Foreign Investment Review 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Mexico

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Cannizzo, Ortiz y Asociados, SC

LAW AND POLICY

Policies and practices

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Mexican government policies and practices regarding foreign investments focus on the economic activities and sometimes on the origin of the investment, in consideration of the international principle of reciprocity regarding Mexican investments in other countries.

The general rule is that foreign investments may participate in any lawful economic activities within the country; nevertheless, there are certain exceptions for activities reserved for state-owned entities, Mexicans or Mexican companies with foreigner exclusion clauses, activities with specific regulations subject to a limit in the participation of foreign investments and activities that require an authorisation from the Foreign Investments Commission.

Some examples of economic activities, strategic to the country, and therefore only state-owned entities may carry them out, are, among others, the following:

- Exploration and extraction of oil and hydrocarbons. Since the enactment of the structural reforms regarding oil and energy, private parties can participate in these activities through the legal schemes previously approved by the state, nevertheless, these economic activities are still considered strategic and the country will carry them out through contractors or assignees. Assignee refers to Petroleos Mexicanos (Pemex) or any other productive company of the state that is a holder of an assignment and therefore, operator of an assignment area. The contractor is Pemex, any other productive company of the state, or a legal private entity that executes, with the National Hydrocarbons Commission, an agreement for the exploration and extraction of hydrocarbons either individually or in a consortium.
- Control of the national electric system.
- Nuclear power generation.

The economic activities mentioned below are reserved for Mexicans or Mexican entities that include an agreement in their by-laws stating that the entity shall not admit directly or indirectly foreign investors nor companies that admit them:

- domestic land transportation of passengers, tourism and freight, not included courier services;
- development banking institutions; and
- provision of professional and technical services set forth expressly by applicable legal provisions.

Certain economic activities are subject to specific regulation and therefore participation of foreign investment is limited to certain percentages. This is the case with the following activities:

- up to 10 per cent in cooperative companies for production, those whose members associate to work together in the production of goods or services, contributing their personal, physical or intellectual work, regardless of the type of production they perform, they can store, preserve, transport and sell their products in the terms of the specific law that regulates these entities: the General Law of Cooperative Entities; and
- up to 49 per cent in, among other economic activities, manufacture and commercialisation or explosives, firearms, ammunitions and fireworks; printing and publication of domestic newspapers; integral port administration; shipping companies engaged in commercial exploitation of ships for interior and coastal navigation; broadcasting; supply of fuels and lubricants for ships, aircrafts and railway equipment, domestic air transportation; and international air taxi transportation and specialised air transportation.

A favourable resolution from the Foreign Investments Commission will be required for foreign investments to participate in a percentage greater than 49 per cent in, among others, the following economic activities:

- port services to carry out interior navigation operations;
- private education services; and
- legal services.

Foreign nationals, Mexican companies with foreign investments and trusts on shares or corporate equity interest, on real estate and on neutral investment whose rights are granted in favour of foreign investors must be registered with the National Registry of Foreign Investments.

There are no currency controls in Mexico.

Main laws

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The main laws that regulate acquisitions and investments by foreign nationals are:

- the Constitution of the Mexican United States;
- international treaties;
- the Foreign Investment Law;
- the Commercial Code;
- the General Law of Commercial Entities;
- the Securities Market Law;
- tax laws;
- the Federal Antitrust Law;

- the Migration Law;
- the Regulations of the Foreign Investment Law and the National Registry of Foreign Investments; and
- the General Resolutions regarding the process of registration by the National Registry of Foreign Investments.

Additional laws and regulations in relation to specific activities, such as hydrocarbons, electric power, energy, finance, telecommunications and such like, are applicable.

Scope of application

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The scope of application of the Foreign Investment Law is to protect the national interest regarding foreign investments and to prefer national investment regarding certain economic activities by ruling direct or indirect foreign investments to promote their contribution to national development. All types of investments are covered by this law.

Foreign investments may participate in any lawful economic activities within the country; nevertheless, there is an exception regime regarding certain sectors in which foreign investments are not permitted such as those economic activities reserved for state-owned entities, ie, control of the national electric system and nuclear power generation; or for Mexicans or Mexican companies with foreigners exclusion clause, ie, domestic land transportation of passengers, tourism and freight. Other economic activities are subject to a limit in the participation of foreign investments or to a favourable resolution from the Foreign Investments Commission, ie, integral port administration and broadcasting, in the first case and port services to carry out interior navigation operations and private education services for the latter.

