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FOREIGN DIRECT INVESTMENT REGULATION GUIDE

SECOND EDITION

Editor
Veronica Roberts

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Foreign Direct Investment Regulation Guide

Second Edition

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Part 2

Analysis of Key Foreign Investment Jurisdictions

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CHAPTER 11

Mexico

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Foreign investment control measures in Mexico have been in place for decades and have been amended on multiple occasions. As described by the Organisation for Economic Co-operation and Development (OECD), such provisions allow governments to analyse and evaluate investment proposals based on their potential impact on essential security or other public policy considerations.[2] The Mexican Foreign direct investment (FDI) regime has decisively leaned towards an open and flexible approach with few restrictions on foreign investors. Our jurisdiction has a straightforward procedure based on generally allowing all foreign investment to operate in Mexico, with some exceptions in specific sectors as established in our Foreign Investment Law (LIE).

Mexico should not yet be considered as part of the global trends on restricting FDI due to national security or other concerns. There are no plans to amend the FDI framework at present and Mexico has not introduced any additional screening mechanism or initiated discussions on topics related to geopolitical trends, technology and privacy issues, or the changes introduced by other countries as a result of the covid-19 pandemic. However, in this chapter we explain that policy changes potentially affecting foreign investors are present in our jurisdiction and may signal a more cautious approach to FDI in our country in future.

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1 Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez are partners and Édgar Martín Padilla is a senior associate at Creel, García-Cuéllar, Aiza y Enríquez. The authors gratefully acknowledge Jesús Miguel Vargas Talamantes (associate) for his research and Esteban Valadez Jimenez (partner) for his review and comments.

2 OECD, *Investment screening in times of COVID-19 and beyond*. July 2020, page 2. Available at: https://read.oecd-ilibrary.org/view/?ref=135_135247-aj6t8nmwlr&title=Investment-screening-in-times-of-covid-and-beyond.

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The first section briefly explains the general approach of Mexico's FDI regime and a summary of the historical context that led to this legal arrangement. The second section describes Mexico's FDI regime in more detail, with particular attention to investment exceptions in our jurisdiction. Additional procedural aspects of the Mexican FDI regime are described in the third section, and the final section outlines some prospective trends for Mexico in the context of a global paradigm shift in FDI.

The Mexican context on foreign investment

As in many other developing countries, the approach to FDI in Mexico has dramatically changed over time. During the first half of the twentieth century, the Mexican government was sceptical of foreign investment and legislation was enacted to control national resources and 'strategic assets'. A strong industrial policy based on import substations, state-owned companies and promotion of local enterprises resulted in an initial FDI regime that aimed to control and regulate several sectors with regard to international exposure.[3] However, during the late 1980s and the early 1990s the government switched gears towards an open economy and a radical shift in attitude towards FDI materialised into a new open and flexible regime that has lasted to this day.

Foreign investment in strategic sectors was fiercely targeted by the Mexican revolutionary regime in the first decades of the past century. During the 1930s, the government expropriated entire strategic sectors such as railroads in 1937, and, of course, oil and gas in 1938. The economic control in critical extractive industries during the twentieth century was ever-present in the mind of foreign investors when investing in other sectors in Mexico. In the decades that followed, the Mexican government intended to develop capabilities by 'picking local winners'. With mixed results in economic development, the government used a wide array of policy tools such as import licences, quotas, tax breaks, direct subsidies and FDI limitations.[4]

By the late 1970s the lack of competitiveness in the local industry, rising double-digit inflation, a huge sovereign debt together with the volatility in commodities made it impossible for the government to sustain a protectionist approach to investment policy. While the enactment in 1973 of the first formal

3 Zeind, Marco Antonio, *Organismos constitucionales autónomos*, México, Tirant lo Blanch, 2018, page 201.

4 Dussel Peters, *Enrique. La inversión extranjera en México*, Santiago de Chile, Naciones Unidas CEPAL, 2000, page 11, Available at: https://repositorio.cepal.org/bitstream/handle/11362/4462/1/S00080670_es.pdf.

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instrument of FDI screening known as the Law to Promote Mexican Investment and Regulate Foreign Investment (LPIMRIE) seemed to strongly encourage local investment over FDI, the government was internally divided in its views as became clear in the years that followed.[5]

After the tremendous sovereign debt crisis of the 1980s, the Mexican government decisively turned to an open free market economy. The executive branch promoted the arrival of foreign capital to Mexico and in 1989 issued the Regulation of the Law to Promote Mexican Investment and Regulate Foreign Investment (RLPIMRIE), which, instead of continuing the protectionist narrative of the initial FDI legislation, included several foreign-friendly provisions.[6] This framework, although legally imperfect, gave a sufficient degree of certainty to foreign investors at a critical moment in Mexico's history.[7]

The FDI-friendly policy shift was intensified in the 1990s. On 17 December 1992, Canada, the United States and Mexico signed the North American Free Trade Agreement (NAFTA), which entered into force in 1994. NAFTA 'forced [the Mexican government] to carry out multiple amendments, reforms and even issue new laws for sectors that were affected'.[8] As part of said measures, with the purpose of carrying out an organised commercial opening that would provide legal stability to investors, on 23 December 1993, the Foreign Investment Law (LIE, as previously defined) was published.

