

# Comparative Study of Laws Related to Investment Promotion in Australia, China and Japan

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## Abstract

**The Covid-19 pandemic has caused huge damage to the global economy since 2019. Given the decline of foreign direct investment, Australia, China and Japan, as three major economies, have taken various policies and laws to respond to this crisis. an analysis of the legal measures taken by these countries in response to the Covid-19 can help promote economic stability and recovery in the Asia-Pacific region.**

## Keywords

**The Covid-19; International Investment; Foreign Direct Investment.**

## 1. Introduction

The Covid-19 pandemic has induced a huge impact on the global economy since 2019. The performance of foreign direct investment (FDI) was poor in 2020. The FDI dropped sharply from \$1.5 trillion in 2019 to \$859 billion and this trend continued, which means that the pandemic is another disaster that threatens the global economy after the financial crisis of 2009. [1] The pandemic hit all works of life including industries, transportation, etc. and Countries affected by the Covid-19 pandemic had to take some measures to prevent their people and property from this crisis, such as the Australian travel ban, which made it more difficult to invest and ultimately led to a decline in FDI. [8]

Fortunately, countries' best efforts to contain the impact of the pandemic and to change investment and trade policies to mitigate economic damage have had some effect. The FDI recovered to an estimated \$852 billion that better than expected. [21] It shows that investment has rebound momentum and we have gradually entered into the post-pandemic era. It is worth mentioning that the FDI inflows in Asia accounted for about 60 percent of the world's total FDI inflows in 2020, a higher proportion than in 2019. [21] We have to admit that Asia has received more attention for its positive economic situation in the world stage. [39] Asian countries represented by China, Japan and South Korea have a better economic development trend, and the GDP of the three countries has exceeded 20% of the world's total GDP. [38] In addition, the influence of the Association of Southeast Asian Nations (ASEAN) is growing, which means that Asia plays an important role in international investment, even the United States also attaches great importance to its development opportunities in Asia-Pacific. (Pekkanen (n 5) 138.)

The other side of the crisis is the opportunity. Analyzing and comparing investment law in Asia-Pacific and law reforms before and after the Covid-19 pandemic is significant for outbound investors, because the prerequisite of investment is proficiency in investment and local policies, especially at a time when the international situation is unstable. This essay selects three representative countries in the field of Investment in Asia-Pacific, namely China, Japan and Australia and compares the corresponding law in national laws regulating foreign investment, corporate governance and securities law and competition law and consumer law separately. Japan and China, as countries with the strongest economic strength in Asia, have close trade relations with Australia, and these three countries occupy an important position in the field of

international investment in Asia-Pacific. Therefore, choosing these three countries as research objects is of great significance for the study of Investment in Asia-Pacific. The three countries have different legal systems, for example, Australia has a common law tradition, while Japan has a civil law tradition and China's legal system has received more infiltration from socialism. [4]

## **2. National Laws Regulating Foreign Investment**

### **2.1. The Current Situation and Reform of the National Laws on Foreign Investment in the Three Countries**

Australia, as a developed country with a perfect investment legal system, has an important role in Asia-Pacific investment, especially as a member of "ASEAN+6", and therefore has close investment and trade relations with countries such as Japan and China. The Australian government has always adopted a policy of encouraging FDI into Australia and pursues to conclude bilateral investment treaties (BITs) and free trade agreements (FTAs), such as China-Australia (ChAFTA) and Japan-Australia (JAEPA). [24] Australia also gives the National Treatment and Most-favoured-nation ('MFN') treatment to investors, But Australia's preferential treatment of Asia-Pacific economic trading partners is inconsistent. [40] In addition to international treaties, international investors should comply with Australian domestic laws regulating foreign investment, such as Corporations Act 2001, and Foreign Acquisitions and Takeovers Act 1975 (FATA 1975), Foreign Acquisitions and Takeovers Regulation 2015 (FATR 2015). FATA 1975 defines some investment terms like "foreign person" or "notifiable action" and provides the foreign investment framework and indicates whether an application is appropriate. [28]

As China's influence in the world grows, its investment market becomes more open and president Xi Jinping states that China insists the open-up policy and liberalization, which is a good signal for international investors. [41] Internationally, China has concluded FTAs and BITs with most Asia-Pacific countries such as Japan and Australia. Furthermore, China has reformed laws regulating foreign investment. The new Foreign Investment Law (FIL) has come into force in January 2020, which provides the National treatment, MFN treatment and Negative list. These reforms are crucial for investors, as policy and legal support have created a relatively comfortable investment environment for investors

