Courts have also held that a corporation that promised to do "all that was necessary" had entered into "an obligation to do, guaranteeing a certain result." And this is so, even if such an obligation—less onerous than a regular surety—may be discharged other than by the controlling company assuming payment for the whole of the debt.[9]

The only way for a controlling company to avoid liability for the unpaid debts of its subsidiary is for the former to prove that it has totally complied with all its acquired commitments. Such was the case of a company that supported its subsidiary by awarding loans to it against future profits, increased its capital, condoned its debts, and refused to pay for the subsidiary's obligations only when such payment would have provoked the insolvency of the controlling company.[10] On the other hand, a court held that a controlling company did not comply with its promises when it drastically reduced the capital investment it had in its subsidiary (from 80 percent to 5 percent), without informing the lending bank.[11]

Pacific Basin*

I. Australia

A. The New Corporations Law

The new Corporations Law (the Law)[1] came into operation on January 1, 1991, and applies throughout the states and territories of Australia. The Law, while in essence a series of enactments by the states, operates as federal law throughout Australia and will be administered by the Australian Securities Commission (the ASC) through its various regional offices.[2]

Below are set out a number of significant changes effected by the Law:

1. *The General Framework*

(a) Whilst companies will continue to be incorporated in a particular state, the new regime will treat existing and new companies as incorporated throughout

9. Judgment of Apr. 30, 1985 (Crédit du Nord v. Industrias Valls S.A.), 1986 D.S. Jur., No. I.R.325 (commentary by Vasseur).

10. Judgment of May 10, 1989, Paris, 1989 D.S. Jur., No. I.R.143.

11. Judgment of Feb. 9, 1989, Versailles, 1989 Bull. Joly, No. 419.

*Prepared by Simon Berger of Baker & McKenzie, Chicago, Illinois, in cooperation with the firm offices in the Pacific Basin. The assistance of Ben McLaughlin for the item on the Australian corporations law is gratefully acknowledged.

1. Corporations Legislation Amendment Act, No. 110 (1990).

2. The Law replaces the Corporations Act of 1989, 2 AUSTL. ACTS P., No. 109 (1989) (which introduced a scheme based on mutual recognition of corporate status among the various States and Territories).

Australia. A single centralized data base (presently containing over 800,000 companies) will contain details of incorporations and the filing of corporate documents. A duly incorporated company will be entitled to carry on business throughout Australia. Similarly, the issue of prospectuses and the licensing of dealers will have universal application.

(b) Companies incorporated under the previous regime are deemed automatically registered under the Law as from January 1, 1991.

(c) Foreign corporations will be required to lodge a single application covering all states and territories and need not have a home state of registration.

(d) Companies are no longer required to publish their state of incorporation on their letterhead, checks, or other documents, although they are required to display their name and the new company number on their seal and on all public documents.

(e) All currently registered company names are deemed automatically registered under the Law. Thus, if two companies with identical names are registered in different states, they will both be entitled to carry on business throughout Australia using that name, subject to existing unfair competition legislation.

(f) Australian companies and foreign companies are no longer required to maintain principal offices in each state where they carry on business but need only maintain one office anywhere in Australia.

(g) The ASC is given powers of investigation and prosecution under the Law, with the assistance of the police and the Federal Director of Public Prosecutions. The prosecution of other disputes under the Law may be brought either before the federal court or any state court.

(h) A new Corporations and Securities Panel has been set up to make declarations regulating the conduct of takeover bids or other unacceptable acquisitions.

(i) The federal government will have power to pass amendments to the Law on matters such as securities, capital issues, and takeovers. These amendments are no longer subject to possible veto by the Ministerial Council of the States.

(j) The states will retain a merely consultative role in making amendments in other areas, and a veto will require the opposition of more than four states.

2. *Offers for Subscription*

The rules relating to the requirement to prepare and lodge with the ASC (and in some cases register) prospectuses have been expanded in scope, dispensing with the previous requirement for an "offer to the public." The new provisions will apply to all offers of shares, debentures, and other prescribed interests, subject to some specific exceptions. The exceptions include:

(a) large subscriptions in excess of A$500,000;
(b) private offers of shares and debentures made to not more than twenty people in the preceding twelve months;
(c) securities to be issued only to executive officers of the company (or their close relatives); and

(d) bonus issues of shares to existing members (as opposed to rights issues where the full subscription price must be paid by the subscriber).