Since then, the LIE has remained in force for almost 29 years, and its last update[9] was on 6 June 2018, months before the beginning of the current government. The LIE establishes, as the general rule, that foreign individuals and foreign legal entities can participate in any business activities, acquire a participation of any size in any company and acquire assets in Mexico unless otherwise stated. The latter illustrates the sense of openness and liberalisation that has been adopted by our legislation since the 1990s.

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5 Law to Promote Mexican Investment and Regulate Foreign Investment. *Revista de Derecho Notarial Mexicano*. Available at: https://revistas-colaboracion.juridicas.unam.mx/index.php/derecho-notarial/article/view/6234/5553.

6 The RLPIMRIE remained in effect until 1998.

7 Flores Farías, Diego. *La inversión extranjera en México*, México, Tirant lo Blanch, 2016, page 39.

8 Op cit. Dussel, Enrique, page 16.

9 The LIE has been amended 17 times since its issuance. Available at: www.diputados.gob.mx/LeyesBiblio/ref/lie.htm.

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Mexico's FDI legal framework

In Mexico, regulation of foreign investment is a matter reserved for the Federal Congress and is regulated by the LIE. The legal authority to issue legislation on foreign investment derives from the Constitution, which states the following: 'Article 73. The Congress has the authority: . . . XXIX-F. To issue laws for the promotion of Mexican investment, the regulation of foreign investment.' Under such dispositions, when a transaction falls within the filing thresholds, approval by the regulator is mandatory and must be obtained before closing. There are no legal exemptions for such filing based on industry type, the origin of the acquirer, or other considerations.

In Article 2 of the LIE, a foreign investor is defined as 'an individual or entity of any nationality other than Mexican, as well as foreign entities with no legal standing.' Likewise, the article states what is considered foreign investment: (1) participation by foreign investors, in any proportion, in the capital stock of Mexican companies; (2) investments by Mexican companies in which foreign capital has a majority interest;[10] and (3) participation by foreign investors in the activities and acts contemplated by the LIE.[11]

The regulatory bodies for the LIE were established with the enactment of the first FDI legislation in 1973, namely: the National Commission of Foreign Investments (CNIE) and the National Registry of Foreign Investments (RNIE). The CNIE was assigned, inter alia, the authority to determine the percentage in which FDI could participate. On the other hand, foreign individuals and companies, Mexican companies with foreign capital, and trusts in which foreigners participated needed to be registered in the RNIE.

General rule and exceptions in the LIE

Foreign investors may participate in any proportion in the capital stock of Mexican companies, acquire fixed assets, enter new economic fields of economic activity or manufacture new product lines, open and operate establishments, and expand or relocate existing establishments, except as otherwise provided in the LIE. In this regard, the LIE establishes the following activities as exceptions to the general rule:

10 Article 1 of the Regulations of the LIE further defines 'foreign capital with a majority interest' as such cases in which foreign investment participates in more than 49 per cent of a company's capital stock.

11 Article 2 of the LIE.

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(1) activities reserved for the Mexican state; (2) activities reserved for Mexicans or Mexican companies with a foreigner exclusion clause; (3) activities with specific regulation; and (4) activities subject to the prior approval of the CNIE.

According to our legal framework, the following activities are reserved for the Mexican state (public monopolies):

- exploration and extraction of petroleum and other hydrocarbons;
- planning and control of the national electric system, as well as the transmission and supply of electricity as a public service;
- nuclear power and treatment of radioactive minerals;
- telegraph, postal services, and radiotelegraphy;
- control, supervision, and surveillance of ports, airports and heliports; and
- issuance of bills and minting coinage.[12]

The activities reserved for Mexicans or Mexican companies with a foreigner exclusion clause are: (1) passenger, tourism, and freight transportation; (2) development banks; and (3) the provision of professional and technical services explicitly covered in the applicable legal provisions.[13]

The activities with specific regulation are classified by the percentage of foreign investment ownership allowed. In this regard, they are categorised as follows:

- up to 10 per cent in producers' cooperatives;
- up to 49 per cent in:
    - manufacture and sale of explosives, fire arms, cartridges, ammunition and fireworks (acquisition and use of explosives for industrial and extraction activities are not included, nor is the preparation of explosive compounds for use in said activities);
    - printing and publishing of newspapers solely within Mexico;
    - series 'T' shares in companies owning agricultural, ranching and forestry land;
    - fishing in freshwaters, coastal waters and in the exclusive economic zone (fish farms excluded);
    - integral port administration;
    - piloting port services to vessels for the conduction of interior sailing in terms of applicable law;

12 Article 5 of the LIE. Please also refer to OECD, *National Treatment for Foreign-Controlled Enterprises. List of measures reported for transparency*, October 2017, page 74. Available at: www.oecd.org/daf/inv/investment-policy/NTItransparencyENG.pdf.

13 Article 6 of the LIE.

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- shipping companies engaged in commercial exploitation of ships for inland and coastal navigation, excluding tourism cruises and exploitation of marine dredges and devices for port construction, conservation and operation;
- supply of fuel and lubricants for ships, aeroplanes, and railway equipment;
- radiobroadcasting (subject to the reciprocity that exists in the controlling investor's country of origin); and
- domestic air transportation, air-taxi transportation, and specialised air transportation.[14]

Jurisdictional thresholds

As further described below, the jurisdictional thresholds outlined in the LIE are based on either the activity in which the foreign investment is participating or the value of the assets of the target. In these cases, approval from the CNIE must be obtained before closing. The LIE does not prevent *ex officio* reviews for investments that do not meet the notification thresholds, but, in our experience, there are no precedents of *ex officio* reviews carried out by the CNIE on these cases.