Definitions

4 How is a foreign investor or foreign investment defined in the applicable law?

The Foreign Investment Law defines foreign investor as the individual or legal entity of a nationality other than Mexican. The same law provides a definition of foreign investment as: (i) the participation of foreign investors in any proportion, in the capital of Mexican entities; (ii) the investment of Mexican entities whose capital is integrated mainly by foreign capital; and (iii) the participation of foreign investors in the activities and acts provided in this law. These activities and acts include, but are not limited to, incorporation of new companies, asset acquisition, development of new economic activities, manufacturing new product lines, operation of commercial establishments, acquisition of real estate, obtaining concession and so on.

Special rules for SOEs and SWFs

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Mexican legislation provides certain restrictions related to foreign government ownership of Mexican entities on a case-by-case basis regarding certain economic activities. According to the Credit Institutions Law, foreign governments may not participate in the capital of commercial banks except for: (i) temporary prudential measures such as bailouts; (ii) when the participation implies the control of the commercial bank through official legal entities and previous discretional authorisation by the National Banking and Securities Commission with agreement by its Board of Governors; or (iii) an indirect participation, without control over the commercial bank and with previous authorisation.

Similarly, the Ports Law provides that concessions for the integral port management will be granted exclusively to Mexican companies and no foreign government can be admitted as partner of said companies nor be holder of the relevant concessions or permits.

As provided in the Roads, Bridges and Federal Transportation Law, a foreign government can not be the holder of the concession or permit or the rights to operate roads, bridges, or provide transport services and its auxiliary services.

Mexican legislation does not provide a definition of foreign state-owned enterprises; nevertheless, legal scholars identify the following as common elements in defining it: an entity that produces or sells goods or services in which a foreign state holds full or majority ownership.

Regarding sovereign wealth funds, Mexico as member of the International Forum of Sovereign Wealth Funds adopted the Santiago Principles, therefore recognises the concept of sovereign wealth funds provided by said principles as special purpose investment funds owned by the general government. Created by the general government for macroeconomic purposes; that hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets.

Sovereign wealth funds are not considered as a foreign government; hence, they have no special rules regarding investments in Mexico, and are subject to the regulations, limits and exceptions mentioned in questions 1 and 3.

Relevant authorities

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

A favourable resolution from the Foreign Investment Commission is required for foreign investment to participate, in more than 49 per cent of the capital of Mexican companies when the value of the assets of such companies at the date of acquisition exceeds a threshold determined annually by the Foreign Investment Commission.

Likewise, Foreign Investment Commission must approve a merger or acquisition if the target economic activity is subject to a limit regarding foreign investments and therefore an authorisation to exceed the percentage of foreign investment participation is needed.

The authorisations are different, the first is required because the threshold value is met and the second one is needed because the economic activity is subject to specific regulation.

In cases where foreign investment is limited, the Foreign Investment Law provides the possibility of authorising neutral investment.

Neutral investment is a mechanism used as an additional funding instrument to complement Mexican entities capital to develop investment projects by a shareholding that does not confer effective control in the relevant companies. Neutral investments are made through shares with no voting rights or limited corporate rights. A company or trust, in order to issue these special series of shares or instruments, will require authorisation from the Ministry of Economy and when applicable, also from the National Banking and Securities Commission or any other relevant authority depending on the industry involved, such as telecommunications and energy, among others.

The Federal Economic Competition Commission, the antitrust authority in Mexico, and the Federal Telecommunications Institute, the antitrust authority in Mexico regarding telecommunications and broadcasting, have the authority to review mergers or acquisitions if the relevant transaction exceeds a threshold provided by the Federal Antitrust Law or if the parties involved want to voluntarily notify it. The analysis of the transaction will be prior to its execution and is intended

to assess the impact on the market and verify that competition and free market access are protected and guaranteed.

The Ministry of Finance and Public Credit, the Mexican Central Bank, the National Banking and Securities Commission, the National Insurance and Bonds Commission, and the National Retirements Savings System Commission must authorise any transaction related to financial entities, as applicable.

Likewise, if the transaction is related to a company holding a concession title or any special permit, it must be authorised by the respective authority.

