

VIRTUAL ROUND TABLE

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FOREIGN INVESTMENT 2016



MEET THE EXPERTS



Mohamed Idwan Ganie - Lubis Ganie Surowidjojo

T: +62 21 8315005

E: ganie@lgslaw.co.id

W: www.lgslaw.co.id

Dr. Ganie specializes in commercial transactions and commercial litigation, including alternative dispute resolution and has acted as an expert in a number court and arbitration proceedings.

His expertise covers general corporate/company law, mining law, investment law, acquisitions, infrastructure projects/project finance, antitrust law, and shipping/aviation law.

A particular focus of Dr. Ganie's practice is corporate governance and compliance. This includes legal compliance audits and legal ratings, which is a unique product of the firm.

Dr. Ganie is the Managing Partner of Lubis, Ganie & Surowidjojo. Under his management the firm has become Indonesia's largest law firm, and has obtained its ISO certifications for (1) quality management, (2) legal services and (3) environmental quality management system (all issued by UK based Lloyd's Register Quality Assurance) which has made LGS the only Indonesian law firm that has acquired and maintains such international quality standard certifications.

Dr. Ganie is an Independent Commissioner of P.T. Global Mediacom Tbk, the owner of Indonesia's largest media company (television, radio, online news and printed media).



Pedro Simoes - Acoq Tax & Financial Consultancy

T: +351 219 205 225

E: contacto@acoq.pt

W: www.acoq.pt

English-Portuguese Accountancy for Companies and Individuals. Fiscal Representation. Management Advising.



Antonia Tzinova - Holland & Knight

T: +1 202 419 2661

E: antonia.tzinova@hkclaw.com

W: www.hkclaw.com

Antonia Tzinova is an attorney in Holland & Knight's Washington, D.C. office. Ms. Tzinova practices in the areas of international trade, foreign direct investment and industrial security. She regularly represents clients before the Committee on Foreign Investment in the United States (CFIUS) and advises on measures to mitigate Foreign Ownership, Control, or Influence (FOCI) in cross-border mergers and acquisitions of U.S. government and defense contractors. She counsels foreign investors on structuring investments in the defense, high-tech and critical infrastructure sectors of the U.S. economy. She also advises on defense and high-technology exports; U.S. sanctions and trade embargoes; and customs matters.



Ronald Oleynik - Holland & Knight

T: +1 202 457 7183

E: ron.oleynik@hkclaw.com

W: www.hkclaw.com

Ronald A. Oleynik is a partner practicing in Holland & Knight's Washington, D.C., office in the area of international trade regulation. His experience includes a broad range of industrial security, customs, export and international trade matters. In the area of industrial security, Mr. Oleynik has been involved in a significant percentage of all foreign investment review proceedings before the Committee on Foreign Investment in the United States (CFIUS), and is one of the leading practitioners in the area of foreign direct investment in the U.S. defense industry under the U.S. regulations regarding Foreign Ownership, Control and Influence (FOCI).

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Robert Volterra - Volterra Fietta
 T: +44 (0) 207 380 3898
 E: robert.volterra@volterrafietta.com
 W: www.volterrafietta.com

Robert Volterra is the Principal of Volterra Fietta, a top-ranked law firm dedicated solely to public international law issues. Robert is lead counsel to governments, international organisations and private clients on a wide range of public international law issues, including but not limited to, boundary issues, international investment agreements, treaties and human rights. He both sits as an arbitrator provides expert testimony for international arbitration tribunals such as ICSID, UNCITRAL, ICC and LCIA arbitrations.

He is Visiting Professor of International Law at University College, University of London (UCL) and has been teaching international law for over the past twenty years, including at Osgoode Hall Law School, the University of Cambridge, the University of Paris and UCL.



Gonzalo Robles - Woodhouse Lorente Ludlow
 T: +52 55 2623-0552
 E: grobles@wll.com.mx
 W: www.wll.com.mx

Mr Robles has worked as an attorney for over 27 years. He initiated his practice with one of the foremost Mexican firms, following which he founded Arena y Robles, S.C., and thereafter founded Gardere, Arena y Robles, S.C., a combined Mexican-American firm with the Texan Dallas-based firm Gardere. He is currently an Of-counsel of Woodhouse Lorente & Ludlow, S.C., a Mexican firm specialised in energy transactions associated with CMS Cameron McKenna. He has an extensive experience in business, in matters related to mergers and acquisitions, incorporation of foreign financial affiliates, corporate reorganisations, regulatory matters and international inbound and outbound transactions, antitrust, financial, banking and insurance matters.