A favourable resolution by the CNIE is required for foreign investors to participate directly or indirectly in a percentage greater than 49 per cent (Article 8 authorisation) in any of the following activities or companies in Mexico:

- port services in order to allow ships to conduct inland navigation operation, such as towing, mooring and barging;
- shipping companies engaged in the exploitation of ships solely for high-seas traffic;
- concessionaire or permissionaire companies of airfields for public service;
- private education services of pre-school, elementary, middle school, high school, college or any combination;
- legal services; and
- construction, operation and exploitation of general railways, and public services of railway transportation.[15]

Further, a favourable resolution from the CNIE is also required for foreign investors to participate, directly or indirectly, in a percentage greater than 49 per cent[16] of the outstanding capital stock of a Mexican company when the aggregate value of

14 Article 7 of the LIE.
15 Article 8 of the LIE.
16 Article 9 of the LIE.

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the assets of such companies on the date of acquisition exceeds 22,647,201,250.50 Mexican pesos (approximately US$$1,127,848,667.85,[17] the 'Article 9 threshold'; the authorisation referred to as 'Article 9 authorisation', and, together with Article 8 authorisation jointly referred to as the 'authorisations').

Based on the CNIE's criteria, the Article 9 authorisation only applies in those cases in which foreign investors will participate in a Mexican entity for the first time; thus, if the target company has foreign investment participating in excess of 49 per cent, the Article 9 authorisation will not be required to transfer such participation to a different foreign investor.[18]

The authorisation process is suspensive in all cases, as these authorisations must be secured before the foreign investment is carried out (in those cases in which the authorisation is required).

National security

According to the OECD, Mexico addresses national security concerns associated with the acquisition or ownership of specific assets through the following mechanisms: (1) a foreign ownership cap at 49 per cent in companies that manufacture or commercialise explosives, firearms, cartridges, ammunitions and fireworks; and (2) a prior approval requirement for foreign shareholdings beyond 49 per cent in companies operating in certain sectors including, among others, education, construction and operation of general railways and overseas shipping.[19]

Financial sector

Regarding corporate organisation, the Credit Institutions Law (LIC) establishes the following restrictions: (1) the majority of the members of the board of directors and the general directors of an affiliate of a foreign financial institution

17 The Article 9 threshold is determined by the CNIE and updated from time to time. Available at: www.gob.mx/cms/uploads/attachment/file/734267/Cuarta_Resolucion_Art.9_LIE_06-06-2022.pdf.

18 In these cases, what we normally recommend is to file a writ before the CNIE requesting confirmation that such criteria apply.

19 OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies*, May 2020, page 141. Available at: www.oecd.org/Investment/OECD-Acquisition-ownership-policies-security-May2020.pdf?_ga=2.107934082.1430974581.1663171618-1170016489.1662404486.

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must be Mexican residents; and (2) the chief executive and the directors representing stock series 'A' and 'B' of financial holding companies in commercial banks controlled by Mexican nationals must be Mexicans.[20]

Real estate

Additionally, the LIE limits foreign individuals and foreign companies from acquiring real estate located in the 'restricted zone'. The restricted zone comprises a strip of the national territory 100 kilometres wide along the borders and 50 kilometres wide along the coast.[21] In contrast, the 'permitted zone' comprises the rest of the national territory. This distinction serves to identify the territory over which foreigners may acquire direct ownership (permitted zone) from that in which they may not acquire direct ownership for any reason (restricted zone).

However, Mexican companies with a foreigner admission clause may acquire real estate within the restricted zone for (1) non-residential use, by filing a notice to the Ministry of Foreign Affairs (MFA) within 60 business days following the acquisition of such real estate, and (2) residential use, only if such real estate is acquired indirectly through a trust, and prior authorisation is granted by the MFA.

Section I of Article 27 of the Mexican Constitution establishes the legal status of foreigners in relation to the acquisition of real estate in Mexico. It provides that foreigners acquiring ownership of land, shares and partnership interests, among others, must agree to consider themselves as nationals and to waive the right to invoke the protection of their governments for matters that are related to said ownership. This constitutional provision is portrayed in the limitations to the acquisition of property in the restricted zone and also with the fact that when a Mexican company intends to allow foreigners to acquire its shares, it should notify this to the MFA[22] including a specific clause in its by-laws, which is commonly regarded as the 'foreigner's admissions clause'. Such a clause should reflect the constitutional provision described above. To our knowledge, this waiver has not been enforced or claimed by the Mexican government and it rather reflects a historical context that has come into disuse. On the contrary, the MFA and of the Ministry of Economy, as well as local governments, tend to be open in discussing issues related to foreign investment with the diplomatic corps accredited in Mexico.

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20 Op cit. OECD, *National Treatment for Foreign-Controlled Enterprises*, page 73.

