

FOREIGN INVESTMENT REVIEW

Mexico



Foreign Investment Review

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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Mexico



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LAW AND POLICY

Policies and practices

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

Until recent years, the Mexican government's policy regarding the oversight and review of foreign investment focused only on confirming whether the foreign investment raised any national security issue. Nonetheless, in recent practice, the government's policies and practice have shifted into a more holistic approach. Under this new approach, the government analyses each case depending on the project's characteristics – for example, size of the company, sector, type of investment and origin of the investor's resources.

Specifically, the limitations on foreign investments are applied to foreign investors that want to participate either directly or indirectly in the equity of companies with a certain volume of sales in Mexico or engaged in certain activities.

It needs to be taken into account that the officials from the National Foreign Investment Commission (Comisión Nacional de Inversiones Extranjeras) (CNIE) have taken a policy-based approach to review, and request additional information in foreign direct investment (FDI) review processes. Under this new approach, it is advisable to contact the CNIE's officials before submitting the filing to discuss the proposed transaction, and what information they would like to see explaining the potential benefits of the transaction in Mexico and prepare the notice considering such discussions.

Although this implies submitting additional information to the formal documentation and information required in this type of process, it helps to accelerate obtaining clearance.

Finally, it is important to point out that Mexico does not have currency controls.

Law stated - 12 December 2021

Main laws

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 Foreign Investment Act and its Regulations (jointly, the FIA) constitute the main statutory framework governing FDI in Mexico.

Although the FIA is the law generally applicable to FDI, foreign investments can be further limited or restricted by specific regulations or permits applicable to the target company. In any process involving the analysis of potential FDI, investors should review the terms and conditions provided in the specific regulatory framework applicable to the target company.

This regulatory framework can be identified in the permits, authorisations or concessions (or all of these) granted to the target company, as well as by reviewing the legislation applicable to the activities of the target entity (eg, financial services, energy sector, transportation services and any kind of public service).

Law stated - 12 December 2021

Scope of application

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 the FIA applies to any kind of acquisition over shares that grants voting rights in the target company. Specifically, under the FIA, foreign investments are generally allowed without prior authorisation from any administrative agency, except with regard to legal entities that are:

- engaged in the activities described in article 6 of the FIA (ie, 'restricted investments'); or
- engaged in the activities provided in articles 7 and 8 of the FIA, or with assets valued in excess of the monetary threshold set forth in article 9, in an amount in excess of the corresponding cap (ie, 'capped foreign investments').

Restricted investments

Restricted investments entail the acquisition of a stake – in any amount – of the equity of Mexican companies engaged in land passenger and freight transport services within the Mexican territory, or development banking.

Pursuant to the FIA, investments in these types of ventures are limited solely to Mexican nationals. Foreign investors are statutorily precluded from undertaking a restricted investment.

Capped foreign investments

Foreign investors cannot acquire more than a 10 per cent capital stake in a Mexican cooperative production company, which is a special low-revenue company dedicated to a certain primary activity (such as fishing, artisanal products and agricultural production) with a preferential tax regime.

Foreign investors cannot acquire more than 49 per cent of the capital stock of Mexican legal entities that are engaged in one of the following reserved activities:

- manufacture and marketing (commercialisation) of explosives, firearms, cartridges, ammunition and fireworks;
- printing and publication of newspapers for exclusive commercialisation and distribution within the Mexican territory;
- ownership of agricultural, livestock and forest lands;
- fishing activities in freshwater, inshore and exclusive economic zones;
- integral port administration;
- piloting services in ports located within the Mexican territory;
- freight maritime shipping within Mexican waters;
- ship, aircraft and rail equipment fuel and lubricant supply;
- broadcasting; and
- air transport services (including scheduled flights and charter flights).

The CNIE may still authorise any foreign investment entailing an acquisition of more than 49 per cent of the capital stock of a Mexican legal entity engaged in:

- manoeuvring services in ports located within the Mexican territory;

- freight shipping via coastal and ocean navigation;
- aerodrome management or operation;
- education services (including pre-school, elementary school, middle school and college);
- legal services;
- construction or operation of railways (or both), as well as railway transportation services; and
- holding assets with a book value that exceeds 19.55 billion Mexican pesos (however, this amount is updated each year).