Reinier Russell - Russell Advocaten
 T: +31 20 301 55 55
 E: reinier.russell@russell.nl
 W: www.russell.nl

Reinier W.L. Russell is the managing partner of the Dutch law firm Russell Advocaten B.V. Russell Advocaten is a law firm located in Amsterdam, the financial heart and capital city of the Netherlands. We are a full service firm and provide prompt, high-quality legal services to corporate clients on a broad range of fields. Reinier is an experienced lawyer who serves as outside corporate counsel for both domestic and foreign businesses in the fields of corporate law, business formation and reorganization, real estate and lease law, labour/employment law and (commercial) litigation.

As outside corporate counsel, we know our clients well. Many of them have been relying on our services for years because of our inside knowledge of their firms and because we offer them a comprehensive range of legal services:

- One-stop-shop: one firm to cover all legal issues (company structure, personnel, real estate, permits and contracts)
- As a member of the International Society of Primerus Law Firms, we can help our clients resolve legal issues worldwide.
- One-on-one personal attention and dedication to our clients
- Helping our clients to prevent legal procedures and high costs
- Our niche practice areas: Embassies & Consulates and Art

The Netherlands is an appealing place to conduct business, particularly with a qualified lawyer steering you through the rules and regulations of Dutch law. Last year, Russell Advocaten has again assisted entrepreneurs from the US, Canada, Europe (EMEA), Russia and Malaysia in setting up an affiliate in the Netherlands and will also gladly provide you with advice on setting up a subsidiary in the Netherlands.

Foreign Investment 2016

The Foreign Investment Roundtable 2016 is an essential tool for better understanding the current landscape in United States, Mexico, Indonesia, Portugal, Netherlands, and the wider European Union. Our seven chosen experts highlight the advantages of investing in their respective jurisdictions, outline the main laws and regulatory authorities, and discuss key topics such as M&A, tax, confidentiality, and economic and political risk.

1. What are the main advantages of investing in your jurisdiction?

Simões: We have a very competitive taxation system to investors. Either EU or for non EU Citizens we have a Great Citizenship upon Investment called Golden Visa that are attracting a huge number of new residents. Exemption and Reduction of taxes are the main advantages.

Ganie: Consumer-oriented sectors appear to be the most attractive investment opportunities at present. This is due to the rapidly growing middle class and an overall gradual shift in the Indonesian economy from being an exporter of natural resources to an economy that is increasingly driven by domestic demand. Recently, banking and insurance have been two notable areas that have seen a fair amount of activity due to a market that is presently underserved and the consequent great opportunities for expansion. Longer-term, mineral investments have been significantly under-represented, at least in part due to problematic government policies, however, it is entirely possible that this sector will see a resurgence.

Oleynik: The United States is one of the most open investment environments in the world. No single industry sector is closed to foreign investment, however, there are restrictions on transactions that impact “national security.” Various U.S. government agencies have developed their own processes for reviewing a particular transaction in terms of its implications to national security; however, one common theme is that the term “national security” is intentionally left undefined. While this allows the government greater discretion in choosing to block a transaction, it also provides for flexibility—with a few, very limited exceptions, there is no bright-line test. Note that of the more than 13,000 M&A transactions in the United States in 2015, the government reviewed only approximately 150 for national security purposes. These facts, coupled with an open economy, the maturity of the U.S. financial system, respect for the rule of law, and predictable enforcement environment, guarantee some of the best advantages in choosing an investment destination.

Primerus: The Netherlands is a perfect business location for foreign investors

and foreign entrepreneurs. It is the gateway to densely populated Western Europe and has a well-developed logistic and technical infrastructure. The highly skilled, multilingual and flexible work force, favourable tax regulations for businesses and investments, a stable political climate and a high standard of living makes the Netherlands the ideal place to start a business or make investments (also for non-Dutch nationals). The Netherlands has an outstanding legal climate with easy access to the Dutch courts. In 2017, the Netherlands Commercial Court will (expectedly) open its doors to (international) enterprises. The Court will allow parties to litigate in English and will specialise in the hearing of large commercial disputes between businesses

Robles:

- Mexico forms a bridge between North America and Latin America due to its geographical location;
- Mexico has an extensive variety of natural resources allowing for the development of all types of industries at competitive prices;
- Mexico is very open to direct foreign investments;

- Labour costs are not high and in general, there is a skilled labour force;
- Positive structural reforms have been made during the current presidential term;
- Mexico is the world’s 8th most popular tourist destination.

