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Mexico



IX. Mexico

A. Foreign investment

i. Authorisations versus limitations or prohibitions

In Mexico, there are some activities that shall be carried out by the Mexican Government such as:

- extraction and exploration of oil and hydrocarbons;
- electric energy distribution and transmission;
- generation of nuclear energy;
- radioactive minerals;
- telegraphs;
- radiotelegraphy;
- postal services;
- issuance of paper currency;
- production of coins; and
- control, supervision and surveillance of seaports, airports and helipads.

Mexican legislation also considers certain activities reserved exclusively to Mexicans or Mexican companies, with a clause excluding foreign nationals. According to this clause, any foreign individuals that invest in Mexican corporations have to act as Mexicans in the said investment and renounce their consular protection over that particular investment. These activities are as follows:

- domestic land transport of passengers and cargo, excluding parcels and couriers; and
- development bank institutions.

Mexican corporations with foreign investment are only able to carry out certain activities if the foreign investment does not exceed up to 49 per cent of:

- manufacture and sale of explosives, firearms, cartridges, ammunition and fireworks, excluding the acquisition and use of explosives for industrial and mining activities, and the development of explosive mixtures for use in such activities;
- printing and publication of newspapers for circulation in the national territory;
- series 'T' shares of companies owning agricultural, livestock and forestry land;
- freshwater, coastal waters and exclusive economic zone fishing, excluding aquaculture;
- the Integral Port Administration;
- port services piloting ships;

- shipping companies engaged in the commercial exploitation of vessels for inland and coastal navigation, excluding tourism cruises and exploitation of dredges and floating structures for port construction, conservation and operation;
- supply of fuels and lubricants for ships, aircraft and railway equipment;
- radio broadcasting: this threshold limitation will be subject to the reciprocity that exists with the country of incorporation of the investor or economic agent who exercises control, in the last instance, directly or indirectly over such an investor; and
- air services, including domestic, whether scheduled or non-scheduled; international air transport services, whether scheduled or non-scheduled; aerotaxi transport; and, specialised air transport services.

Every other licit activity may be carried out by foreign investors with the proper registration in the National Foreign Investment Registry, controlled by the Ministry of Economy. The Foreign Investment Law contemplates the registry for:

- Mexican corporations whose capital is comprised of foreign investment, neutral investment and Mexicans living abroad that have acquired another nationality;
- any foreigner, foreign corporation or Mexican living abroad that has acquired another nationality that carries out commercial activities in the Mexican territory; and
- trusts that result in foreign investment rights.

The registration must be made within 40 days after the foreign investment is carried out.

ii. Treatment of foreign investment in infrastructure initiatives and PPP projects

The National Infrastructure Programme 2014–2018 is focused on promoting and creating more economic activity and jobs to support infrastructure development, with a long-term vision based on three guiding principles of the National Development Plan: (1) balanced regional development; (2) urban development; and (3) logistic connectivity in order to achieve all national targets.

According to the National Democratic Planning System and through the National Infrastructure Programme 2014–2018, the Federal Government seeks to guide the comprehensive functionality of existing and new infrastructure of the country, through the following specific objectives per sector:

- have an infrastructure and logistics platform for transport and modern communications to promote greater competitiveness, productivity, economic and social development;
- optimise the coordination of efforts directed at energy infrastructure, ensuring the proper development of this specific sector in order to have enough energy of good quality and offer competitive prices;
- increase water infrastructure, both to ensure water for human consumption and agricultural irrigation, as well as ensuring water protection in the case of floods;
- contribute to strengthen and improve interagency health infrastructure to guarantee effective access to quality health services;

- promote urban development and the construction of quality housing, equipped with infrastructure and basic services, with orderly land access; and
- develop competitive infrastructure that promotes tourism as a strong guiding principle of regional productivity and as a welfare detonator.

Projects (with an exchange rate at the time of the elaboration of the planned projects)

Total estimated investment	Planned projects 2014–2018
\$505,395.39m	743

According to the statistics from Centro de Estudios Económicos del Sector de la Construcción ('CEESCO'), the maximum calculated progress by the end of 2018 will be 73 per cent.

A. COMMUNICATION AND TRANSPORT

Objective: Have an infrastructure and logistics platform for transport and modern communications to promote greater competitiveness, productivity, economic and social development.