The Law does not prescribe a detailed checklist of matters to be contained in a prospectus. Generally, the Law requires the disclosure of all information that investors and professional advisors would reasonably require and reasonably expect to find in a prospectus for the purpose of making an informed assessment of the financial position and prospects of the corporation, the rights attaching to the issued securities, and (in the case of share option or similar schemes) the merits of the scheme and the risks involved. Also, printed copies of a proposed prospectus must be lodged with the ASC, which then has fourteen days to decide whether to register the prospectus. Liability for misstatements in the prospectuses is imposed on all persons named therein as an expert, auditor, banker, or attorney, or as having performed a professional or advisory role in relation to the issue of securities, as well as directors and promoters of the issuing company. This liability is subject to a defense based on the exercise of due diligence.

The existing procedure for obtaining preliminary comments on prospectuses from the predecessor body to the ASC has been withdrawn.

3. *Shareholder Notifications*

A shareholder who acquires 5 percent or more of the entire issued share capital of a company is required to notify the board of directors. Formerly such notification was only required upon obtaining a 10 percent shareholding.

4. *Loans to Directors*

The new provisions are similar to the former prohibitions on loans to directors. However, new proposed legislation is intended to further regulate loans made to company directors and officers and loans to related companies.

II. Hong Kong

A. Tax Audits

The Hong Kong annual budget in March 1991 included proposals for the introduction of a "field audit" system whereby Inland Revenue officers will begin interviewing taxpayers and checking business records at the taxpayers' business premises, as opposed to merely examining returns and raising queries by correspondence. The new system is designed to encourage voluntary compliance by taxpayers, based on the theory that the threat of an audit and possible penalties should result in fuller disclosure in tax returns.

B. Tax Concessions for Shipping

A broad range of tax concessions for shipping operations is expected to be introduced shortly. Under the package, the profits obtained from ships registered in Hong Kong will be exempt from profits tax. Instead, the ship will be liable to pay an annual registration fee. The concession will not apply to ships engaged in the "river trade," including navigable inland waters and coastal shipping in and around Hong Kong.

The provisions will have effect from December 19, 1990, when the Hong Kong shipping register came into force. The proposals are designed to encourage shipowners to register their ships in Hong Kong, and also intended to compete with similar tax concessions offered to the shipping industry by Singapore,[3] although they are not incompatible with the Singapore incentives.

C. Registration of Service Marks

On May 23, 1991, the Trade Marks (Amendment) Ordinance 1991[4] was passed, amending the existing trademark law[5] to include its application to trademarks in respect of services. The Ordinance became effective on March 1, 1992, with applications accepted for registration from December 1, 1991. The Ordinance adopts the International Classification of Services, with the result that protection will be available for the following categories of services: (i) advertising and business; (ii) insurance and financial services; (iii) construction and repairs; (iv) communications; (v) transport and storage; (vi) treatment of materials; (vii) education and entertainment; and (viii) miscellaneous.

Registration of service marks is particularly important to businesses in the banking, insurance, or hotel and leisure sectors. It will also be useful for companies offering goods and ancillary services, for example, computer manufacturers who offer after-sales support services such as installation, repair, programming, or training.

The Ordinance also includes provisions for linkage to be implied between trademark and service registrations. A new application will not be registered if there are relevant prior marks for similar goods or services. Thus, in seeking to register a mark, a search should previously be done in both the trademark and service mark registers.