National interest

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Authorities may have discretion to approve or reject transactions; nevertheless, in Mexico, all resolutions from authorities must be substantiated and provided with a reasonable justification regarding its decision.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

A favourable resolution from the Foreign Investment Commission is required for foreign investment to participate in more than 49 per cent of the capital of Mexican companies when the value of the assets of such companies at the date of acquisition exceeds an aggregate amount, for 2019, of 19,558,790,064.21 pesos; this amount is updated annually.

There are additional regulations that must be considered for the authorisation of a transaction, regardless of the nationality of the parties involved. Such is the case of antitrust assessment of a merger or acquisition to determine that the free market access and competition will not be affected.

It is mandatory to obtain, as applicable, the Federal Economic Competition Commission or the Federal Telecommunications Institute authorisation to execute any merger or acquisition transaction if any of the following thresholds are met:

- the transaction is worth, within Mexican territory, an amount in excess to the equivalent of 18 million times the current daily general minimum wage in Mexico City;
- the transaction results in the accumulation of 35 per cent or more of the assets or capital of a party, whose annual sales or assets in Mexico, are worth an amount in excess of the equivalent of 18 million times the current daily general minimum wage in Mexico City; or
- the transaction results in the accumulation of assets or capital in excess of the equivalent to 8.4 million times the current daily general minimum wage in Mexico City, and two or more of parties in the transaction have annual sales or assets in Mexico worth, jointly or separately, an amount in excess of 48 million times the current daily general minimum wage in Mexico City.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Mergers or acquisition transactions are not subject to a specific national interest clearance, nevertheless, the Foreign Investment Commission will consider it in the assessment of the relevant transaction and therefore in its resolution.

Filing fees must be paid in order to request the authorisation from the Foreign Investment Commission, the relevant fees are updated annually.

The Foreign Investment Commission have a standard form to make the submission, which is identified as Form SE-02-007 Questionnaire to request resolution from the Foreign Investment Commission.

The information required to file the request is, among other, the incorporation deed and bylaws of the entity, powers of attorney, information of the legal representative or attorney in fact, a general description of the transaction and project to be developed, audited financial statements, in case of foreign entities, all documents must be apostille or legalised before a Mexican consul and documents in a language other than Spanish must be translated.

Securing approval

10 | Which party is responsible for securing approval?

The process is usually secured by both parties; however, the acquirer is the one that usually provides more information thus has greater responsibilities.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The Foreign Investment Commission has a period of 35 business days to grant or deny any authorisation and 10 additional days to notify them.

The Federal Economic Competition Commission's regular time frame to authorise a merger or acquisition, as per applicable law, is 60 business days; however, in practice, it may take longer. There is a 'fast-track' process with a time frame to grant the authorisation of 15 days, applicable to cases in which it is clear that the transaction will not damage the free market and competition will not be affected. To be eligible for this option, the acquiring party must not have participated in the relevant market in which the transaction is taking place; the parties must not be competitors between them; and the acquiring party must not already hold control over the acquired party. In our experience, it is difficult to qualify for the 'fast-track' process.

If the Federal Economic Competition Commission considers the transaction as a complex case, it has the authority to request additional information or documents, even from third parties, therefore the time frame will be extended. In any case, the Federal Economic Competition Commission has the authority to extend the legal time frames and the process may take more than six months.

As provided in the Federal Telecommunications and Broadcasting Law, any subscription or transfer of shares or part of the capital of an entity holder of a concession to provide telecommunication or broadcasting services, in excess of 10 per cent of its capital must comply with the following:

- it must notify the transaction to the Federal Telecommunications Institute, providing detailed information regarding the possible acquirers;
- the Federal Telecommunications Institute will have a 10-business-day term to request the opinion of the Ministry of Communications and Transportation;
- the Ministry will have 30 calendar days to issue an opinion; and
- the Federal Telecommunications Institute will have 15 business days to object to the transaction providing reasonable justification. If the 15 business days elapsed without the objection from the Institute, it will be considered authorised.

Clearance penalties

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

The parties to a merger or acquisition must obtain authorisation to carry out the transaction prior to:

- its execution;
- the fulfilment of the condition to which the transaction may be subject to;
- the exercise actual or legal control of the other party;
- acquiring actual or legal property or assets of the other party;
- execution of any concentration agreement by the parties; or
- the execution of the last act of a sequence of acts by virtue of which the thresholds mentioned above are met.