21 Article 2 of the LIE.

22 Article 16 of the LIE establishes that 'The companies that replace their foreigners exclusion clause with the foreigners admission clause shall notify such event to the Ministry of Foreign Affairs within thirty business days following the above mentioned change.'

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Transportation services

The regulation of freight, passenger and tourism transportation on federal roads and bridges is established in the Federal Roads, Bridges and Transportation Law (LCPAF). Section VIII of Article 2 of the LCPAF defines freight transportation service as the transportation of goods provided to third parties on roads under federal jurisdiction ('freight transportation service').

Likewise, Section IX of Article 2 of the LCPAF defines the passenger transportation service as that which is provided on a regular basis subject to schedules and intervals for the departure and arrival of vehicles ('passenger transportation service'). Finally, Section X of Article 2 of the LCPAF defines the tourist transportation service as that which is provided on a non-regular basis for the transportation of persons for recreational, cultural and amusement purposes to places or areas of interest ('tourist transportation service', together with freight transportation service and passenger transportation service, 'transportation services').

In accordance with Section I of Article 8 of the LCPAF, transportation services are subject to obtaining permission granted by the Ministry of Infrastructure, Communications and Transportation, through the General Directorate of Federal Transportation.

Transportation services are also regulated by the LIE. Specifically, Section I of Article 6 of the FDI legislation establishes that freight, passenger and tourism transportation are economic activities reserved solely for Mexicans or Mexican companies with a foreigner exclusion clause. The foreigner exclusion clause is the provision that forms an integral part of the by-laws, whereby it is established that a company will not directly or indirectly admit as partners or shareholders foreign investors or companies with a foreigners' admission clause. Likewise, Article 6 of the LIE establishes that foreign investors may not participate in transportation services, either directly or through trusts, agreements, by-laws, statutory covenants, schemes, or any other mechanism that grants any control or participation, except in the case of neutral investment (e.g., an investment made in Mexican companies or authorised trusts that will not be considered to determine the percentage of foreign investment in the capital stock of Mexican companies).

In other words, foreigners and Mexican companies with a foreigners' admission clause are not allowed to participate, directly or indirectly, in transportation services.

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Additional procedural aspects of the Mexican FDI regime

Notification

Filing before the CNIE is mandatory when the transaction falls within any of the thresholds described above. Parties that fail to do so and implement the transaction without obtaining prior authorisation from the CNIE are subject to fines, as further detailed below. Additionally, the LIE grants to the CNIE the authority to nullify any acts that are carried out in violation of the LIE.

The party responsible for filing is the acquirer. A legal representative or attorney-in-fact of the acquirer must sign the application writ. Further, if the acquirer is a foreign entity, the power of attorney granted abroad to the legal representative or attorney-in-fact must be notarised, apostilled in the country of origin, and then formalised before a Mexican notary public.

To obtain authorisation from the CNIE, an application must be filed before such authority. The application mainly consists of filing a writ explaining the details of the underlying project, together with responses to a standard format questionnaire providing certain information to the CNIE concerning the type of project to be carried out in Mexico, and evidence of the benefits for the Mexican economy. Additionally, support documentation is required to be annexed to the application, such as (1) a copy of the annual report or the audited financial statements for the previous fiscal year of the foreign investor; (2) incorporation documents of the foreign company; and (3) a copy of the receipt of the filing fees payment.[23] According to Section I of Article 72 of the Federal Law of Government Rights the filing fees amount to 8,563.73 Mexican pesos (approximately US$$426.44).[24]

Review process

The CNIE is the federal entity that substantiates the review and adopts the final determination. Broadly, the CNIE is in charge of (1) issuing policy guidelines on foreign investment and the mechanisms for its promotion in Mexico; (2) determining the terms and conditions under which foreign investment and activities regulated by the LIE will be allowed; (3) acting as an official consultation entity of the Mexican federal government on foreign investment issues; and (4) setting general guidelines on the application and interpretation of the LIE.

23 Article 29 of the Regulations of the LIE.

24 Article 72 of the Federal Law of Government Rights.

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The CNIE takes into consideration public interest to grant the authorisations. It is important to note that these authorisations are different from, and independent of, the merger control review process conducted by the Mexican competition authorities.

The CNIE carries out a subjective evaluation when authorisations are required. In such cases, the CNIE will assess whether it will grant an authorisation based on the following criteria:[25] (1) impact upon employment and training of workers; (2) technological contribution; (3) compliance with environmental provisions included in the regulations governing the matter; (4) in general, its contribution to increasing competitiveness of the country's productive system; and (5) national security concerns.

Although Article 30 of the LIE authorises the CNIE to deny any authorisation on the basis of national security concerns, neither the LIE nor its regulations specify what should be considered a national security concern and no authorisation has been denied based on this type of concern.

The LIE does not establish a deadline for the filing of the application before the CNIE. However, authorisation from the CNIE is required to close the transaction. Likewise, the CNIE must resolve the requests submitted to its consideration within 45 business days of the date of the respective request. If the CNIE fails to respond within this time, the request shall be considered approved as submitted.[26] Based on our experience, the review can take from 30 to 45 business days following the submission of the application.

In addition, the Ministry of Economy will have a maximum of 35 business days to grant or deny the authorisation in cases relating to neutral investments[27] (i.e., investments made in Mexican companies or trusts in stocks with no voting rights or with limited corporate rights); otherwise, the authorisation shall be deemed to have been granted.

