitor their legal frameworks for foreign investment to determine the extent to which they strike the right balance between supporting the social contract they have with their own citizens and encouraging the economic gains that foreign private equity investment can bring.