Total estimated investment	Planned projects 2014–2018
\$86,081.27m	223

Total funds per sector (millions of dollars)

Total \$86,081.27	Public resources \$36,384.32	Private resources \$49,696.92
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According to the statistics from CEESCO, by the end of 2018, the communication and transport sector is expected to make 80 per cent progress according to the investment programme.

B. TERRITORIAL AGRICULTURAL AND URBAN DEVELOPMENT

Objective: Promote urban development and the construction of quality housing, equipped with infrastructure and basic services, with orderly land access.

Total estimated investment	Planned projects 2014–2018
\$124,703.35m dollars	4

Total funds per sector (millions of dollars)

Total \$124,703.35	Public resources \$65,758.26	Private resources \$58,945.00
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C. ENERGY (RESERVED FOR PUBLIC INVESTMENT ONLY)

Objective: Ensure the proper development of energy infrastructure in order to have enough energy of good quality and offer competitive prices.

Total estimated investment	Planned projects 2014–2018
\$35,582.45m	133

D. ENERGY

Objective: Ensure the proper development of energy infrastructure, in order to have enough energy of good quality and offer competitive prices.

Total estimated investment	Planned projects 2014–2018
\$225,647.68m	129

Total funds per sector (millions of dollars)

According to the statistics from CEESCO, by the end of 2018, 57 per cent progress is expected.

Policies and strategies for 2018–2019 in the energy sector:

- identify the supply of the energy sector and track the committed investments;
- encourage the participation of national companies in infrastructure projects; and
- develop talent, innovation and technology on behalf of infrastructure projects to develop and work towards the implementation of technology and international certifications.

For productivity and efficiency:

- develop better financial instruments, in coordination with Nacional Financiera ('NAFIN'), Banco Nacional de Obras y Servicios Públicos ('Banobras') and other entities in order to allow private companies to access competitive credits.

Total \$225,647.68	Public resources \$189,925.84	Private resources \$71,304.28
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E. HYDRAULICS

Objective: Increase water infrastructure, both to ensure water for human consumption and agricultural irrigation, as well as ensuring water protection in the case of floods.

Total estimated investment	Planned projects 2014–2018
\$27,997.22m	84

Total funds per sector (millions of dollars)

Total \$27,997.22	Public resources \$24,808.50	Private resources \$3,188.72
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According to the statistics from CEESCO, the expected progress by the end of 2018 in the water sector is about 44 per cent.

F. HEALTH

Objective: Contribute to strengthening and improving interagency health infrastructure to guarantee effective access to quality health services.

Total estimated investment	Planned projects 2014–2018
\$4,878.96m	87

Total funds per sector (millions of dollars)

Total \$4,878.96	Public resources \$4,807.74	Private resources \$71.17
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According to the statistics from CEESCO, the expected progress in the health sector by the end of 2018 is 61 per cent.

G. TOURISM

Objective: Promote the development of tourism infrastructure that consolidates priority destinations and helps to diversify the offer to new destinations.

Total estimated investment	Planned projects 2014–2018
\$12,146.50m	83

Total funds per sector (millions of dollars)

Total \$12,146.50	Public resources \$4,626.86	Private resources \$7,519.63
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According to the statistics from CEESCO, the expected progress in the tourism sector by the end of 2018 is ten per cent.

iii. *Treatment of foreign investment in oil and gas, and mining activities*

The Mexican Federal Constitution was reformed in 2013, allowing the participation of private investments in the oil and gas industries, although, as mentioned above, the extraction and exploration of hydrocarbons is still an activity reserved for the Federal Government, which can be made through productive public companies and agreements with the private sector. The corresponding acts and regulations to execute the constitutional amendment were made in 2014.

A. OIL AND GAS

- The Federal Constitution expressly provides that the exploration and extraction of oil and any other hydrocarbons will be carried out exclusively by the state through its public companies (Pemex) and agreements with the private sector.
- As part of round zero, the Ministry of Energy gave Pemex 83 per cent of hydrocarbons reserves and 21 per cent of prospective resources.
- Pemex announced ten strategic partnership opportunities in the following four projects (over a period of 13 months beginning in November 2014):