The reform of Japan's investment environment has been influenced by multiple factors, such as the economic crisis, the demand for the development of domestic enterprises and the promotion of the United States. [42] Under the World Trade Organization (WTO) system, Japan concluded BITs and FTAs which give the National treatment and MFN treatment to investors. At the domestic level, investors should comply with the Companies Act (CA) and Foreign Exchange and Foreign Trade Act (FEFTA) when they access to the Japanese market. In view of the changing international situation, these laws have been amended several times to help the government monitor foreign investment. Investors have the obligation to give prior notification or ex-post notification in accordance with the new regulations or they could be punished. [27]

### **2.2. The Relative Pros and Cons for Each Country Across National Laws Regulating Foreign Investment**

Both the Australian government and its people have shown great enthusiasm for foreign investment, which creates a good investment environment. Australia commits to establishing the National treatment, MFN treatment and relative higher thresholds, which is undoubtedly attractive to the investors and partners. But it is a pity that the relevant monetary thresholds are different from countries, with higher thresholds available to investors in countries such as China and Japan, while these differences increase the regulatory complexity. ( Bath (n 10) 159.)

There are other disadvantages in FTAs and negative lists that need to be mentioned. The FTAs as a fixed legal instruments, which stipulates the rights and obligations in advance. However, the Foreign Investment Review Board (FIRB) has the duty to review the investment proposals and the Australian Treasurer can have the flexibility to decide whether foreign investment is in the national security or national interest based on reality, which has been limited by FTAs. [26] in addition, the negative lists and thresholds are reflected in the FTAs and other trade agreements, so they are not easy to amend, which means that it is difficult for the government to change its policy to respond the current situation.

China's reform of the FIL indeed brings many conveniences and benefits to international investors. On the one hand, the FIL incorporates the other three laws on foreign investment, which makes the legal system clearer. On the other hand, the new FIL grants the investor more rights. For example, FIL stipulates that government cannot expropriate the assets of foreign investors and intellectual property is protected by the local government. [18] However, there also are some issues that remain unresolved. The problem is that many provisions are expressed too broadly and vaguely exists in many laws and regulations in China including the FIL, which can make it difficult to enforce the law in practice. Moreover, due to the lack of clarity of the legal provisions, in practice there have been cases where investors have problems and do not know to whom to complain about. It is further explained that the settlement of disputes by foreign investors is different from ordinary domestic litigation and that courts and administrative bodies do not have sufficient experience and expertise to settle such investment disputes. [25] Therefore, China has a long way to resolve the problems of legal reform.

The advantage for investors is that the protection of foreign investment in Japan is reflected in the entire legal system. First of all, the Supreme Court held that provisions of the 1947 Constitution of Japan protecting freedoms and individual rights, such as the protection of investors from illegal expropriation and the protection of intellectual property rights, could also apply to foreign investors, which was the highest level of protection for foreign investors. Secondly, there are lots of national laws relating to foreign investment, such as the Foreign Exchange and Foreign Trade Act (FEFTA) and other special laws. After several times amendments, the FEFTA stipulates many cases where international investors are required to give prior notification and ex-post notification, which provides a level of national security. However, some special laws, such as the Ship Law, limits the investment areas of foreign investors, which decreases the freedom of the market. [43] Japan also has some weaknesses in international investment. Firstly, strategic reform of FTAs has been slow, and treaties have not been updated in time. laws regulating on investment are more influenced by the United States and lack independence, as political considerations outweigh economic motives. secondly, the reform of FEFTA, which reduces the threshold of notification from 10% to 1%, could cause panic among investors. ( Group (n 14).)

### **2.3. The Impact of the Covid-19 Pandemic on the Law**

Australia has taken a cautious attitude to the Covid-19 pandemic and has temporarily changed some of its laws accordingly. Investors have the duty of mandatory notification in "national security businesses" or "national security land", and the monetary thresholds decrease to \$0 due to the Covid-19 pandemic. [35] Government limits the exemption for foreign taking security over some areas relating to national security and gives the Treasurer more autonomy to respond to what may happen during the pandemic, such as redetermination the time of investment notification or company registration .[35] In addition, the period of reviewing the investment application is extended, which is useful for foreign investment and for maintaining stability in domestic economic development.