2. What markets currently provide the best investment opportunities?

Simões: The real estate and the tourism market are very strong, and offer great opportunities.

Ganie: Particularly in the natural resources sector the recovery expectations were at times too optimistic, which prevented M&A activity due to a mismatch in expectations, and therefore prospects and valuations between sellers and buyers. This situation is starting to correct itself and we are in fact seeing more activity, including in distressed situations. In other sectors there has been concern over potential for a more significant downturn that would also significantly affect the Indonesian market. The market is working through these issues, and we expect to see growth in the M&A over 2016.

Primerus: The Netherlands Foreign Investment Agency (NFIA), an operational unit of the Dutch Ministry of Economic Affairs, will assist (foreign) investors at any stage of establishing or expanding their operations in the Netherlands. The NFIA can connect you with business partners, regional economic development organisations and government institutions. Before and during an investment Russell Advocaten (www.russell.law) will gladly assist (potential) investors to find legal possibilities and safeguards to achieve their goals.

Robles: In recent years, a wave of reforms initiated in 2014 could improve the situation; the energy sector has been opened to foreign companies. Mexico foresees substantial infrastructure development, especially with regard to airports, which could attract foreign investors. Moreover, according to a report by the IMF, the exploitation of hydrocarbon reserves will require an investment of USD 40 billion annually in the years 2015-2019. Since 2014, the Government has also been planning to create new industrial centres (located in Guerrero, Oaxaca and Chiapas), which could encourage FDI. The business climate in Mexico has improved and the country ranked 38th in the 2016 Doing Business report of the World Bank.

3. Are there any compliance issues investors need to be aware of?

Simões: The compliance of the operations is good for the investors, as it grants the security of the investment. We still have some bureaucracy, however it is becoming better.

Ganie: Compliance with regulatory requirements, such as licensing, is certainly an important point to consider, especially as Indonesia has a highly bureaucratic administrative state with, at times, insufficiently circulated regulatory requirements that are inconsistently enforced. Another is security of ownership of assets, this includes both movable and immovable assets (*de jure* and *de facto*, as land disputes are common while the land registry office often lacks capacity), security interests (which need to be carefully verified), and most importantly licenses (particularly in the natural resource sector).

Oleynik: In addition to taking measures to have the transaction reviewed and approved by the relevant regulatory authorities, a buyer need to consider the successor liability doctrine, which is peculiar to the United States. Under the doctrine, certain U.S. agencies with jurisdiction over the business of the target company may assess pen-

alties against the new owner for past conduct of the target or its previous owners (e.g., the Departments of State and Commerce with respect to export transactions of controlled equipment; the Department of Justice with respect to corruption activities abroad of target or its foreign affiliates and agents). Successor liability may be asserted even in asset purchases, where the violations were related to the underlying assets acquired by buyer.

Primerus: In accordance with the Dutch Prevention of Money Laundering and the Financing of Terrorism Act (Wwft), specific professional groups in the Netherlands (such as lawyers, notaries and accountants) have the legal duty to report unusual transaction to the Financial Intelligence Unit (FIU). The Wwft provides a comprehensive set of measures to prevent the use of the financial system for money laundering or terrorist financing. Under the Wwft lawyers are, *inter alia*, obliged to perform a client investigation. This investigation may require the disclosure of the Ultimate Beneficial Owner (UBO) of a (foreign) entity.

Volterra: In order to obtain protection under the investment treaty, an investor will have to show that three threshold requirements are met:

Ratione materiae: the transaction out of which the dispute arises must qualify as an investment as defined by the applicable investment treaty.

Ratione personae: the investor must have been a national of a State party to the investment treaty when the events complained of occurred and remained so thereafter.

Ratione temporis: the act or acts complained of must have occurred after the investment treaty entered into force.

Robles: Corruption and administrative inefficiency are major problems. Congress is currently examining anti-corruption legislation, but progress is slow despite examples of disruption due to –mostly– governmental corruption among important Latin American economies. Mexico's competitiveness has also been hampered by the growth of organised crime and the lack of reforms in the energy sector, professional services and taxation. Constitutional reforms in the energy sector were approved by Congress in 2013, but success of such reforms has been stymied by the sharp fall of prices of petrol.

4. Can you outline the main laws and regulatory authorities relating to oversight and review of foreign invest-

ment in your jurisdiction?