- mature fields: over a probable 1,600,000 barrels of crude petroleum equivalent; as a ‘2P’ reserve;
- extra heavy raw petroleum fields: will focus on the three areas of extra heavy crude oil;
- development of gas: associated with the development of two giant gas fields in deep waters containing 212 million barrels of crude oil equivalent; and
- deep waters: deep water fields; as a 2P reserve;
- As part of round one, the Ministry of Energy announced that it will offer 169 blocks to bidders in round one: 109 blocks for exploration and 60 blocks for extraction.
- The reserves to be offered are estimated at around 3.8 billion barrels of oil equivalent for 2P reserves, and about 14.6 billion barrels of crude oil equivalent (‘BOE’) for prospective reserves.
- Mexico expects the annual investment in these projects to be in the region of U\$8bn for 2015–2018.
- For these activities, foreign investment is permitted through a public bid that contemplates the best technical and economic conditions of the bidders.
- Pemex announced in 2016 its 2017–2021 business plan, in accordance with Pemex’s official statement on its business plan.
- The actions contained in the business plan are based on conservative scenarios and realistic parameters.
- With the announced measures, Pemex will reach a financial balance in 2019, and in 2021, it will overcome the losses in the National Refining System.
- The business plan is already in execution, and has made important breakthroughs:
 - Pemex risk has decreased by 50 per cent, 148 basis points;
 - the launch of first farm outs: Trion block in deep waters, Ayin-Batsil in shallow waters and Cárdenas-Mora-Ogarrio onshore fields; and
 - Gasoductos de Chihuahua divestiture.

B. MINING

- The Mining Act establishes that the exploration and exploitation of minerals can be granted to the private sector, and even Mexican companies with foreign investment in their capital. These activities can be carried out by the private sector through a concession on the conditions established in the act.
- To obtain the concession, a company must comply with the following requirements:
 - its corporate objective must include the exploration and exploitation of minerals; and
 - It must have its corporate domicile in the Mexican territory.

Every concession granted will be only for a specific mining lot. The concession will be granted to the first applicant if this applicant satisfies the operation requirements necessary for exploring the mining lot; this concession will have a length of 50 years.

iv. Treatment of foreign investment in real estate

The Mexican Law does not have any restrictions on the acquisition or lease of real estate in Mexico by foreigners or foreign investment companies. However, there is a special procedure for real estate acquisition in the restricted zone, which is within 100 kilometres of the frontiers and 50 kilometres of the coast.

The special procedure is as follows:

- Mexican corporations with foreign investment:
 - outside the restricted zone: there is no limitation on the acquisition of real estate; and
 - within the restricted zone:
 - for residential purposes: the real estate property can be acquired by a trust in which the fiduciary has the property of the real estate but the beneficiary has the usage and enjoyment of the property; and
 - for non-residential purposes: the real estate property can be acquired directly, with registration at the Secretariat of Foreign Affairs.
- foreigners and foreign corporations:
 - outside the forbidden zone: the real estate property can be acquired directly with registration at the Secretariat of Foreign Affairs; and
 - within the forbidden zone: for residential and non-residential proposes, the real estate property can only be acquired through a trust.

v. Treatment of foreign investment in agribusiness activities

Mexico has very rich land for agriculture production, especially because of its climate. Mexico's agribusiness activities are ruled by the Agrarian Act. The Federal Government promotes the development of the rural sector through the promotion of productive activities and social action to improve the welfare of the population and its participation in national life. There are no limitations to the exploitation of private property real estate for agricultural activities.

The Agrarian Act includes a land property regime called 'ejido' for rural communities. Ejido communities own massive parcels of land for their own agrarian exploitation. Ejidos can be turned into private property through a complex procedure, and even be owned by foreigners, with the real estate limitations mentioned above.

Although agricultural products can be imported into Mexico without apparent limitations, except for illegal drugs, the Foreign Trade Act establishes policies to prevent subvention and dumping practices.

The protection to the agribusiness industry can include the imposition of countervailing duties in certain products that may threaten the Mexican production.

In accordance with the National Institute of Statistics and Geography (Instituto Nacional de Estadística y Geografía ('INEGI')), the main agricultural products in Mexico are the following:

- sugar cane;
- corn;
- sorghum;
- orange;
- wheat;
- banana;
- tomato;
- green chilli;
- lime;
- mango;
- potato;
- coffee cherry;
- avocado;
- beans;
- apple;
- barley;
- grapes;
- rice;
- strawberry;
- peach; and
- soy.

vi. Treatment of foreign investment in the rendering of public services

The Public Service of Electric Energy Distribution is reserved exclusively for the Mexican Government, however the provision of other services may be performed by private investment. Therefore, given the limitations established in the Foreign Investment Law mentioned in the first section of this chapter, some of these services can only be provided by the private sector through public bids and the granting of concessions; the remainder are conducted through PPPs.