Additionally, the sectorial agencies have broad authority to review the mergers and acquisitions of their regulated entities. Thus, if the target company has a permit, concession or authorisation – or is subject to a specific regulatory framework – that requires the prior authorisation of the sectorial agency, the proposed transaction may be prevented. In other cases, a specific permit may preclude any type of foreign investment in the equity of the permit holder. Due to the lack of homogeneity of the existing permits in Mexico, this analysis has to be made on a case-by-case basis during the due diligence process.

Law stated - 12 December 2021

Definitions

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

Foreign investment: (1) any kind of direct or indirect participation of foreign investors, in any proportion, in the equity of companies incorporated in Mexico (excluding neutral investments that do not grant voting rights); and (2) any kind of direct or indirect participation of companies incorporated in Mexico (controlled by foreign investors), in any proportion, in the capital stock of Mexican companies.

Foreign investor: any individual or legal entity with a non-Mexican nationality.

Law stated - 12 December 2021

Special rules for SOEs and SWFs

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?

The main statutory framework governing FDI in Mexico provides specific rules for investments made by foreign SOEs and SWFs.

Nonetheless, it is advisable to review whether the target company has a permit, concession or authorisation – or is subject to a specific regulatory framework – that may provide additional specific provisions over foreign investments.

Additionally, it should be noted that during the review process before the CNIE, the case handler may consider it relevant to analyse the specificities of the applicable regulatory framework to the foreign SOE or SWF making the investment. The purpose of this is to understand the potential characteristics of the project and their benefits to Mexico.

Law stated - 12 December 2021

Relevant authorities

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

There are no regulatory agencies in Mexico reviewing mergers or acquisitions solely on national interest grounds. Nonetheless, the main regulatory body reviewing foreign investments is the CNIE and it can only deny a foreign investment request for national security purposes.

However, the target company may have a permit, concession or authorisation – or be subject to a specific regulatory framework – that includes additional provisions governing reviewing processes with sectorial regulators and emphasising national interest policies. There is a low likelihood of this scenario, but considering there is no standard form for the permits, concessions and authorisations granted in Mexico, it is advisable to review these documents for this purpose.

Law stated - 12 December 2021

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

The CNIE can only deny a foreign investment request for national security purposes and has broad discretion to approve or reject any transaction based on these grounds. Aside from the Mexican competition authorities (which must sustain their decision based on economic analysis), the sectorial agencies have broader authority to approve or reject transactions. Therefore, they also could base their rejection in any case on national interest grounds.

Law stated - 12 December 2021

PROCEDURE

Jurisdictional thresholds

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

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- ship, aircraft and rail equipment fuel and lubricant supply;
- broadcasting; and
- air transport services (including scheduled flights and charter flights).

The National Foreign Investment Commission (Comisión Nacional de Inversiones Extranjeras) (CNIE) may still authorise any foreign investment entailing an acquisition of more than 49 per cent of the capital stock of a Mexican legal entity engaged in:

- manoeuvring services in ports located within the Mexican territory;
- freight shipping via coastal and ocean navigation;
- aerodrome management or operation;
- education services (including pre-school, elementary school, middle school and college);
- legal services;
- construction or operation of railways (or both), as well as railway transportation services; and
- holding assets with a book value that exceeds 19.55 billion Mexican pesos (however, this amount is updated each year).

Additionally, the sectorial agencies have broad authority to review the mergers and acquisitions of their regulated entities. Thus, if the target company has a permit, concession or authorisation – or is subject to a specific regulatory framework – that requires the prior authorisation of the sectorial agency, the proposed transaction may be prevented. In other cases, a specific permit may preclude any type of foreign investment in the equity of the permit holder. Due to the lack of homogeneity of the existing permits in Mexico, this analysis has to be made on a case-by-case basis during the due diligence process.