III. Korea

A. Regulation of Korean Investment Abroad

The Korean Government is gradually reducing restrictions on overseas investment by Korean nationals, including restrictions on investment by joint venture operations between Korean and foreign nationals. However, the Foreign Exchange Control Regulations (as amended) still limit overseas investment by Korean firms and individuals to the following prescribed areas:

(a) direct equity investment, provided that the Korean investor holds at least 20 percent of the equity in the overseas company; exceptions may be

3. *See infra* part VI.
4. Ordinance No. 44 (1991).
5. Trade Marks Ordinance, 5 Laws of Hong Kong ch. 43 (1986).

made if relevant foreign law prohibits the 20 percent local ownership, or for certain tripartite joint ventures, if the Korean party has a reasonable level of management control; acquisitions merely for portfolio purposes are prohibited;

(b) loans with a maturity period of one year or more;

(c) acquisition of real estate;

(d) investment in a high technology venture managed by an overseas company or in the form of a joint venture, or a venture that will otherwise benefit Korean exports or technology;

(e) direct acquisition of, or merger with, a foreign business; and

(f) establishment of a new foreign joint venture or subsidiary.

IV. Malaysia

A. Removal of Export Incentive

Prior to 1990 a scheme existed whereby manufacturing companies were eligible for a 50 percent reduction in their tax liability on the adjusted portion of their income earned from exports.[6] All manufacturing companies were eligible regardless of being accorded pioneer status or receiving investment tax allowances. Furthermore, sales made by manufacturing companies located in Free Trade Zones to similar manufacturing companies were treated themselves as export sales.

The Promotion of Investment (Amendment) Act 1990 restricts the reduction to companies operating in the Principal Customs Area that have 70 percent or more equity participation by Malaysians or Malaysian-owned entities. The Act also restricts the reduction to statutory income rather than adjusted export income. The withdrawal will have a significant effect on many manufacturing companies and increase the relative advantages of other tax exemptions.

B. Malaysia Budget for 1992

The 1992 Malaysian budget contains several significant tax changes, including changes to the tax treatment of pioneer companies and of investment tax allowances. Highlights are as follows:

1. *Pioneer Companies*

Companies granted pioneer status after November 1, 1991, will no longer be eligible for complete exemption from tax. Instead, they will be assessed tax on 30 percent of their statutory income. Whether development tax will also be assessed on the same basis is not clear (see 3. below).

Companies granted pioneer status prior to November 1, 1991, will retain an exempt status holiday for up to five years. Extension of the pioneer status will no longer be available.

6. *See* Promotion of Investments Act 1986, § 36(5).

There remains a possibility, on a case-by-case basis, of obtaining a 100 percent tax exemption for "a limited number of strategic projects of national importance," namely, projects "with heavy capital investment and high technology, which can generate extensive linkages and have significant impact on the Malaysian economy."[7]

2. *Investment Tax Allowances*

The maximum investment allowance has been reduced from 100 percent to 60 percent of qualifying capital expenditure incurred on a promoted activity or product. The amount of investment tax allowance to be abated for each year of assessment will also be limited to a maximum of 70 percent of statutory income for that year. Any unutilized allowance can be carried forward to subsequent years. From November 1, 1991, the investment tax allowance will not be granted to companies that have enjoyed or are enjoying an investment tax allowance in respect of a similar product or activity.

3. *Development Tax*

The rate of development tax has been reduced from 3 percent to 2 percent for fiscal year 1992. A proposal has been made to abolish the tax from fiscal year 1993.

4. *Venture Capital Companies*

Existing incentives for venture capital companies will be expanded as follows, with effect from fiscal year 1992:

(a) expenses not deducted in any year of assessment because of insufficient income can be carried forward to the subsequent year of assessment;
(b) losses incurred on the disposal of shares in a venture capital company, or on the liquidation of a venture company, will be allowed as deductions against income of the venture capital company;
(c) the period of exemption from tax on gains from the disposal of shares in a venture capital company will be extended from two years to three years after the date on which the company is listed on the Kuala Lumpur Stock Exchange.

5. *Other Incentives*

The guidelines for equity ownership in Malaysian companies will be liberalized as follows:

(a) no equity conditions will be imposed on companies that export 80 percent or more of their production.
(b) foreign companies that export 50 percent or more, but less than 80 percent, of their production may hold 100 percent equity if (i) there is an investment of 50 million Ringgit or more in fixed assets and (ii) the project has at least 50 percent value added to the cost of production.