A. PPP AGREEMENTS

The Public–Private Partnership Act establishes the contractual rules for PPP agreements. The private party of these agreements can only be a company in which the corporate objective is exclusively the activities necessary to develop the specific project in the agreement. The authority publishes the rules of the bid that contain specific regulations for the corporate structure of a company that wants to obtain the contractual right to be part of a PPP.

The agreement must establish the following:

- objective of the agreement, which will be the provision of the services and the execution of the necessary infrastructure works;
- rights and obligations of the parties;
- product features, specifications, technical standards, performance standards and quality for the execution of the work and service delivery;
- a list of the real estate and merchandise needed for the project, and its destiny at the termination of the agreement;
- the financial regime of the project;
- distribution of risks;
- the constitution of a surety for any possible breach;
- the term for the development work, the beginning of the service provision and the duration of the agreement; and
- the corresponding authorisations (concession, permits, etc) for the service provision.

B. Rendering of public services

i. General framework

The Constitution determines what is considered as a public service; this is categorised by political jurisdictions: the federation (Articles 25, 27, 28 and 73), the states (Articles 116, 122 and 124) and the municipalities (Article 115). The federal and municipal levels concentrate on the rendering of these services, leaving the state with a mere coordination role. The federal level is responsible for issues related to hydrocarbons, electricity supply, postal service, financial system and communication, as well as health, education and roads. For the state and municipal levels, on the other hand, public services comprise mostly education, water utility services, public lighting, pavements, waste collection, markets, graveyards, public safety and transit systems, among others.

These services can be rendered either by means of a state monopoly, by joint participation with private parties or by coordination with other political jurisdictions.

The Constitution sets out principles for the participation of the private initiative in rendering public services. These can be found in Article 25, whereby it is established that public, social and private

sectors shall contribute to national economic development, with social responsibility. Social and private sector enterprises shall be supported under the criteria of social equity, productivity and sustainability. This article also mentions that, in order to develop and organise the nation's priority development areas, both public and private sectors will concur.

Besides concessions, another common scheme for rendering public services is through PPPs, especially with respect to roads and water utility services. PPPs are regulated by the Federal Public-Private Partnership Law (*Ley de Asociaciones Público-Privadas*) as well as the respective state's PPP laws, if any. The most common PPP modality used in Mexico is through contracts whereby the private parties are obliged to provide a service, whether it is water supply or public lightening supply, or conduct a construction project (ie, road projects). It is important to mention that PPPs are forbidden in terms of the Hydrocarbon Law for exploration and production activities.

Concerning water utility services, the municipality is responsible for rendering the service in coordination with Congress. Generally the municipal authority grants a concession for this purpose. The title granted under the concession represents an exclusive right for the concessionaire, subject to the terms and conditions set out in the contract entered into with the municipality, in order to ensure the avoidance of abusive practices that could prejudice users. Likewise, for the energy supply or public lightening, the municipality will generally issue a concession or PPP through which private parties will participate, upon approval by Congress.

ii. Governmental monopoly versus private initiative

Governmental or state monopolies in Mexico can be understood as one of the following concepts: (1) decentralised public entities; (2) state-owned enterprises; (3) public trusts; and (4) state productive enterprises.

State monopolies in Mexico are closely linked to the strategic areas concept, which encompasses economic sectors such as post, telegraphs, radiotelegraphy, radioactive minerals, nuclear energy, and the control and design of the National Electric System; as well the exploration and production of petroleum and other hydrocarbons. Similarly, it is also related to the concept of priority areas for national development, such as satellite communication and railways. Nevertheless, as mentioned above, the Constitution allows the participation of the private initiative in public services for both strategic and priority areas by means of concession, permits or titles, as may be the case.

In the federal level, concessions and permits are generally granted by the Executive Branch through its respective office, whether it is the Secretariat of Energy (Hydrocarbons, minerals, etc) or the Secretariat of Communications and Transportation (roads, ports, etc), among others. The only exception is for the broadcasting and telecommunications sectors, where the Federal Telecommunications Institute is the body granting such concessions.