Law stated - 12 December 2021

National interest clearance

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

There is no process to obtain clearance based on national interests, but in a foreign investment authorisation before the CNIE the interested foreign investors are required to submit a preinvestment control notice. The notice must attach the following: a duly filled-in questionnaire issued by the CNIE; the financial and corporate documents of the interested foreign investors; a general description of the investment impact in terms of employment, technological contributions and increase in competitiveness of the target company (or any other synergy that could derive therefrom); evidence of payment of filing fees; and any other information that may be deemed relevant to the analysis of the impact of the transaction.

Once the pre-investment control notice is duly submitted, the CNIE has 45 business days to authorise the proposed investment. If the CNIE does not issue a decision within that period, the proposed investment will be deemed implicitly authorised according to the FIA.

Foreign investors may acquire a non-limited participation in the capital stake of companies engaged in capped activities without prior authorisation if the investment is 'neutral' – a preferred non-voting financial investment equity that is not characterised as foreign investment under the FIA.

Law stated - 12 December 2021

Which party is responsible for securing approval?

Pursuant to the relevant regulatory provision, the potential investors are the ones responsible for securing the approval issued by the CNIE. This responsibility can, however, be distributed among the involved parties of the transaction by a contractual arrangement (eg, best efforts and mutual cooperation clause).

Law stated - 12 December 2021

Review process

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?

According to the FIA's provision, the CNIE has 45 business days to authorise the proposed investment. If the CNIE does not issue a decision within that period, the proposed investment will be deemed implicitly authorised according to the FIA.

However, the CNIE may pause the clock and request information from third parties, which may lead to a delay in obtaining clearance.

Nonetheless, this has been unusual in recent years. Unfortunately, there is no expedited or 'fast-track' process for the foreign investment review process. It may help to expedite the process by discussing the case, during the preparation of the transaction documents, with the officers of the CNIE. Following this approach will help the officers to understand your case before filing, and avoid potential questions or requests for additional information during the authorisation process.

Law stated - 12 December 2021

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 must wait to obtain authorisation prior to closing. Any foreign investment that falls within the category of capped investments, that is undertaken without the prior authorisation from the CNIE, will be declared null, including all the legal acts executed to perform the investment. Additionally, the CNIE can also levy a fine on the involved foreign investors of up to 434,400 Mexican pesos.

In theory, this would entail the CNIE issuing an official communication ordering the nullification of all the legal acts executed to perform the investment, which would be served on the involved parties (eg, investors, sellers, target company) as well as on any authority involved in the registration of such acts. As at the time of writing, the CNIE has not exercised this authority.

Law stated - 12 December 2021

Involvement of authorities

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?

Before submitting the notice, notifying parties can freely contact the relevant authorities for guidance. Nonetheless, such guidance is not legally binding to the request and analysis an authority may undertake during the formal process.

However, contacting an authority's officers may be helpful so as to explain the potential transaction to them, as well as discuss the details of the corresponding project and what additional information would be helpful to include with the notice.

Law stated - 12 December 2021

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?

The best informal procedure to accelerate the clearance process is to contact the officers of the corresponding authorities to explain the transaction to them and ask them what additional information they may want to review. This approach can lead to a more effective and complete filing, thus avoiding potential additional requests for information that could delay clearance.

Law stated - 12 December 2021

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?

Pursuant to the FIA, the CNIE may nullify all the legal acts executed to perform the investment, and levy a fine on the involved foreign investors of up to 434,400 Mexican pesos.

Regarding the nullification process, in theory this would entail the CNIE issuing an official communication ordering the nullification of all the legal acts executed to perform the investment, which would be served on the involved parties (eg, investors, sellers, target company) as well as on any authority involved in the registration of such acts. As at the time of writing, the CNIE has not exercised this authority.

Law stated - 12 December 2021

SUBSTANTIVE ASSESSMENT

Substantive test

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

Pursuant to the Foreign Investment Act and its Regulations (jointly, the FIA), there is no express substantive test to prove a specific transaction has to be authorised by the National Foreign Investment Commission (Comisión Nacional de Inversiones Extranjeras) (CNIE). Nonetheless, any transaction has to be authorised by the CNIE if the notice submitted is deemed complete, and the proposed transaction does not raise any national security concerns. However, it is advisable to contact the officers of the corresponding authorities to explain the transaction to them, ask them what additional information they may want to review and if an additional standard they would like to review is met.