Finally, the MFA is required to respond within five business days following the date of applications in cases relating to banks to acquire, as trustees, rights to real estate located within the restricted zone.[28] If the MFA fails to respond within this time frame, the request shall be deemed to have been approved.

25 Article 29 of the LIE.
26 Article 28 of the LIE.
27 Article 19 of the LIE.
28 Article 14 of the LIE.

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Remedies and conditions

On resolving the legal feasibility of a request, the CNIE may impose any kind of remedies as long as they do not distort international trade.[29] According to the LIE, remedies are imposed by the CNIE. Although there is no specific procedure to propose or negotiate such remedies, the parties can discuss with the CNIE the most suitable conditions that might be imposed to mitigate any concerns.

Sanctions

The Ministry of Economy will be able to revoke the authorisations granted in the case of acts performed in violation of the provisions of the LIE. The acts, covenants or partnerships and by-law agreements declared null and void by the Ministry of Economy due to their non-compliance shall have no legal effect between the parties and shall not be enforced before third parties.[30]

Infringements to the provisions under the LIE and its regulatory provisions shall be subject to the following sanctions:[31]

- If a foreign investor engages in activities, acquisitions or any other acts that require a favourable resolution from the CNIE, without having previously obtained such resolution, a fine ranging from 1,000 to 5,000 times the value of the general unit of measurement and adjustment (UMA) shall be imposed.[32]
- If foreign companies regularly engage in business acts in the Mexican Republic, without having obtained prior authorisation from the Ministry, a fine ranging from 500 to 1,000 times the value of the UMA shall be imposed.
- In the event of acts in violation of what is set forth in the LIE or its regulatory provisions on the matter of neutral investment, a fine ranging from 100 to 300 times the value of the UMA shall be imposed.
- In case of non-performance, untimely performance, submitting incomplete or incorrect information with respect to the registration, reporting or notice obligations with the RNIE on the part of the obligated individuals, a fine ranging from 30 to 100 times the value of the UMA shall be imposed.

29 Article 29 of the LIE.

30 Article 37 of the LIE.

31 Article 38 of the LIE.

32 Although the LIE makes reference to the term 'wages', as of 2016, monetary values are calculated based on the equivalent in pesos to the UMA, which is updated every calendar year by the National Institute of Statistics and Geography (INEGI). For 2022, the daily value of the UMA is 96.22 Mexican pesos.

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- If fraud is incurred in order to allow the enjoyment or disposal of real estate in the restricted zone by foreign individuals or entities or to Mexican companies that do not have a foreigner's exclusion clause, in violation of what is set forth by the LIE, the offender shall be sanctioned with a fine of up to the amount of the transaction.
- Any other violations of the LIE or its regulatory provisions shall bear a fine ranging from 100 to 1,000 times the value of the UMA.[33]

For the determination and imposition of any sanction, the interested party shall be heard beforehand and, in the case of pecuniary sanctions, the nature and seriousness of the violation, the earning power of the violator, the time that has elapsed from the date the obligations should have been performed and their compliance or regularisation, and the total value of the operation shall be taken into consideration.

Nevertheless, based on our experience, we consider that it is highly unlikely the CNIE will deny an authorisation. In Mexico, foreign investment is considered critical for the economic dynamic, and the CNIE tends to follow a strong pro-business approach to facilitate the flow of resources to the country.

Registry[34]

Finally, according to Article 32 of the LIE, the following must register with the RNIE:

- Mexican companies in which there is participation, including through trusts, of (1) foreign investment; (2) Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory; and (3) neutral investment.
- Those who regularly engage in business acts in Mexico, if they are (1) foreign individuals or foreign companies; and (2) Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory.
- Trusts on shares or corporate equity interest, on real estate, and on neutral investment whereby rights in favour of the foreign investment or of Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory shall be derived.

33 Article 38 of the LIE.

34 The RNIE shall not be public and shall be divided into the sections set forth by its regulations.

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The registration must be done within 40 business days from the date of the creation of the company or the equity participation by foreign investment, of formalisation or official recording by public notary of the documents relating to the foreign company, or of the creation of the relevant trust or granting of beneficial rights in favour of the foreign investment.

Additionally,[35] apart from registering before the RNIE, those who are (1) foreign individuals or foreign companies, or (2) Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory, and regularly engage in business activities, must submit:

- a quarterly notice when modifications are made to the name or corporate name, economic activity, tax domicile, and to the income and expense report;[36]
- an annual report when the threshold established by the CNIE is exceeded (110 million Mexican pesos); and
- cancellation.[37]

Mexican companies in which there is participation, including through trusts, of (1) foreign individuals or foreign companies and Mexican companies with a majority of foreign capital; (2) Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory; and (3) neutral investment, in addition to registering before the RNIE, must submit:

- a quarterly notice when modifications are made to the name, corporate name, economic activity, tax domicile, capital and/or shareholding structure, and to the income and expense report;[38]
- an annual report when the threshold established by the CNIE is exceeded (110 million Mexican pesos); and
- cancellation.[39]

35 Available at: https://rnie.economia.gob.mx/RNIE/faces/obligaciones.xhtml.

36 The income and expense report is only filed if it exceeds the threshold established by the CNIE (20 million Mexican pesos).