7. 1992 Budget Speech by Minister of Finance, Anwar Ibrahim (Oct. 18, 1991).

6. *Tax Relief for Interest from Corporate Bonds*

To promote individual investment in corporate bonds, interest earned by individuals from corporate bonds issued by public companies listed on the Kuala Lumpur Stock Exchange will be exempted from income tax. The exemption will not apply to interest earned from loan stocks that are convertible into equity shares. The proposed change will be effective from fiscal year 1992.

7. *Stamp Duty*

With effect from January 1, 1992, ad valorem stamp duty imposed on transfer instruments of patents, trademarks, bills of exchange, bills of lading, and receipts was eliminated.

V. Philippines

A. Foreign Investments Act of 1991

The Foreign Investments Act of 1991[8] was promulgated on June 13, 1991. The Act amends the existing foreign investments legislation to permit a level of foreign ownership of up to 100 percent in Philippine export enterprises providing products and services not included on Lists A and B of the Foreign Investment Negative List (see below). Furthermore, foreign ownership of up to 100 percent is also permitted in domestic market enterprises where such ownership is not prohibited by existing law or by prescription in the Foreign Investment Negative List.

An export enterprise is defined as a manufacturing or service enterprise that exports at least 60 percent of its output or a trading enterprise that purchases products domestically and exports at least 60 percent of the purchases. A domestic market enterprise is defined as an enterprise that produces goods for sale, or renders services, solely to the domestic market, or that consistently exports less than 60 percent of its output.

Foreign ownership in an enterprise that carries on activities prescribed by the Foreign Investment Negative List is limited to a maximum of 40 percent of its equity share capital.

The Foreign Investment Negative List is formulated by the National Economic Development Authority of the Philippines and consists of three component lists:

- List A details areas of economic activity reserved to Philippine nationals.
- List B specifies areas of activity regulated by law. These include: (i) the manufacture and distribution of armaments, weapons, and related products; (ii) the manufacture and distribution of dangerous drugs and activities affecting public health and morals, such as gambling clubs, nightclubs, and bars; (iii) small and medium-sized domestic enterprises having equity capital of less than the equivalent of U.S. $500,000 (except high technology

8. Republic Act No. 7042.

enterprises); and (iv) export enterprises of small or medium size (as above) that utilize raw materials that contribute to the depletion of the Philippines' natural resources);

- List C specifies areas of activity where existing enterprises adequately service the economy.

B. New Import Duty

Presidential Executive Order 443, implemented in February 1991, imposes a new ad valorem import duty of 9 percent on all imports with the exception of: (i) imports exempt under international agreements to which the Philippines is a signatory; (ii) foreign embassy imports; (iii) imports by enterprises registered with the Export Processing Zone Authority; (iv) bonded manufacturing imports; (v) imports released under a re-export bond; and (vi) imports by registered veteran enterprises.

The effect of the new duty will be mitigated by a number of concessions. Firms registered with the Board of Investments (BOI) that hold valid certificates of authority issued on or before December 31, 1990, will be exempt from the duty. All BOI-registered firms are entitled to credits in relation to raw materials used in the production of goods for export.[9]

The relevant date for assessment and collection of the additional import duty is the time of entry of the goods into the Philippines or the time of withdrawal from a bonded warehouse for consumption in the Philippines.

VI. Singapore

A. Dividends from Foreign Sourced Income

The Income Tax (Amendment) Bill 1991 includes an important proposed change to the system of taxation of dividends in Singapore. Dividends paid by a Singapore resident company will be treated as exempt from tax when paid out of foreign source income for which there are insufficient franking credits (credits available upon dividends paid to holding companies) due to the operation of the foreign tax credits received on the income.

This provision is intended to deal with the problem faced by resident companies that earn foreign sourced income with the benefit of a foreign tax credit. Previously, if the company claimed its tax credit (thus reducing its taxable income), the resulting tax deduction reduced the credits normally available to the company to pay a franked dividend, and (to the extent that all the foreign sourced income was paid out as a dividend) the franking charge eliminated the benefit of the foreign tax credit and brought the effective tax rate to the current corporate rate.