Ganie: All non-portfolio investment into Indonesia are subject to the approval of the Investment Coordinating Board of the Republic of Indonesia (BKPM), which licenses investments on the basis of the Negative Investment List. The Negative Investment List sets out business sectors that are subject to restrictions, or outright prohibition, on foreign ownership, typically expressed in maximum percentage terms, investment size, and further industry-specific license requirements. Additionally, the Commission for the Supervision of Business Competition (KPPU) has the purview to review M&A transactions that cross certain thresholds and those that result in potentially anticompetitive outcomes.

Oleynik: The Committee on Foreign Investment in the United States (“CFIUS”) has been granted authority to review foreign investment in existing U.S. businesses under the Defense Production Act of 1950, as more recently amended by the Foreign Investment and National Security Act of 2007. CFIUS is an interagency committee chaired by the Department of the Treasury, and comprising representatives from 16 U.S. departments and agencies, including the departments of defence,

state, commerce, and homeland security, among others. CFIUS jurisdiction extends to any transaction that will result in a foreign control over a U.S. business, and which could impact U.S. national security. A transaction that poses a threat to U.S. national security where the threat cannot be reasonably mitigated under existing law or a CFIUS mitigation agreement may be referred to the President of the United States with a recommendation to block the transaction. Foreign investors should note that a review of a covered transaction may be initiated any time after the transaction closes, with no statute of limitations. The only guarantee that a foreign acquirer will not be ordered to divest is if the transaction has been reviewed, and not objected to, by CFIUS.

In parallel with the CFIUS review process, certain investments in various industry sectors are reviewed separately by the respective regulator. For example, the Department of Defense administers its own review of foreign investment in defence contractors performing on classified projects; the Department of Justice and the Federal Communications Commission review investments in companies that hold telecom licenses; the Department of Energy (“DOE”) reviews investments

in DOE contractors performing on DOE classified projects; the Department of State reviews certain foreign acquisitions of manufacturers or exporters of defence articles; the Federal Aviation Administration reviews investments in air carriers; and the Federal Maritime Commission reviews investments in domestic waterway carriers.

Primerus: The Dutch Bank (DNB) is responsible for the financial stability. The DNB supervises financial institutions and provides economic advice to the Dutch government.

The Authority for Consumer & Markets (ACM) is an independent regulator that champions the rights of consumers and businesses. The ACM is charged with competition oversight (important in M&A transactions), sector-specific regulations, and enforcement of consumer protection laws.

The Authority for the Financial Markets (AFM) is responsible for supervising the operation of the financial markets. The AFM supervises the conduct of the entire financial market sector: savings, investment, insurance and loans.

The Social and Economic Council (SER) is financed by industry and is wholly independent from the govern-

ment. The SER, inter alia, supervises the conduct of potential merger partners to protect employee interests.

Robles: The foreign investment legal framework is governed mainly by the Foreign Investment Law, effective as of December 1993, which opens the possibility of foreign investors investing in various economic activities that were restricted under the former law. This law provides only 11 areas limited exclusively to the Mexican State and five other to either Mexican nationals or corporations with a foreign exclusion clause.

The main investment sectors in Mexico during 2015: manufacturing Industry (56.5%); financial services (22.4%); mining sector (8.8%); Trade (8.4%); construction (4.3%); hotel industry (3.5%); real estate (2.1%).

5. Have there been any recent regulatory changes or interesting developments?

Simões: Regulation has been very stable over the last 3/4 years, and it’s not likely to change.

Ganie: Regulatory changes sometimes pose a challenge in Indonesia. With the implementation of the new Indo-

nesian Negative Investment List that sets out foreign ownership limits, there are expectations that it, and the border approaches to foreign investment, will once again be revised in the near future. As a result there is substantial uncertainty – both regulatory and in terms of market prices – in the natural resources sector. The natural resources sector, and certain aspects of other sectors have seen a number of policy changes that appear spurred on by populist sentiment, a trend that is expected to continue in the near future.

Primerus: In January 2012, the European Commission introduced a proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

The GDPR will establish a single, pan-European law for data protection, replacing the current inconsistent patchwork of national laws (such as the Data Protection Act). Companies active in the European Union shall then have to deal with one single law and supervisory authority, not 28. The GDPR is expected to become effective in the course of 2016.

Volterra: During the past few years,

certain States have changed the content of investment treaties that they enter into. These changes often seek to strengthen a State's right to regulate its economy to protect the environment, promote labour rights and fight corruption.