37 Article 40 of the Regulations of the LIE establishes that 'Individuals, foreign legal entities and Mexican companies registered in the Registry must request the cancellation of their registration in the event that they cease to be in any of the cases referred to in fractions I and II of article 32 of the Law, within the forty business days following the date on which it occurs'.

38 In the case of the last two modifications (capital and/or shareholding structure; and the income and expense report), it is only filed if it exceeds the threshold established by the CNIE (20 million Mexican pesos).

39 Article 40 of the Regulations of the LIE.

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Finally, trusts on shares or corporate equity interest, on real estate, and on neutral investment whereby rights in favour of the foreign investment or of Mexicans who have or acquire another nationality and who have their domicile outside Mexican territory shall be derived, in addition to registering before the RNIE, must submit:

- notice of modification to previously filed information when changes are made to the trustee, trust matter, and to the first-degree trust beneficiary;[40] and
- cancellation.[41]

Mexico and the global trends on FDI policy

FDI is currently subject to a paradigm shift mostly led by strong and developed economies. As Esplugues Mota points out, it is ironic that 'the most developed countries, those that have historically supported [economic] freedoms, are today leading a backlash against FDI and trigger[ing] a roll-back of investor protection and liberalization'.[42] According to the OECD, the reasons behind this paradigm shift are: (1) concerns about the involvement of foreign state-controlled entities; (2) concerns that foreign ownership could threaten a state's security by limiting the diversity of suppliers of certain products or services; and (3) technological changes and the growing sensitivity and quantity of sensitive data.[43]

This policy turn, likely motivated by geopolitical concerns and global crises, has not yet resulted in changes to the Mexican FDI regime. Nonetheless, it has certainly impacted investment policy – for both local and foreign enterprises – in strategic sectors, particularly, hydrocarbons, electricity and mining, as described in the next sections.

While Mexico has not implemented additional safeguards or amendments to the LIE based on national security concerns, it is important to bear in mind that a policy change from the government in this respect would not necessarily

40 In the last case, it is only filed if it exceeds the threshold established by the CNIE (20 million Mexican pesos).

41 Article 42 of the Regulations of the LIE establishes that 'The fiduciary institutions must request the cancellation of the registration of the trusts in the event that they cease to be in the cases referred to in fraction III of article 32 of the Law, within the forty business days following the date it occur'.

42 Esplugues Mota, Carlos, *El control de las inversiones extranjeras directas*, Spain, Tirant lo Blanch, 2018, page 20.

43 OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies.* May 2020, page 6. Available at: www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf.

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require a legislative change. The CNIE has the authority to condition or reject a transaction with certain discretion and could use such rationale when exerting its subjective opinion on substantial concerns. From a review of publicly available information, it is our understanding that no transaction has been conditioned or blocked under national security concerns.

Global trends

As previously mentioned, Mexico has not joined the global trend of imposing further limitations on FDI based on national security concerns. For example, Mexico has not imposed any legal restriction or special screening mechanism on state-owned enterprises, as has been the case in Australia, the United States or Germany.[44]

In the same way, as of 2017, several countries have opted to establish protective measures against foreign acquisitions or FDI of sensitive assets, such as artificial intelligence-related technologies. Such acquisitions are often explicitly included in the scope of investment screening mechanisms, given concerns over undesirable technology transfer and malicious acquirers (e.g., countries with divergent political regimes or countries with ongoing military conflicts).[45] In this regard, while the CNIE would have the authority to impose remedies or block certain transactions on national security grounds, no particular discussions have taken place on acquisitions of companies that possess or produce artificial intelligence or sensitive technology.

Finally, Mexico has not changed its FDI policies due to the covid-19 health crisis as some governments did.[46] Mechanisms such as (1) reforms to add assets to the scope of screening mechanisms that are crucial for the pandemic response, and (2) measures to introduce or enhance FDI screening mechanisms in sectors suffering from temporary financial stress associated with the pandemic were not taken in our jurisdiction.

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44 OECD, *State-owned enterprises, international investment and national security: The way forward*, October 2017. Available at: https://oecdonthelevel.com/2017/10/04/state-owned-enterprises-international-investment-and-national-security-the-way-forward/.

45 OECD, *Managing access to AI advances to safeguard countries' essential security interests*. Available at: www.oecd-ilibrary.org/sites/ba682899-en/1/3/6/index.html?itemId=/content/publication/ba682899-en&_csp_=02d27ef0d7308d76a010fd2a9882228f&itemIGO=oecd&itemContentType=book.

46 OECD, *Investment screening in times of COVID-19- and beyond*, July 2020. Available at: https://read.oecd-ilibrary.org/view/?ref=135_135247-aj6t8nmwlr&title=Investment-screening-in-times-of-COVID-and-beyond.

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Mexico's investment policy trends

As in other countries, investment policy that may affect foreign companies is not limited to the FDI screening regime. In Mexico, many of the recent changes affecting both local and foreign companies in sectors such as hydrocarbons, electricity and mining have taken place without changing one sentence of the LIE. The battle in our jurisdiction normally takes place over Article 28 of the Mexican Constitution, which sets forth strategic and priority areas where the Mexican government is entitled to perform exclusive functions, and in exceptional cases where the general interest prevails. Below, we discuss recent examples of investment policy shifts outside of our FDI regime that may well be aligned with the global paradigm shift towards foreign investment in strategic sectors.