It is now proposed to exempt from tax dividends paid out of foreign sourced income, where the effect of foreign tax credits would be to reduce the franking

9. Department of Finance Memorandum (Jan. 18, 1991).

credit available. Under this scheme, when the foreign tax paid on the income is equal to or greater than the corporate rate (currently 31 percent), the total foreign income may be distributed as tax exempt dividends to shareholders. Where the foreign tax is lower than the current Singapore rate, Singapore may impose tax on the differential.

Consequently, Singapore should be a favorable jurisdiction for the establishment of regional holding companies deriving income from other overseas companies located in countries with which Singapore has a favorable double tax treaty.

B. New Tax Incentives

The Income Tax (Amendment) Bill 1991 also implements the various other tax changes proposed by the 1990 budget statement. Included in the draft legislation are the following new tax concessions:

1. *Tax Allowances for Finance Lessees*

The Minister for Trade will have authority to introduce regulations providing that allowances relating to machinery or plant under a finance lease may be received by the lessee instead of the lessor as if the asset had been sold to the lessee. For these purposes a finance lease is a lease of machinery or plant that effectively transfers to the lessee the risks or rewards incidental to ownership.

2. *Offshore Leasing Incentive*

Under this scheme the income of a leasing company derived from the offshore leasing of machinery or plant will be taxed at a flat rate of 10 percent. No application for the concession is required, so long as the leasing company is engaged in the offshore leasing of plant and machinery. The concession will apply where: (a) the machinery or plant has not been treated as being sold to the lessee (see above); (b) the machinery or plant is used solely outside Singapore; (c) the lease payments are in a currency other than Singapore dollars; or (d) the lease payments are not deductible against any income derived from Singapore. Furthermore, the leasing company is obliged to claim all available capital allowances in determining its offshore leasing income, since all losses arising from offshore leasing activities may only be offset against offshore leasing income.

3. *Other Incentives*

The legislation also introduces 10 percent concessionary tax rates for income derived from various overseas activities including:

- (a) income derived from qualifying activities carried out by the company on its own account or on behalf of its offices and associated companies outside Singapore;
- (b) prescribed commodities or futures trading by approved international commodity trading companies; and
- (c) relevant insurance transactions conducted offshore by insurance companies.

C. Shipping Enterprise Scheme

A new incentive scheme designed to encourage foreign shipowners to set up operations in Singapore will become effective on January 1, 1992.[10] Under this scheme, shipowners will obtain a tax exemption on income derived from the operation of vessels wherever registered.

To obtain the benefit, the company must be resident in Singapore, own and operate a significant fleet of ships, have at least 10 percent of its fleet (or at least one vessel) registered in Singapore, and have spent at least Singapore $4 million per year in connection with operations based in Singapore. Status under the scheme is granted for an initial ten-year period, which may be extended. The exemption applies to income derived from physical operations in Singapore and dividends from approved subsidiaries and associated shipping companies. The incentive may be available in conjunction with the new Hong Kong registration incentive.[11]

D. Registration of Service Marks

An amendment to the Singapore Trade Marks Act was passed on January 3, 1991, to be effective on March 1, 1991, that provides for the registration of service marks, defined as marks relating to goods or services. The new law adopts the International Classification of Services,[12] which will permit providers of specialist services, as well as those who provide goods coupled with ancillary services, to obtain protection for all their marks, however used.

The amendment also includes provisions to increase the penalties for counterfeiting a trademark. These penalties will also apply to persons importing or selling goods to which counterfeit marks are affixed. This measure is obviously intended to make some impact into the counterfeit products market.

E. New Stock Exchange Guidelines

The Stock Exchange of Singapore (SES) has recently implemented new guidelines in connection with new company listings. The following is a summary of the main areas of the guidelines:

1. *Allotment of Shares*

The SES has stated that no preferential allotment of reserved shares should be given to persons who have a professional relationship with the issuer. Such persons include independent directors, the issue manager, and any reporting accountant, valuer, or solicitor. In addition, any preferential allotment of re-

10. Approved International Shipping Enterprise Scheme.
11. *See supra* part II.B.
12. *See supra* part II.C.

served shares to corporate "business associates"[13] should be allocated to the entities themselves, and not to their officers or employees.