The European Union has indicated that it wants future investment treaties to contain permanent courts to deal with disputes. The EU convinced Canada to agree to this in their recent trade and investment treaty, called the CETA. However, at the same time, a dozen Asia-Pacific States – including Canada – recent signed a trade and investment treaty called the TPP. The TPP covers over 40% of world trade and investment flows. It rejects the EU model of a permanent court for disputes and follows the prevalent ad hoc arbitration model used in all investment treaties apart from CETA.

Robles: The Energy Reform passed by the Mexican Government provide the private sector with great opportunities to enter the Oil & Gas and Power industries, and manage sources of renewable and non-conventional (i.e. shale gas) energy. For the first time in Mexico's recent history, such reforms will enable national and foreign investors and operators to join this sector.

As stated above, growth has been less than expected due in great part to the great fall in the price of oil, but reforms in the electricity sector are expected to generate great investment and thereby industrial growth.

In addition, an important reform in telecommunications has brought competition to a former state-owned telecommunications monopoly (mainly in land-lines) which was thereafter monopolised by private sector investors that bought it from the state. Foreign investors have been either persuaded to stay (e.g. Telefónica of Spain) or to enter the market (e.g. ATT&T). Prices for consumers have dropped significantly and overall improvement in the sector has resulted.

6. Can you outline the process of an M&A transaction with foreign investors?

Simões: The acquisition of shares or mergers is one way for non EU investors to acquire a Visa.

Ganie: The first step is the approval of the Investment Coordinating Board of the Republic of Indonesia (BKPM), which licenses investments on the basis of the Negative Investment List. The Negative Investment List sets out

business sectors that are subject to restrictions, or outright prohibition, on foreign ownership, typically expressed in maximum percentage terms, investment size, and further industry-specific license requirements. Afterwards, either a new company is established and subsequently the necessary licenses are applied for and obtained, or an M&A transaction takes place, with 30 day prior newspaper notification in case of a change of control, and a notarial share transfer that is then registered with the Ministry of Law and Human Rights.

Oleynik: In addition to the general due diligence review any buyer should undertake a foreign investor looking to acquire a U.S. business should satisfy itself with respect to the following questions:

(i) Is the industry sector among the few that have a cap on foreign investment (e.g., air carrier, banking, maritime)? If so, determine the relevant thresholds and reporting requirements.

(ii) Is the acquisition of such character that it will be perceived by the U.S. government as posing a threat to national security (e.g., investing in a defence contractor, a company that serves predominantly the U.S. Government, a

unique technology that is not available elsewhere, a company that holds a predominant market share within the U.S. or worldwide, an asset that is considered to be part of the U.S. critical infrastructure, such as a port or the electric grid)? If yes, consider filing with CFIUS to obtain approval of the transaction before closing.

(iii) Will foreign persons acquire more than 50% of the ownership or effective control over a manufacturer or exporter of defence articles? If yes, the transaction must be notified and approved by the Department of State.

(iv) Is the U.S. target involved in classified work for the U.S. Government? A foreign ownership, control, or influence ("FOCI") mitigation plan must be reviewed and approved by the Defense Security Service before closing.

Primerus: In the process of an M&A with foreign investors, it is extremely important to cooperate with a team of experts. Russell Advocaten (www.russell.law) has built a substantial, solid and international interdisciplinary network and works closely together with senior partners of international tax, accountancy and trust companies and companies with other areas of expertise. Therefore, we can immediately engage, for instance, specialised tax advisers, chartered accountants, civil-

law notaries and/or trust offices.

The three most important elements of an M&A process with foreign investors are:

Understanding: assisting the foreign investor with understanding the structure of the transaction and implications of the investment. Russell Advocaten (www.russell.law) is also used to explain it to the head office or legal department of the investment company. Value & risks of the target company: perform due diligence on the target. Russell Advocaten will judge the legal part of the outcome and will take care of the documents that have to be drafted.

Negotiations and finalising the deal. Main topics from the legal point of view are warranties and securities.

Robles: Significant 'cultural' issues cannot be underestimated. There are, in Mexico, many public companies with an overriding stock majority owned by Mexican families. In particular, in the overall process of an M&A with foreign investors a due diligence should be conducted on the Mexican target entity in order to verify not only if the correct authorisations, permits, licences and sundry contract and agreements are in order, but also to check that no

instances of graft that could trigger the FCPA's provisions and penalties exist.