As for electricity supply, market liberalisation is now in process after the Constitutional amendment of 2013. As part of this process, in the energy sector, generation and commercialisation of power are no longer strategic activities of the state; in turn, CFE alongside other private parties will develop such activities. Nevertheless, the state will hold exclusive control over the National Electric system, as well as the transmission and distribution of power. The Regulatory Commission of Energy

(Comisión Reguladora de Energía (CRE)), as a coordinated energy regulator, is the body in charge of controlling the sector. It grants permits for producers and determines the tariffs for the delivery of the service. No concessions are to be granted in this sector; however, the state may enter into agreements with private parties under the terms of the respective regulations.

iii. Privatisation general rules

Over the past three decades, Mexico's Government has pursued a policy that aims at the privatisation of public entities. Two main purposes have driven this path: first, to strengthen public finances, macroeconomic stabilisation and to expand the productivity of strategic sectors; and second, to open up non-strategic economic sectors to public access.

In Mexico, privatisation of public enterprises is generally executed by Presidential Decree. The Federal Law of State-Owned Enterprises (Ley Federal de Empresas Paraestatales) sets the basis for the privatisation of public companies. It establishes that when a state-owned enterprise ceases to fulfil its purpose or becomes economically unattractive, the Secretary of Finance may suggest to the executive power (ie, the President), that it is sold, disposed of or dissolved. This process is conducted by the Inter-Secretariat Commission of Public Expenses, Financing and Disincorporation (Comisión Intersecretarial de Gasto Público, Financiamiento y Desincorporación).

iv. Limitations and/or prohibitions to private parties in the rendering of public services

Antitrust regulations are applicable to private entities rendering public services. The Federal Economic Competition Commission (Comisión Federal de Competencia Económica (CFCE)) enforces the Economic Competition Law (Ley Federal de Competencia Económica) in all economic areas, including those comprising public services under the Constitution, with the exception of broadcasting and telecommunications sectors. The law is applicable to all economic agents, which, according to the legal definition, comprises any legal person or individual, as well as any public entity, with the exception of activities that the state exercises as strategic areas. The CFCE regulates monopolistic practices and economic concentrations concerning all activities related to the public sector, with the exception of those executed by the state under the concept of strategic areas. However, it is unclear yet how state productive enterprises will be affected by these regulations as they will participate as equals with other private parties. In accordance with the Hydrocarbon Law and Electric Industry Law, the CFCE has to ensure that the activities of the new energy sector are carried out under the criteria of fair economic competition.

For the broadcasting and telecommunications sectors, the body responsible for this regulation is the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones (IFT)). Its main tasks are, among others, to regulate, promote and supervise the development of the radio spectrum, telecommunications networks and satellite services. It is the authority that regulates economic competition in this sector, in conformity with the Economic Competition Law.

C. Real estate

Article 27 of the Mexican Constitution regulates land ownership in the country by establishing that the nation originally owns the land and waters within the national territory. However, it has the right to transfer the domain of them to private parties, therefore constituting private property.

i. Holding title to real estate

A. WHO CAN HOLD TITLE?

While it is clearly stated that only Mexican nationals can have the right to hold title in real estate, foreign nationals are also entitled to do so if and only when they convene with the Ministry of Foreign Affairs that they shall be considered as nationals in matters concerning the real estate they acquire and, therefore, will not invoke protection from their government regarding the real estate they obtain.

B. RECORDATION OF TITLE

Each state in Mexico has its own public recordation system where matters relating to real property are recorded, including titles of property, transfers, encumbrances and limitations on ownership. Each titled property is identified by a number given by the recordation offices.

Any person can verify title to a specific property in the local records, which is advisable when interested in acquiring property. Mexican laws require that transactions involving real property are granted in public deed, including their purchase. Therefore, people who are interested in acquiring property must do so through a notary public who will issue a deed of property, including the terms of purchase and sale contract. This deed must be registered in the recordation offices, a procedure normally carried out by the notary public who issues the deed. Once the deed is recorded, it will have effects before third parties.

ii. Limitations and modalities to ownership

A. CONDOMINIUM REGIME

Mexican states have enacted laws that regulate horizontal and vertical (buildings) condominiums. Their purpose is to regulate the rights and obligations of owners whose properties are located in land divided into common and private areas. Therefore, while the owners may have exclusive rights, albeit subject to certain limitations, with regard to their private units, they also have obligations towards areas intended for common use (gardens, car parks and amenities), which may include participation in the expenses required for maintenance, adherence to the condominium rules, etc.