China's policy changes focus on ensuring economic stability while protecting people's health. The FIL was enacted during the Covid-19 pandemic, so it indeed plays important role in

stabilizing the investment market. Despite the decline in global cross-border direct investment, the enactment of the law, coupled with investment policy reforms, has allowed China to sustain steady growth in foreign investment. Furthermore, the State Council has also made a number of policy changes, including giving local governments more autonomy in responding to the epidemic, extending the application period for foreign companies, lowering bank interest rates and even making it easier for foreign business people to come to China. [34]

Japan has also responded quickly to the outbreak, constantly updating its investment policies to respond to them during the pandemic, including the domestic and international levels. Internationally, Japan government has strengthened cooperation with the international organizations, such as the Organization for Economic Cooperation and Development (OECD), to ensure the steady development of international investment. [36] Japan government also assists in fundraising to support small and medium business Investment, accelerates the patent examination and shortens investment procedures. [31] In addition, the government calls for private financial institutions to actively provide new loans and change terms for existing debt, and the Japan External Trade Organization (JETRO) tries its best to survey business operation and provides business opportunity to foreign investors, which are contributed to reduced the impact of the outbreak on foreign-funded enterprises. [30]

### 3. Corporate Governance and Securities Law

In contemporary international investment, it is undoubted that corporation has become one of the most important forms. Outbound investors pursue economic interests by running their corporations. Asia, as the world's largest stock market, has become the stage for international investors to pursue. Although many countries have developed corporate governance codes and the Cadbury Code and OECD principles regulate corporate conduct in some regions, corporate governance in Asia has some particularities. For example, compared with the United States, Asian companies' equity is more concentrated. [33] Furthermore, countries have their particular cultures (securities market and corporate governance in China have been greatly influenced by government policies), legal systems (civil law in Japan and common law in Australia) and political elements (The leadership of the Communist Party in China), which have led to considerable differences in corporate governance between Australia, China and Japan, making it difficult for investors to adapt to national markets. [13] In addition, during the Covid-19 pandemic, outbound investors should pay more attention to the impact of the pandemic on corporate governance and securities markets in different countries. (Bath (n 10) 159–161.)

#### 3.1. The Current State and Reforms of the Corporate Governance on the Three Countries

The development of corporate governance in Australia is not smooth. In the late 1990s, corporate governance was regarded as a hindrance to the development of business. [14] However, corporate governance gradually backed to track in the early 2000s and some countermeasures including independent directors and disclosure policy were proposed during the period of corporate collapses like other western countries. [14] the system of corporate governance in Australia can be split into three parts. Firstly, Corporations Act (hard law) is the main law that investors shall comply with and it regulates the rights and obligations of shareholders and directors. Secondly, there are several influential documents (soft law) including the Bosch Report, the Hilmer Report that are useful to investors. [44] In addition, the Investment and Financial Services Association Ltd (IFSA) published a guide, namely the IFSA Blue Book, that improves the environment of the securities market and corporate governance. [45] Finally, self-regulation plays an important role in corporate governance. For instance, Australian Securities Exchange (ASX), as a self-regulation organization, provides rules and standards to regulate corporate action. [46]

Although China is the second largest economy, the development of corporate governance is relatively late. China was established in 1949 and China has experienced many political movements and economic system reforms, which have a great impact on the development of corporate governance. Initially, the private economy was not allowed in China, and the government stated all property to be collectively owned. After the Great Leap Forward and the Cultural Revolution, China's leaders continued to draw lessons from their failures and eventually began a market economy under Deng Xiaoping, from which corporate governance was progressively introduced to China. However, after reform of China's economic system, state-owned enterprises (SOE) are still remained and occupy a considerable share in the market, which has become an important feature of China's corporate system. [19] Unlike Australian corporate governance, Chinese corporate governance is more dependent on hard laws and national policies. The China Securities Regulatory Commission of the State Council (CSRC), as the company administration agency of the central government, issued the Corporate Governance Code and other regulations, cooperating with the Corporate Law, which maintains the securities market and the operating environment of the company together. [19]

In the 1980s, the performance of the corporation received praise from western countries and attract the attention of scholars. [19] Initially, Japan's Corporate Law was influenced by Germany in the 19<sup>th</sup> century and gradually Corporate Law and securities law absorbed American elements. Since the "lost decade", the government tried to increase external supervision (Corporate Governance Code) and internal supervision (independent director) by reforming the law and enacting some related codes. However, investors should also pay more attention on Japan's unique corporate culture. For example, there are many family businesses in Japan, and companies have close relationships with banks. Furthermore, other elements that could influence investment, such as political interference and employees have high loyalty to their companies, may create pressure on investors.