Typically, when an M&A letter of intent is executed, investors request that all documents necessary to conduct a due diligence be made available by the target entity. Accountants shall verify financial records, while lawyers will examine all legal documents, including therein all employment agreements and in particular any and all agreements reached with labour unions, bearing in mind peculiarities of Mexican Federal Labour Law.

7. Why is it important to consider the tax issues and implications of a possible deal at the very outset?

Simões: The taxation is essential to a new investor, as the tax itself is important to the cost of the investment and to maximise the revenue.

Ganie: Due to the current economic downturn the Indonesian tax office has experienced a significant shortfall in 2015 and is expected to meet similar difficulties in 2016. As a result, tax collection has become a significant political issue, and the tax office has become increasingly aggressive in its approach to interpretation of transactions, tax laws and regulations, and particularly

tax audits. In light of this it is advisable to very carefully structure and review any transaction structures, not only in relation to tax non-compliance, but also in relation to potential alternative interpretations that could be advanced by the Indonesian tax officials.

Primerus: Our experience is that foreign investors also wish to obtain additional advice on the favourable tax climate in the Netherlands. Any investor may have to deal with corporate income tax, value added tax ('btw'), wage tax, personal income tax and dividend tax. Russell Advocaten (www.russell.law) has an outstanding external network of tax offices, which we can introduce if necessary. These tax offices can provide advice and assistance with regard to, inter alia, the tax position of the investor, double taxation, withholding taxes, and tax treaties.

Robles: On 8 September 2015, Mexico's President, Enrique Peña Nieto, presented the 2016 tax reform package (the Proposed Reform) to the Mexican Congress. The Proposed Reform includes amendments to the Income Tax Law, the Excise Tax on Production and Services Law, the Federal Fiscal Code (FFC), and the Federal Budget and Responsibilities of the Ministry of Finance Law. The reform package was debated

and approved by the two chambers of Congress. When passed and enacted, the reform became effective on 1 January 2016. This Proposed Reform comes somewhat as a surprise considering President Peña Nieto previously stated publicly that after the very comprehensive 2014 tax reform, there would be no additional tax reforms in Mexico for the following three years.

The Proposed Reform allows the immediate deduction for investments in the activities regulated by the Hydrocarbons Law (except seismic activities and exploration and extraction of hydrocarbons) and in machinery and equipment for the production, transportation, distribution and supply of energy.

Financing obtained for investments in infrastructure from non-resident related parties regarding the production of electric power has been excluded for purposes of calculating the thin capitalisation ratio.

Investments made in fixed assets for the generation of renewable energy or systems for the cogeneration of energy savings were before 100% deductible in the year in which they were made, which often lead to the undesired effect of having trapped cash or triggering income tax upon distributions of

dividends. The Proposed Reform has established a separate CUFIN ('Only Financial Account) calculation for Income from renewable energy or systems for the cogeneration of energy savings, taking into account the deduction for investments in fixed assets related to those industries on a straight-line basis, instead of the complete amount of the immediate deduction. This change is intended to alleviate the tax burden triggered upon dividend distributions. This alternate calculation should allow companies to generate CUFIN even if no tax is paid at the corporate level.

As a consequence of the energy reform enacted in Mexico, diesel and gasoline prices shall henceforward be unregulated and private companies will now be allowed to retail such products under market conditions.

Under these circumstances, a variable tax system on Excise Tax on Production and Services (IEPS) could bring business uncertainty for investors; as such rates could vary depending on PEMEX (Mexican National Oil Company) performance over time and other external circumstances. Consequently, for 2016 and 2017, the Proposed Reform proposes a transitional period; although IEPS rates will not yet be fixed, a maximum and minimum threshold shall

be defined, which should provide a smooth transition to a fixed rate system by 2018. By then, pre-established rates would apply to the different types of fossil fuels (i.e., fuel composed of less than 92 octanes; fuels composed of 92 or higher levels of octane and non fossil fuels; and diesel), and would only be adjusted to inflation each year.

Regarding combustible fossils, the following products shall be classified as destined to processes that are different from combustion processes (thus not subject to IEPS):

- (a) Petroleum products: paraffin, raw material for carbon black, long residue and asphalt
- (b) Oil: light cycle oil, basic oil and lubricants
- (c) Gas: propylene, propylene refinery grade and propylene chemical grade.

8. What jurisdictional thresholds (such as turnover, asset size, sector, purchase price, etc.) trigger a review or application of the law?