Energy sector

Recent amendments to the Electric Industry Law and the Hydrocarbons Law limited private investment and have resulted in uncertainty especially for foreign investors in these sectors. In 2013, the previous government passed a constitutional amendment to significantly open the energy sector to private investment, arguing the need for additional resources and technological capacities to better seize the country's natural resources. This amendment limited the government's public monopoly to the planning and control of the national electric system and the exploration and extraction of oil, liberating the rest of the value chain in both areas to private investment, which was mostly foreign.

In 2021, however, both laws were amended by the current government with the intention of favouring and attributing exclusive functions and advantages to the state-owned Federal Electricity Commission and Petróleos Mexicanos (PEMEX), effectively reverting many of the effects of the previous constitutional amendment and making it harder for national and foreign companies to compete in these sectors. The amendments have been challenged through different constitutional mechanisms: (1) by individuals through *amparo* (i.e., a trial for the protection of constitutional rights), (2) as well as in unconstitutionality action by the opposing legislators in the Senate.

As for the Hydrocarbons Law, in May 2021, the specialised antitrust courts granted injunctions with general effects against all the consequences derived from the reform decree. The courts argued that such general injunction resolution was necessary to prevent affectation in the efficient development of the hydrocarbons, petroleum and petrochemicals markets, which would not only affect the plaintiff, but also all of the participants in these markets and, consequently, the customers. In September 2021, however, the same judge started to reverse the criteria as a

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result of later appeals before the collegiate courts which determined that individuals could not yet challenge the law in *amparo* until the authorities applied the law to them.

However, it has not yet been observed that the authorities seek to apply the Hydrocarbons Law, until such time as the unconstitutionality action filed by the senators is resolved by the Supreme Court.

Regarding the Electric Industry Law, recently a federal judge granted a resolution in an *amparo* claim with general effects to avoid providing a competitive advantage to any of the economic agents that participate in the electricity sector that could affect free and open competition in the market. In that sense, the resolution is applicable to all participants in the electricity market.

The Mexican authorities have appealed these rulings, so the final decision on the future of these *amparo* claims against the Electric Industry Law will be determined by the Supreme Court.

As can be derived from the above examples, even when the current government in Mexico has not been able to secure a super-majority to amend the Mexican Constitution, and even though Mexico's FDI regime has remained untouched since 2018, it is clear that uncertainty for foreign and national investors is present in the energy sector in Mexico. As in other jurisdictions, foreign investors should not only look to the formal FDI regime and screening mechanisms to evaluate the best legal strategy, but also bear in mind the myriad legislations in each sector to form an appropriate risk assessment before investing in Mexico.

Lithium

Another controversial case occurred in the lithium market. It is thought that there are lithium deposits in Baja California, San Luis Potosí, Zacatecas, and Sonora. Therefore, some foreign companies, through the Ministry of Economy, acquired mining concessions to explore, exploit and carry out operations contemplated in the Mining Law.

In April 2022, however, several provisions of the Mining Law were amended establishing lithium as a strategic area. Among the amended dispositions were: (1) the declaration of public utility of lithium; (2) the restriction of activities along the value chain of lithium, only for the state; (3) the prohibition on granting any particular or private entity concessions, licences, contracts or permits related to the value chain of lithium; and (4) the creation of a public entity for the exclusive management of lithium, which was then formally created in August 2022.

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Experts believe that this policy is part of the Latin American trend called 'lithium nationalism', with proposals to nationalise newfound deposits or establish state enterprises for their exploration.[47] Many have argued that the amendment may represent a violation of the Mexican Constitution and could leave foreign companies in enormous legal uncertainty resulting in constitutional (*amparo*) lawsuits being filed to obtain the protection of rights. Again, the lithium case is an example where the LIE was not modified whatsoever, and yet, the investment policy shift seems to be real and materially affecting foreign investment.

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APPENDIX: Summary of restricted activities in the Mexican FDI regime

Activity	Industries	Foreign investment ownership threshold	Comments
Activities reserved for the Mexican state (public monopolies)	• Exploration and extraction of petroleum and other hydrocarbons. • Planning and control of the national electric system, as well as the transmission and supply of electricity as a public service. • Nuclear power and treatment of radioactive minerals. • Telegraph and postal services, and radiotelegraphy. • Control, supervision and surveillance of ports, airports and heliports. • Issuance of bills and minting coinage.	0%	Article 28 of the Mexican Constitution establishes that such industries are strategic areas (i.e., functions identified with economic sovereignty and services under the exclusive responsibility of the federal government).
Activities reserved for Mexicans or Mexican companies with a foreigner exclusion clause	• Passenger, tourism and freight transportation. • Development banks. • Provision of professional and technical services explicitly covered in the applicable legal provisions.	0%	Foreign investment may not participate in such activities and companies, directly or indirectly, except in the case of neutral investment.

47 Hailes, Oliver. 'Lithium in International Law: Trade, Investment, and the Pursuit of Supply Chain Justice'. Oxford Academic, *Journal of International Economic Law*, March 2022, page 149. Available at: https://doi.org/10.1093/jiel/jgac002.