Law stated - 12 December 2021

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

In our experience, it is uncommon for the Mexican authorities (specifically, the CNIE) to contact officials in other countries during the substantive assessment in foreign investment review processes. Nonetheless, it is possible. This, however, would depend on the specific case and if Mexico has a cooperation agreement in place with the other countries where the notifying investors operate.

Law stated - 12 December 2021

Other relevant parties

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

The process is confidential, and no third party has the right or legal standing to file complaints within the foreign investment review process. Nonetheless, the CNIE may issue additional information requests to third parties, but this is not a recurrent practice in foreign investment review processes.

Law stated - 12 December 2021

Prohibition and objections to transaction

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

If a specific transaction is subject to prior authorisation or was subject to such process and did not obtain the corresponding authorisation, the relevant authority can seek to nullify the transaction or levy a fine on the parties that were legally compelled to obtain the authorisation, or both.

The nullification process would entail the CNIE issuing an official communication ordering the nullification of all the legal acts executed to perform the investment, which would be served on the involved parties (eg, investors, sellers, target company) as well as on any authority involved in the registration of these acts. As of the time of writing, the CNIE has not exercised this authority.

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

It is possible, and the specific remedies will depend on the risks identified by the authority. However, the CNIE can only deny a foreign investment request for reasons of national security. Therefore, any potential risk related to another matter may be groundless.

Law stated - 12 December 2021

Challenge and appeal

Can a negative decision be challenged or appealed?

Any resolution can be appealed. Specifically, if the CNIE denies a foreign investment request, the interested foreign investors may file an administrative appellate motion within 15 business days challenging the denial. If the motion is denied, they may file an amparo writ before a court within the following 15 business days challenging both resolutions.

Law stated - 12 December 2021

Confidential information

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

All the information filed and classified as confidential will be protected as such. If confidentiality is breached by an officer of one of the relevant authorities, the involved parties may seek to file a complaint against the officer.

Law stated - 12 December 2021

RECENT CASES

Relevant recent case law

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.

There have not been any recent cases reflecting a shift in the case law of foreign investment reviews in Mexico, since reviews are generally approved and the administrative dockets remain confidential.

Law stated - 12 December 2021

UPDATE AND TRENDS

Key developments of the past year

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?

Although there have been no changes to the Foreign Investment Act and its Regulations, nor are there any proposed bills to amend this law, recently the CNIE's officials have taken a policy-based approach to review, and request additional information in foreign direct investment review processes.

Under this new approach, it is advisable to contact the CNIE's officials before filing to discuss the proposed transaction, and what information they would like to see explaining the potential benefits of the transaction in Mexico.

Although this implies submitting additional information to the formal documentation and information required in this type of process, it can accelerate obtaining clearance.

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Jurisdictions

	Australia	Gilbert + Tobin
	Austria	Barnert Egermann Illigasch Rechtsanwälte
	Cambodia	Tilleke & Gibbins
	Canada	McCarthy Tétrault LLP
	China	Global Law Office
	Denmark	Bech-Bruun
	European Union	Allen & Overy LLP
	France	White & Case LLP
	Germany	Blomstein
	India	AZB & Partners
	Indonesia	Nagashima Ohno & Tsunematsu
	Italy	Gianni & Origoni
	Japan	Tokyo International Law Office
	Laos	Tilleke & Gibbins
	Malaysia	Nagashima Ohno & Tsunematsu
	Mexico	White & Case LLP
	Myanmar	Tilleke & Gibbins
	New Zealand	Russell McVeagh
	Norway	CMS Kluge
	Spain	White & Case LLP
	Sri Lanka	Tiruchelvam Associates
	Sweden	BOKWALL RISLUND Advokatbyrå
	Switzerland	Lenz & Staehelin
	Thailand	Nishimura & Asahi
	United Arab Emirates	Afridi & Angell

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 Uzbekistan	Winfields
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