Primerus: The initial setup of a B.V. must be done properly, both from a legal and a tax perspective. If this setup is done properly, the corporate base is established and the corporation can grow without major adjustments in the future. This also applies to employ-

ment: all conditions can be introduced from the beginning and will apply in the event the enterprise grows. Therefore, it is very important to get specialist advice and assistance from the very beginning.

Robles: The Federal Economic Competition Law provides that there are certain concentrations that are subject to prior authorisation from the regulators (depending on the particular sector), prior to their closing. These concentrations include those falling under any of the following thresholds:

- those transactions involving an act or a series of acts, regardless of the place of execution, amounting in Mexico the equivalent of 18 million times the minimum general wage in force for the Federal District or more;
- transactions involving an act or a series of acts with an accumulation of at least 35% of the assets or capital stock of an economic agent, whose assets in Mexico or annual sales originated in Mexico involve more than the equivalent to 18 million times the minimum general wage in force for the Federal District; or
- transactions involving an act or series of acts with an accumulation in Mexico of assets or capital stock higher than 8.4 million times the minimum

general wage in force for the Federal District, and the transaction involves the participation of two or more economic agents with assets in Mexico or annual sales originated in Mexico, jointly or separately, of 48 million times the minimum general wage in force for the Federal District.

The first two thresholds are referred to the target's assets located in Mexico, target's companies with direct operation in Mexico (mainly Mexican subsidiaries or branches) or target's sales originated in Mexico. The third threshold considers a combination of sales or assets of the parties in Mexico, and an additional accumulation of assets or capital stock in Mexico of the target company only. There is no filing obligation if the target or seller company has no presence (assets or sales or both) in (or into) Mexico. However, there is no *de minimis* doctrine. If any of the thresholds is met, then the transaction must be filed, even if one of the parties has insignificant presence or sales in (or into) the country. Economic groups are indeed considered for purposes of the threshold. As mentioned later for the response to question 10, the concept of economic group has been analysed for competition law purposes, considering both legal and *de facto* control of companies, and the common goal and

direction of each of them.

9. How long does the review process take? What factors determine the timelines for clearance?

Oleynik: Each agency with a jurisdiction to review a foreign investment has its own review process. The CFIUS review is strictly regulated by statute and undergoes an informal and a formal phase. The informal phase can be initiated at any point by the parties to garner CFIUS view on a successful transaction. While not required, a pre-filing notification five business days before formal filing has become customary. Following formal filing and acceptance of the notice, CFIUS has thirty days to review the transaction. The review process may be extended to an additional 45-day follow-up investigation in the following cases: (i) during the review phase, national security concerns have not been resolved, (ii) the transaction will result in a foreign-government owned or controlled investor acquiring control over a U.S. business; or (iii) the acquisition will result in foreign control over assets of critical infrastructure. At any point, CFIUS may approve the transaction or refer the case to the President of the United States with a recommendation to block the acquisition.

Other agencies have differing timelines. For example, a transaction subject to the Department of State's jurisdiction must be notified 60 days in advance of closing. An acquisition of a company performing on classified projects must be notified as soon as the parties determine they are moving forward, and a FOCl mitigation plan must be approved by the Defense Security Service before closing.

Primerus: We cannot provide a standard answer to this question because it depends on many different factors. It can be a matter of days.

Robles: The COFECO will first evaluate whether the filing requirements under the Federal Competition Act are met. If not, the competition agencies will issue a first request for information, which the notifying parties will have to respond to within ten business days. This time period can be extended for duly justified causes. If the original filing is complete or the information under the first request has been provided, the agencies will then decide whether or not they need additional information for the purposes of analysing the transaction. If they do, a second request for information will be sent to the parties with a time limit of 15 days to satisfy it. After the information is submitted and

if the relevant agency is satisfied, a full analysis of the decision by the relevant staff will follow.

During this period, the parties can request meetings with staff and address concerns raised in the course of an interview. If no substantive concerns arise or they are resolved to the satisfaction of the agency, a report will be prepared proposing to clear the transaction. This report will be subsequently distributed to the commissioners for their review. Once the commissioners are satisfied, the matter is listed for discussion at the plenum (the ultimate decision-making body of the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) comprised of seven commissioners) and a final decision is entered.

If, on the other hand, the staff raises concerns in their analysis of a transaction, they can ask the parties to consider providing remedies. If the parties accept such suggestions and present the remedies, the report to the commissioners will include the conditions provided by the parties and the recommendation of the staff to approve the transaction subject to such condition.