The relevant authorities have the power to revoke the authorisations and declare the transaction, agreements, or any act related to it, null and void, without prejudice to the fines and additional liabilities that may be applicable.

Involvement of authorities

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Foreign investment authorities, antitrust authorities and regulatory authorities may be contacted in order to get formal and informal guidance; however, it is not necessary to have pre-filing meetings in all cases.

It is advisable to have pre-filing conversations and regular communication with the Foreign Investment Commission and the Federal Economic Competition Commission to better understand if the authority is expecting specific or additional information or to explain the transaction structure and market situation.

Facilitating clearance

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

It is important to keep government relations as formal and professional as possible to avoid any misinterpretation of facilitation activities as bribery or corruption of public officials.

A formal meeting can be requested before the Foreign Investment Commission, the National Banking and Securities Commission, the National Insurance and Bonding Commission, the National Retirements Savings System Commission or other regulatory authorities.

The Federal Antitrust Law provides rules regarding interviews between commissioners and representatives of the parties involved in a concentration notification. All commissioners shall be convened to the interview. Each interview shall be recorded and registered, then the information regarding the place, date, time, topic and the names of the attendees shall be published on the Federal Economic Competition Commission website.

Post-closing powers

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The Ministry of Economy has the authority to impose penalties to individuals or legal entities that engage in activities, acquisitions or any other acts that require authorisation from the Foreign Investments Commission without having obtained such resolution.

The Federal Economic Competition Commission can review a transaction that was not subject to a pre-merger review in the year following the closing date if there is probable cause of an anticompetitive behaviour in which case it has powers enough to unwind the transaction and fine the parties involved.

Regulatory authorities may impose a wide range of administrative sanctions to regulated entities if they have not obtained the relevant authorisations.

SUBSTANTIVE ASSESSMENT

Substantive test

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Regarding foreign investments, authorisation from the Foreign Investments Commission will be required for foreign investments to participate in a percentage greater than 49 per cent in the economic activities mentioned in question 1.

Likewise, for a company to issue special series of shares, considered as neutral investment, it will require authorisation from the Ministry of Economy. In this case, the test look to the limits of foreign investments permitted by law.

Consulting other countries

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The Federal Economic Competition Commission has executed collaboration agreements with foreign countries all over the world, as an example, on June 2018 it signed a collaboration agreement with the European Union to settle the basis for the collaboration between the countries for the assessment, consult and cooperation regarding related matters, especially in the assessment of global mergers and acquisitions subject to several jurisdictions.

Other regulatory authorities such as the National Banking and Securities Commission also has executed international cooperation agreements to provide cooperation and assistance to its foreign counterparts, as well as for the exchange of information and documentation.

The extent of the cooperation between domestic and foreign authorities will be determined on a case-by-case basis and the impact of a transaction in different jurisdictions.

Other relevant parties

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Regulatory authorities have the power to request information from third parties that may be competitors, customers, business associations or government agencies in order to assess the relevant transaction and therefore grant or deny the applicable authorisation.

Prohibition and objections to transaction

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Ministry of Economy may revoke the authorisation to execute a transaction or to declare it, as well as any ancillary agreements, or any act related to it, null and void if such authority considers that the transaction violates the provisions of the law.

The Federal Economic Competition Commission may deny the execution of a merger or acquisition if it is considered as an unlawful concentration, that is, a transaction whose purpose or effect is to obstruct, diminish or harm free market access and economic competition.

Regulatory authorities may deny the authorisation of a transaction if it is considered as having harmful effects in the relevant industry or if the transaction is against the specific regulatory laws.

Mitigating arrangements

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

The Federal Antitrust Law provides the option for the parties of a merger or acquisition transaction to propose conditions or remedies that may correct the risks for the competition process and free market access; nevertheless, the Federal Economic Competition Commission must assess and determine if such conditions are adequate to address such risks.

The Foreign Investment Law does not provide the option for the parties of a merger or acquisition transaction to propose conditions or corrective actions that may remedy authorities' objections to a transaction. Nevertheless, there is no express prohibition in the law in this regard, considering this, there is no restriction for the parties to a transaction to propose a remedy or conditions for the transaction to be approved. The above-mentioned would be applicable to other cases in which a transaction is subject to authorisation from other regulatory authorities, such as the Ministry of Finance and Public Credit, the Mexican Central Bank, the National Banking and Securities Commission, the National Insurance and Bonds Commission, the National Retirements Savings System Commission, the Energy Regulatory Commission and the Ministry of Communications and Transportation, among others.