### **3.2. The Relative Pros and Cons for Each Country Across Corporate Governance**

Supervision of companies varies in the three countries due to differences in corporate culture and legal systems. Australia's corporate governance absorbs the essence of Europe and America so the investment environment is better than China. The self-regulation of corporate governance is more prominent in Australia, resulting in freer operating companies than in Japan and China. Moreover, ASX provides a transparent financial market and comprehensive financial services, which is conducive to perfect external governance environment. Australian Securities and Investments Commission (ASIC), as a supervisory body, strongly monitors listing rules, securities markets and other corporate practices. With freer markets, it is more difficult for the state to regulate companies, especially in fostering corporate social responsibility. In Japan and China, by contrast, there is more political pressure on how companies operate, which facilitates state control but sacrifices market freedom.

In China, SOEs have two sides. On the one hand, it is more convenient for the state to regulate SOEs, which means that the cost of corporate governance is cheaper. On the other hand, since many senior executives are appointed by the government, management will be caused by the lack of professional knowledge of senior executives and corruption will be occurred. [47]

Corporate governance is a concern for Japan, and certainly for China. there are lots of American elements in Japan's corporate governance, such as the independent director. Japan, as a civil law country, is influenced by German law and has a board of supervisors in the company, but at the same time draws lessons from the independent director system. However, Japan's corporate culture (enterprise internal promotion system) and lack of professionals have not led to good practice with independent directors, which implies that corporate supervision is not effective. In addition, "main bank" also has advantages and disadvantages. The "main bank" is a problem left over from history, because banks at special times can indeed help enterprises



through economic hardship, and help enterprises reduce operational risks.( Tricker (n 35) 379–382.) But if the bank interferes with the operation of the enterprise, it will also cause the risk of trade secret leakage and so on.

### **3.3. The Influence of the Covid-19 Pandemic**

Influenced by the Covid-19 pandemic, ASIC has proposed policy reforms related to corporate governance. In Australia, policies related to shareholder meetings have been changed temporarily, for example, the shareholders' meeting may be held without physical contact or the deadline for the shareholder meeting of the stock company can be extended. [23] Banks should provide relief to small businesses affected by the pandemic. [25] The insolvency law was modified for six months from 25 March 2020, which relieved some directors' liabilities. [6]

In Japan, the Ministry of Justice (MoJ) changed rules about shareholder meetings, which stated that the annual general meeting of shareholders can be held online or by reselecting the date and shareholders can exercise their right to vote by email, similar to Australia. [32] Moreover, the Japanese government has made many efforts to avoid bankruptcy, including giving companies some cash support. [32] Compared with the first two countries, China has made no special changes to basic laws, but the People's Bank of China and the Securities Regulatory Commission have reformed laws for financial sectors such as banking and insurance. For example, banks support companies by increasing their repayment terms and reducing interest rates.

## **4. Competition Law and Consumer Law**

### **4.1. The Current Situation and Reform of the Competition Law and Consumer Law in the Three Countries**

European and America have always paid much attention to the development of competition law and consumer law. Under the influence of them, Australia has systematic competition law and consumer law. The Competition and Consumer Act 2010 (CCA) and Trade Practices Act 1974 (TPA) the main resource to rectify the market order and some regulations assist the CCA in the administration. In order to govern some industries, there are five special Codes, such as Franchising Code, Oil Code, etc., and there are many business guidelines issued by the Australian Competition and Consumer Commission (ACCC). Foreign investors should also comply with the competition law, especially the intellectual property sector or they may face the risk of litigation. [10] Australia has undertaken a number of national reforms to consumer law, although competition law is also designed to protect consumers. This reform of consumer law is closer to world standards, which is a good sign for international investors, but it also gives suppliers more responsibility to inform regulators of important matters. Furthermore, the enforcement of the consumer law has been strengthened and regulators can give the warning information to market due to consumer credit suppliers reporting to regulators. [16]

It is relatively difficult for a socialist country to reform competition and consumer law, because of interference of state-owned enterprises and a planned economy. With the improvement of marketization, China government issues many new regulations and reforms laws, for example, the National Development and Reform Commission (NDRC) has proposed reform laws, such as price law and anti-unfair competition law, to control and prohibit the monopoly pricing, which is conducive to maintain price and against price discrimination. [7] China has amended the Consumer Protection Act, which cooperates with the Anti-Monopoly Law and Anti-Unfair Competition Law to promote the protection of consumer rights and create a better investment environment.