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Activity	Industries	Foreign investment ownership threshold	Comments
	• Producers' cooperatives.	Up to 10%	Limits for foreign investment participation may not be exceeded, directly or indirectly, than those established, except in the case of neutral investment.
Activities with specific regulation and ownership threshold for foreigners	• Manufacture and sale of explosives, firearms, cartridges, ammunition and fireworks (acquisition and use of explosives for industrial and extraction activities are not included, nor is the preparation of explosive compounds for use in said activities). • Printing and publishing of newspapers solely within Mexico. • Series 'T' shares in companies owning agricultural, ranching and forestry land. • Fishing in freshwaters, coastal waters and in the exclusive economic zone (fish farms excluded). • Integral port administration. • Piloting port services to vessels for the conduction of interior sailing in terms of applicable law. • Shipping companies engaged in commercial exploitation of ships for inland and coastal navigation, excluding tourism cruises and exploitation of marine dredges and devices for port construction, conservation and operation. • Supply of fuel and lubricants for ships, airplanes, and railway equipment. • Radio broadcasting (subject to the reciprocity that exists in the controlling investors' country of origin). • Domestic air transportation, air-taxi transportation; and specialised air transportation.	Up to 49%	Limits for foreign investment participation may not be exceeded, directly or indirectly, than those established, except in the case of neutral investment.

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Activity	Industries	Foreign investment ownership threshold	Comments
Activities subject to the prior approval of the CNIE	• Port services in order to allow ships to conduct inland navigation operation, such as towing, mooring and barging. • Shipping companies engaged in the exploitation of ships solely for high-seas traffic. • Concessionaire or permissionaire companies of air fields for public service. • Private education services of pre-school, elementary, middle school, high school, college or any combination. • Legal services. • Construction, operation and exploitation of general railways, and public services of railway transportation.	More than 49%	A favourable resolution by the CNIE is required for foreign investors to participate with a percentage higher than 49%. For reasons of national security, the CNIE may impede acquisitions by foreign investment.

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APPENDIX 1

About the Authors

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Luis Gerardo García Santos Coy is a partner at Creel, García-Cuéllar, Aiza y Enríquez and a member of the firm's board of directors. His practice focuses on antitrust and competition law, actively participating in cases before the competition authorities, from complex pre-merger filings, to investigations, administrative procedures, constitutional (*amparo*) proceedings, as well as leniency applications. Mr García also regularly advises multinationals and private equity investors on acquisitions and investments in Mexico across multiple industries, as well as helping clients with FDI regulation in Mexico. Mr García has participated in some of the most relevant and sophisticated cases before the antitrust authorities.

Mr García has been ranked or cited as Band 1, Tier 1 or equivalent in antitrust and competition by many publications, including: *Chambers and Partners*, *Global Competition Review*, *The Legal 500*, *Best Lawyers* and *Who's Who Legal*. He has also been consistently recognised as LACCA approved by the Latin America Corporate Counsel Association.

He is a member of the Mexican Bar Association and the International Bar Association. Mr García is also a frequent speaker in national and international events on antitrust related matters and has written multiple articles and papers on various legal subjects.

Mr García obtained his law degree (JD) from Universidad Iberoamericana in Mexico City in 1993.

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Mauricio Serralde Rodríguez specialises in antitrust and competition law, actively participating in all types of cases before the competition authorities, from pre-merger filings, to investigations, administrative procedures, constitutional

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Mr Serralde has been featured as a recognised practitioner in the field of antitrust and competition in *Best Lawyers*, *Who's Who Legal*, *Global Competition Review*, and the Latin America edition of *Chambers and Partners*. Furthermore, he is a member of the International Bar Association and the Mexican Bar Association.

Mr Serralde was born in Mexico City, Mexico. He received his law degree (JD) from Instituto Tecnológico Autónomo de México (ITAM) in 2005.

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Édgar Martín Padilla is part of the antitrust team of Creel, García-Cuéllar, Aiza y Enríquez. His practice has mostly focused on advising national and international companies in complex pre-merger authorisations, cartel investigations and procedures before regulatory entities, as well as compliance programmes. Prior to joining the firm, he worked for the Mexican government as an economic policy and foreign investment adviser. Mr Martín holds a master's degree in political economy from the London School of Economics and Political Science (LSE), and an LLM in economic analysis of law from the University of Salamanca. He obtained his law degree from the Autonomous University of Aguascalientes, where he graduated top of his class, and also holds a postgraduate degree in statistics from the National Math Research Center (CIMAT).

He has participated in complex merger control procedures before the Competition Authority in Mexico and has been able to design successful compliance strategies, joint ventures, as well as helping heavy regulated companies and private equity funds to navigate merger control and FDI requirements in Mexico.

Mr Martín has co-authored articles in the most prestigious antitrust publications and has recently joined the ITAM and the ITESM as a professor of competition law and regulation.

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While the appetite, and necessity, for outside capital remains unabated, increasingly this is running into increasing national security concerns – particularly since Russia's invasion of Ukraine – as well as stricter regulations on mergers. Although controls on foreign direct investment were already in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have brought these concerns into sharper focus for governments. The second edition of the *Foreign Direct Investment Regulation Guide* – edited by Veronica Roberts – provides practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment. The Guide draws on the wisdom and expertise of distinguished practitioners globally to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security.

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