There can be many types of condominiums based on the purpose given to their units, which can be for residential, commercial, industrial or mixed purposes. The law requires that the regime must be incorporated through a public deed and recorded in the property records, including the specific regulations that apply to the condominium. These regulations must include the appointment of an administrator, the use that can be given to each unit, and terms and conditions of use of common areas, as well as matters pertaining to the owners' assembly, which is the highest decision-making authority of the condominium.

*Ejid*os are population centres with legal personality and self-patrimony. Those farmers who inhabit *ejidos* have use and usufruct over the common-owned land in *ejidos*. The Agrarian Law and the *ejido*'s own regulations subject them to different rights and obligations with regard to the land they can exploit. These rights and obligations are, among others:

- use and profit from their plot of land assigned to them and the right to dispose of it;
- use and profit from land intended for common use;
- testamentary rights with regard to the land assigned to them; and
- participation in the *ejido*'s governing assembly, and in the election and integration of its representation organs.

Farmers may execute different contractual operations with regard to the use and usufruct of their plots of land; however, there are several requirements that must be met in order for them to alienate them.

The Agrarian Law divides land located in *ejidos* into three categories:

1. land intended for settlement;
2. land intended for common use; and
3. plots of land.

In principle, each and all of these lands are inalienable and not subject to a statute of limitations or dstraint. Despite this, plots of land may be alienated if they are detached from the *ejido* regime.

In order to detach a plot of land from the regime, the farmer must receive the full domain of his/her plot of land from the general assembly (farmers only have the use and usufruct). Once this has been done, the plot's registration in the National Agrarian Registry must be cancelled. The National Agrarian Registry will then issue the deed of property. Then, the deed must be registered in the Public Registry of Property. It is important to point out that other farmers in the *ejido* have the right of first refusal with regard to the first sale once the land is detached from the *ejido*.

From 1996, commercial corporations have been allowed to own and manage agricultural real estate in Mexico. This means that corporations may own agricultural real estate for industrial, commercial or residential use. In this case, the corporation must notify the National Agrarian Registry that the real estate has a purpose other than agricultural, provided it receives permission from the local authorities (*uso de suelo*).

- Corporations with an interest in acquiring agricultural property intended for agriculture are subject to several terms and conditions:
- the corporation's purpose must be limited to the production, transformation and commercialisation of agricultural products;
- there are limits to the extension of land they can own;

- capital stock must have a series ‘T’ stock, which must be equal to the amount of capital invested in agricultural land;
- foreign investors may not hold over 49 per cent of series ‘T’ stock;
- the corporation and its shareholders, as well as series ‘T’ shareholders, must be registered before the National Agrarian Registry.

If a corporation’s agricultural land exceeds the limits set out in the law, the Mexican Government has the authority to order its sale.

C. RESTRICTED ZONE

There are also constitutional limits to foreigners holding title in the areas commonly known as the ‘restricted zone’, which is a 100-kilometre strip along the borders and 50 kilometres along beaches.

However, due to the importance of foreign investment in Mexico, the Mexican Government created mechanisms to allow foreigners to acquire property in the restricted zone. One of them is known as the ‘beach trust’: through the use of a trust, in which the owner of the property acts as the trustor, a Mexican bank acts as the trustee and the foreign buyer acts as the beneficiary, it is assured that the foreign buyer has all the rights and privileges of ownership. The Foreign Investment Law allows for the trust to be established for a 50-year term, renewable any time during its existence.

Foreign corporations can also take part in the trust scheme in order to acquire property in the restricted zone. As to Mexican corporations that allow foreign investment, these can acquire property in the restricted zone, provided it is not intended for residential purposes and they give notice to the Ministry of Foreign Affairs.

iii. *Expropriation events*

The Mexican Constitution states that expropriation can only be carried out when it is deemed necessary due to public utility causes and through compensation, following a procedure described in the federal Expropriation Law. Said law establishes a list of causes that may be considered a public utility, which includes the establishment of a public service, and construction of streets and public infrastructure, among others. Compensation is given based on a valuation performed by the state, and is subject to litigation in the case in which the affected party considers it to be inappropriate.