Challenge and appeal

21 Can a negative decision be challenged or appealed?

A negative decision can be challenged or appealed by two different approaches: (i) as provided by the Federal Administrative Procedure with a nullity suit; or (ii) by an *amparo* lawsuit (constitutional procedure).

Confidential information

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

According to transparency and access to public information laws, the information and documents provided to authorities can be classified as public, reserved or confidential.

Access to the file of the transaction shall not be granted to third parties different to the parties to the transaction; and the confidential information would only be available to the party that disclosed such information.

In 2016, General Guidelines on the classification and declassification of information, as well as for the preparation of public versions was published in the Official Federal Gazette, which provides the criteria regarding the classification of information and standard to generate public versions of the writs presented by the parties and resolutions issued by authorities.

All authorities are subject to the General Law on Protection of Personal Data Held by Obligated Parties, which protects the personal data held by any authority, entity, political parties or autonomous agencies. Likewise, all authorities must make available a privacy notice to the owner of the data upon of collection of the data in order to inform him or her on the purpose of their processing.

Any person, as data owner, has the right to access, rectify, cancel and oppose to the processing of its personal data.

RECENT CASES

Relevant recent case law

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Considering that cabotage in Mexico is a strategic economic development industry, as established in article 23 of the Mexican Foreign Investment Law, it is exclusively reserved to Mexicans and foreign investment needs an authorisation to hold more than the 49 per cent of the capital. A cabotage company in June 2015 asked the Foreign Investments Commission for an authorisation to increase the foreign investment participation in its capital to 99 per cent through neutral investment. In August 2015, the Foreign Investment Commission authorised that company to hold the relevant neutral investment of 99 per cent of its capital and granted them a 60-day term to submit the documentation proving that the capital was subscribed in the authorised percentage.

A recent and outstanding case of foreign investment is Delta Air Line's investment in Grupo Aeromexico SAB de CV. Since March 2011, Grupo Aeromexico had authorisation from the foreign investment authority to issue 'neutral investment' shares with limited minority rights provided that any subsequent acquisition of shares by foreigners shall be considered as neutral investment and subject to compliance of certain conditions. By 2012, Delta Air Lines had a 4.17 per cent shareholding of Grupo Aeromexico but, in 2017, Delta Air Lines launched a takeover bid for Grupo Aeromexico's shares and, since 31 December 2017, it has held 49 per cent of Aeromexico Group shares.

According to the Foreign Investment Law, companies that provide domestic air transportation; international air taxi transportation and specialised air transportation are subject to a limit of 49 per cent regarding foreign investment participation and must hold a concession granted by the Ministry of Communications and Transportation, under the Civil Aviation Law.

The latest case reviewed by the Federal Economic Competition Commission in which the relevant transaction was not authorised is the concentration between Wal-Mart International Holdings, Cornershop, Cornershop Technologies LLC, Shareholder Representative Services LLC and an individual whose personal information is not available for data protection purposes.

The notification was presented in November 2018. The Federal Economic Competition Commission requested missing information and clarifications from the parties. In December, the parties presented voluntarily additional information to assist in the analysis of the transaction. The authority requested additional information and documentation which was presented by the parties in January 2019.

The Federal Economic Competition Commission also requested information to third parties related to the relevant market, such as retailers, discount departments stores, grocery stores and online delivery platforms.

The parties to the transaction were called for an interview with the authority to discuss the possible risks to competition and free competition process that the transaction may generate. As a result of this interview, the parties presented, in May 2019, a proposal with conditions to prevent the risks discussed in the interview.

The resolution of the Federal Economic Competition Commission dated 27 May 2019 denied the execution of the transaction because the proposed conditions were not enough to prevent the risks to competition process and free market access. The Federal Economic Competition Commission identified the following risks regarding the transaction: (i) unduly displace of competitors; (ii) substantial obstruction of access to a platform establishing exclusive advantages for the stores that are part of Wal-Mart International Holdings; and (ii) competitors may quit using the platform as a result of lack of confidence regarding the use of their information.

UPDATE AND TRENDS

Key developments of the past year

24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

Currently, there are no material developments that should be noted. However, even though it is not applicable only to foreigners, the government is reviewing its policy in relation to oil and gas exploration and production, limiting the assignment of the corresponding activities.

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