Another significant guideline states that in normal circumstances at least 30 percent of an issue must be allotted to "small applicants,"[14] with ballots to be organized in the event of over-subscription. This requirement could be dispensed with upon prior approval by the SES.

2. *Multiple Applications*

The guidelines also propose that prospectuses and share application forms include warnings against submitting multiple applications to the effect that the applications could be handed to the relevant authorities for investigation.

3. *Primary Listings*

The SES also announced that it will consider applications for primary listing and admission to the Official List from Singapore-incorporated companies whose assets and businesses are located outside Singapore. Such applications would be considered individually, taking into account all relevant factors. One condition imposed on such companies admitted to the Official List is that all funds raised in Singapore be in U.S. dollars or other foreign currencies. Subsequent quotation of the shares must be in the same currency. Furthermore, quotations of such shares must be made in larger denominations so as to target sophisticated investors.

VII. Taiwan

A. Access to Securities Market

A number of significant changes have been made to the operation of the Taiwan securities market. The major new developments are:

1. *Investment Trust Companies*

The Securities and Exchange Commission (SEC) has announced it will issue a limited number of new licenses for the formation and operation of securities investment trust companies on an annual basis. These trust companies are authorized to raise and manage funds, including foreign funds for investment in Taiwan and funds raised in Taiwan for investment in Taiwan and abroad. The new licenses will be granted only to joint venture operations, including major overseas fund managers and banks, and a further condition will be the successful launching of an NT$4 billion fund for its investment activities.

13. The term refers to a recognized exception to the rules governing offers of shares to the public.

14. Defined as persons applying for between 1,000 to 9,000 shares.

2. *Direct Foreign Investment*

The Taiwan Stock Exchange will permit certain foreign institutions to invest directly in the market, with effect from January 1, 1991. Qualifying institutions are defined as follows: (a) banks ranking among the world's top 200 in terms of total assets and holding securities of more than U.S. $300 million; (b) insurance companies established for more than ten years and holding securities of more than U.S. $500 million; or (c) fund managers established for more than five years with more than U.S. $500 million of assets under management. Under the proposals an initial limit on total direct foreign investment in Taiwan is set at a maximum of U.S. $2.5 billion, and investment quotas will be allocated to each institution at a figure between U.S. $5 million and U.S. $50 million.

Each foreign institution is required to designate a local agent to submit the required application documents for SEC approval, and a local custodian must also be appointed to hold assets in Taiwan.

Funds may be remitted in installments. The initial remittance must be at least U.S. $5 million, with the balance to be remitted within three months after the SEC grants approval.

Capital may be repatriated three months after the remitted funds are converted into NT dollars. Earnings, including interest income, cash dividends, stock dividends, and capital gains may be repatriated only once in each year based on certified financial statements, provided that the stock dividends and capital gains are realized.

VIII. Thailand

A. Relaxation of Foreign Exchange Controls

With effect from April 1, 1991, many of the Thai foreign exchange regulatory controls have been relaxed. As a result, most transactions no longer require prior approval from the Bank of Thailand but may be undertaken freely through a commercial bank. The following is a list of the major changes:

(1) Exports are now free from exchange restrictions. Under the new rules, export proceeds worth more than Baht 500,000 are required to be obtained within 180 days, and then sold or deposited with a commercial bank within fifteen days of acquisition. Formerly, the export of goods valued at more than Baht 100,000 required the exporter to obtain the foreign currency proceeds within 180 days and to sell them to a commercial bank within seven days of acquisition.

(2) Importers may now purchase or draw foreign exchange from their own foreign currency accounts in an amount not exceeding the value of the goods imported. Formerly, where payment for the imports was by foreign currency or letter of credit, the purchaser was required to submit an application through a commercial bank.

(3) Imported foreign currency is required to be converted into Baht or deposited in a foreign currency account with a commercial bank in Thailand within