D. Compliance programmes

i. *Background*

Compliance has become a relevant topic for companies and practitioners in Mexico due to the recent enactment of the Anti-Corruption Act (*Ley General de Responsabilidades Administrativas*), which incentivises the design and implementation of integrity or anti-corruption compliance programmes. Also, recent amendments to the National Criminal Procedure Code (*Código Nacional de Procedimientos Penales*) subject corporations to criminal liability if, among others, they fail to exercise ‘adequate control’.

ii. The Anti-Corruption Act

The Anti-Corruption Act, which became effective in July 2017, mandates that in assessing the liability of a company for alleged acts of corruption, the competent court must assess whether the indicted company has an integrity policy in place and if it includes, among others: (1) an organisation and proceedings manual clearly setting forth the responsibilities of the appropriate areas and individuals within the organisation; (2) a code of conduct appropriately socialised within the organisation; (3) adequate control and audit mechanisms; (4) adequate whistleblowing mechanisms and sanctions for violations from the policy; and (5) adequate training mechanisms.

Among others, the Anti-Corruption Act punishes as corrupt acts, bribery, influence peddling, illegal hiring of former public officers and bid rigging. Liability under the Anti-Corruption Law, on the other hand, may include: (1) fines for an amount of up to twice the economic benefit obtained from the corrupt act by the individual or corporation, or affiliated parties thereof; or, if no benefit is obtained, up to approximately MXP\$11.0m, in the case of individuals, or MXP\$110.0m, in the case of corporations; (2) ban from public tenders for a period of up to eight years in the case of individuals and ten years in the case of corporations; (3) obligation to indemnify the public treasury for losses and damages (*daños y perjuicios*) caused to it; and (4) solely in the case of corporations: (i) the prohibition to engage in trade for a period not to exceed three years; and/or (ii) the order to dissolve and liquidate the corporation.

As noted above, the existence of compliance programmes (integrity policies) and the active participation and cooperation of the management or shareholders of a corporation in an investigation are mitigating factors that must be weighed when imposing liability on a corporation. By the same token, the management or oversight bodies of a corporation failing to report corrupt acts within the organisation of which they are aware is considered an aggravating factor that thus weighs in favour of a more severe penalty.

The statute of limitations for pursuing liability under the New Anti-Corruption Law is three years in the case of minor offences of public officers, and seven years in the case of aggravated offences of public officers or offences of private parties.

iii. The criminal angle

The National Criminal Procedure Code (Código Nacional de Procedimientos Penales) subjects corporations to criminal liability for certain offences if, among others, the offences are committed in the name and on behalf of the organisation, for its benefit or with resources provided by the organisation, if and to the extent it is established that said organisation failed to exercise 'adequate control'.

While no statutory definition nor precedent or guidance exists as to what should be understood as 'adequate control', having compliance programmes should be considered as evidence of the prima facie existence of adequate control.

iv. Privacy legislation

The Federal Privacy Act (Ley Federal de Protección de Datos Personales en Posesión de Particulares) mandates that data controllers must, among others, take adequate measures to ensure that personal data is handled pursuant to the principles set forth therein. The Regulations of the Privacy Act, on the other hand, make it explicit that data controllers are required, pursuant to the Privacy Act, to create internal policies and procedures to that end, and to ensure that the same are periodically audited and compliance thereof verified, and that personnel is trained in data privacy.

As in the case of the Anti-Corruption Act, privacy compliance programmes weigh in favour of an organisation that is investigated for breaching the Privacy Act.

v. Other laws

The Federal Anti-Money Laundering Act (Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita) requires that entities and individuals that engage in certain activities ('vulnerable activities'), conduct know your customer (KYC) diligence and maintain records of their customers and the transactions they enter into with those customers. Also, this statute prohibits the use of cash for certain transactions.

In order to comply with these obligations, entities that engage in vulnerable activities must have anti-money laundering compliance policies and procedures to avoid liability.

Finally, in the case of antitrust law, while the Federal Competition Act (Ley Federal de Competencia Económica) does not give credit to entities that have antitrust compliance programmes, the precedents of the Federal Economic Competition Commission (Comisión Federal de Competencia Económica) suggest that the enforcer could take these programmes into account when assessing the intentionality behind an antitrust offence, which is one of the factors that dictate the size of a potential fine. Furthermore, the commission has issued guidance for the establishment of antitrust compliance programmes.

vi. Conclusion

While there is no obligation under any statute to have and maintain compliance programmes, criminal and anti-corruption laws clearly incentivise having compliant integrity policies and procedures. Also, in order to stay compliant with privacy, competition and anti-money laundering laws, these programmes appear to be critical.