Japan developed competition and consumer law in the early 20th century, following the EU. The Antimonopoly Act plays important role in Japan adjusting business action, and private

monopolization and unreasonable restriction of trade will be punished. [29] if the investors suffer damage due to the improper behavior of other companies, they can claim compensation according to the law. Although Japan does not have a uniform code of consumer law, there are fundamental laws (Basic Act on Consumer Polices) and special laws (Act on Specified Commercial Transactions and Installment Sales Act). Outbound investors who want to access to Japanese market must know these laws in detail.

#### **4.2. The Relative Pros and Cons for Each Country Across Competition and Consumer Law**

The CCA and TPA provide a clear legal framework for foreign investors on how to trade fairly and how to remedy unfair treatment. The biggest advantage of these laws is that they cover all aspects of the trade field, not only regulating the market order, but also protecting the individual rights and interests of consumers. However, enforcement of these laws become s a disadvantage that cannot be ignored. In Australia, the Australian Competition and Consumer Commission (ACCC) has the power to enforce competition law and most competition proceedings are brought by ACCC so that there are less chances for private to litigate. [5] Although the intellectual property has significant influence globally, there are few related proceedings due to some improper exemption provisions and regulators rarely enforce competition law.( Hanks (n 45) 330–331.)

It is obvious that reforms of competition and consumer laws attract more foreign investment to China, which promote China to become the second largest economy body in the world. The success of legal reform has helped China to have the opportunity to conclude more FTAs and has created a favorable investment environment for China's Belt and Road Strategy. However, as China's legal reform has developed too fast, the public's legal awareness has not been sufficiently raised, which may lead to foreign investors not adapting to Chinese consumers. In addition, the competition law is not fully applied to SOEs, and the implementation of the law is affected by many political factors, which will inevitably cause concerns of investors. [15]

The goals of competition law in Japan are complex, as the government pursues the political interest and economic development. There are positive aspects to the reform of the competition law. For example, the Antimonopoly Act has improved the situation of traditional family firms monopolizing the market. Outbound investors' interest could be protected because the Antimonopoly Act restrict the unfair trade actions. [48] Another advantage is that private enforcement of the Antimonopoly Act is a frequent occurrence, which improves the efficiency of enforcement of the competition laws. [48] We have to admit that Basic Act on Consumer Policies only stipulates that the basic principles and guidance and local governments have the right to enact policies to implement laws, which would result in different standards for enforcing the law.

### **5. Conclusion**

FDI has always played an important role in international economic development, particularly in promoting sustainable economic development in Asia-Pacific and helping poor countries to improve their economic situation. Australia, China and Japan, as economic powers in the Asia-Pacific region, are also highly dependent on FDI. Although the three countries have their own culture and legal backgrounds and business environments and these investment-related legal reforms also have advantages and disadvantages, they are promoting sustainable foreign investment in ways that best suit their own condition. During the law reform period, each country is learning from the advanced experience of others so that the legal system of investment in Asia-Pacific gradually has been mixed and expanded, while there is a combination between Civil law and Common law, which is useful to promote FDI. However, in 2020, given that the Covid-19 pandemic disrupts the normal economic order of the world, FDI

fell by a third. On the one hand, how to recover from the epidemic and maintain sustainable economic development has become the main goal of all countries. on the other hand, how to adapt to international investment under the pandemic is also a difficult problem for investors. The three countries have all taken steps to assist overseas investors in responding to the epidemic. These approaches cover three main aspects: first, the Government has increased its review of investment in order to ensure the national security. Second, the period of investment application or approval has been extended, which can help investors to overcome the impact of the epidemic. Third, the Government provides corporate subsidies and policy support to established and small companies to prevent them from facing bankruptcy crises.

The three governments made rapid policy adjustments in the face of the outbreak so that the economy does not suffer serious damage, which also accumulated experience in the face of international emergencies in the future. Improving the flexibility and transparency of investment-related laws may be the focus of future legal reforms, which could attract more foreign investment.

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