E. Offshore vehicle providers in Latin American countries

i. Legal framework and scope of general activities

Mexico has been characterised through time as a jurisdiction where residents are taxed on their worldwide income, including that derived indirectly subject to preferential tax regimes or low-tax jurisdictions rules.

In this regard, Mexico maintains a strictly enforced regime whereby any items of income realised indirectly by Mexican residents from investments made through vehicles whose income is considered subject to a preferential tax regime are taxed in the Mexican entity, considering such income perceived at the moment it was generated in the entity resident in the preferential tax regime country.

Mexico does not follow the criterion of tax havens, but it has implemented controlled foreign corporation (CFC) rules. In the following, we focus on how Mexican legislation deals with the income taxation of controlled foreign subsidiaries in the hands of resident shareholders.

ii. Applicable legal regime in Mexico

In order to fully understand the current regime established in the Mexican Income Tax Law regarding 'tax havens', it is mandatory to refer to the report titled 'Harmful Tax Competition – an Emerging Global Issue', published in 1998 by the OECD, which claims the need to strengthen effective international cooperation to combat harmful tax competition through so-called tax havens and preferential tax regimes.

The report has been considered by member countries (including Mexico) as a starting point for corresponding adaptation and implementation in their domestic legislation, in order to combat harmful tax practices.

Hence, the tax treatment applicable to offshore investment maintained by either Mexican individuals or corporations (including a permanent establishment in Mexico) has changed significantly since 2005.

Since then, the Mexican Income Tax Law has provided that an income obtained, directly and indirectly, by Mexican residents and non-residents with a permanent establishment in Mexico through controlled foreign entities or vehicles will be considered income subject to preferential tax regimes when income or gains obtained directly or indirectly through such entities is not taxed or is taxed at an income tax rate lower than 75 per cent of the income tax that would have been due and paid in Mexico on this income.

The current applicable Mexican tax rate for corporations is 30 per cent, so the rules apply to income taxed at a rate of less than 22.5 per cent.

Mexican tax legislation provides that income subject to a preferential tax regime is that generated in cash, kind, services or credits, or presumptively determined by the tax authorities, even if such income has not been distributed by the entity where it was generated.

It is considered that income is subject to a preferential tax regime if the tax actually incurred and paid abroad is lower than the 75 per cent of the income tax that would have been paid in Mexico, even if the referenced tax incurred and paid abroad is lower because of the utilisation of a legal, administrative or regulatory provision, authorisation, refund, credit or any other procedure.

The aforementioned law provides that when income is earned indirectly, the tax paid by each intermediate vehicle or entity in which the Mexican taxpayer has an interest should be taken into account in order to determine the 75 per cent rule within the whole structure.

Furthermore, non-residents whose income is subject to a preferential tax regime are subject to 40 per cent fixed withholding tax in Mexico.

Under the current administrative rules, the withholding tax rate may be lowered to the extent that the transactions carried out by the vehicle, whose income is subject to a preferential tax regime, were undertaken with an unrelated party or related party that is a resident of a country that entered into a broad agreement with Mexico for the exchange of information.

In addition, Mexican legislation provides that taxpayers who maintain investments through vehicles considered subject to preferential tax regimes are obliged to file before the tax authorities, on an annual basis, an informative return on the income subject to the preferential tax regime.

In this regard, the Mexican Income Tax Law provides that reporting obligations are applicable when transactions are performed through entities or vehicles deemed to be fiscally transparent, which are defined as those that are not considered taxpayers in their country of incorporation, and the income of which is attributed to their members, partners, shareholders or beneficiaries.

In July 2013, as a part of the 'Action Plan on Base Erosion and Profit Shifting' (BEPS) implemented by the OECD, it launched 15 actions designed to ensure the coherence of corporate income taxation at an international level.

One of those actions, Action 3, highlighted the need to address BEPS by using CFC rules, considering that those rules have existed in the international tax context for over five decades, and dozens of countries have implemented them.

In October 2015, the OECD published the final report of Action 3, Designing Effective Controlled Foreign Company Rules.

The draft and final report consider all the constituent elements for effective CFC rules, aimed at having countries that do not have those rules to implement them, and countries with existing CFC rules to modify their rules to align them more closely with said recommendations.

Accordingly, on 7 June 2017, Mexico signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. This multilateral convention was enacted on 1 July 2018, adopting the provision related to hybrid mismatches (transparent entities).

Additional modifications to the Mexican tax law may be derived as part of the implementation and adoption of these actions.



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