If the parties cannot accept the con-

ditions or do not agree with them (or with the concerns that were raised), they can ask to have an audience with the commissioners directly to express their views. This audience is formal and must be scheduled.

If the parties are unable to persuade the COFECE or the IFT, formal notice will be given stating the concerns identified by the regulator and giving the parties ten business days to propose remedies. After that, COFECE or the IFT will make a final decision. At this point, any conditions imposed will be on a “take it or leave it” basis. Offering conditions resets the term within which the agencies must resolve the matter.

A resolution on a short-form filing must be issued within 15 business days. For long-form filings, the term is 60 business days from the date of the filing, or submission of additional requested information (if any). The regulator can extend the period for an additional 60 business days where the case is particularly complex.

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

Oleynik: Each reviewing agency operates under strict confidentiality requirements. Filings are exempt from reporting under the Freedom of Information Act (“FOIA”). In the case of CFIUS, information provided by the parties is shared very narrowly within the government, only with government officials who are essential for the review process. Unauthorised disclosure triggers criminal liability of up to 10 years imprisonment. CFIUS does not at any time report on a specific transaction. Summaries of a review are provided to select members of Congress and generally treated as classified information. Once a year, CFIUS publishes a report on prior years’ reviews (with a two year delay); however, the report provides aggregated numbers and tracking by industry and country only. The intent behind the statutory prohibition is to provide the parties to the transaction strict confidentiality and confidence that filing with CFIUS will not inadvertently hurt their financial positions by leaking confidential business information.

Primerus: Lawyers in the Netherlands are obliged to respect the confidentiality of their clients’ information: they are not allowed to disclose anything about their clients or their clients’ cases. This legal professional principle of confidentiality also means that law-

yers have a privilege. This privilege is based on the principle that an individual should feel free to consult a Dutch lawyer (advocaat) or civil-law notary (notaris) without having to fear that confidential information will be disclosed at a later stage. A lawyer may refuse to testify during a witness hearing in relation to information received in his official or professional capacity.

Robles: Filings are not made public until they are resolved. Once a matter is resolved, a public version, (that is, a redacted version) of the decision is made public. Both regulatory agencies have transparency obligations that require them to publish notices and events on their websites relating to matters pending before them. Accordingly, the names of the parties to a procedure and the fact that clearance is pending will become public shortly after a filing is made.

Under transparency and public information laws, the agencies must classify the information delivered by the parties as “reserved”, “confidential” or “public” within the meaning of those laws and regulations.

Under the transparency laws and the Federal Competition Act, the parties to a merger control filing can request that

information provided to the agencies be classified as confidential, provided that the request is based on the law. The agencies can request that public versions (with redacted confidential information) of documents filed by the parties be attached to a confidential treatment request

The Mexican Federal Law on the Protection of Personal Data Possessed by Private Persons regulates the processing of Personal Data. The Law applies to Personal Data that are processed, transferred or disposed of by private persons or entities. Personal Data includes any information pertaining to an identified or identifiable and individual.

11. Have there been any recent case studies which reflect how the foregoing laws and policies are applied?

Primerus: Dutch law is based on the continental European civil law tradition and is – the Netherlands being a founding member of the European Union – highly influenced by the laws of the European Union. This means, the law is mostly written, but one should not underestimate the relevance of case law. Since the Dutch Civil Code dates from 1992, and is updated frequently with new case law, the Dutch legal sys-

tem is perfectly geared towards M&A and new developments thereof.

Volterra: A number of recent investment arbitration cases have attracted particular interest:

1. Philip Morris Asia Limited v Australia

The arbitration tribunal in this case decided that it did not have jurisdiction to consider Philip Morris’s claim. Amongst other things, it accepted that the dispute had arisen before the Claimant obtained the protection of the BIT, and that, in any event, the commencement of the arbitration shortly after the Claimant’s restructuring constituted an abuse of rights.

2. Metal-Tech v Uzbekistan

The arbitration tribunal in this case rejected Uzbekistan’s counterclaim related to corruption. It held that the State’s offer in the investment treaty to arbitrate any investment dispute with an investor did not extend to this ‘non-investment’ issue.

3. OIEG Group BV v Venezuela

The arbitration tribunal in this case upheld the investor’s claims. It rejected all of Venezuela’s objections and ruled that Venezuela’s expropriation of the foreign investor’s assets was unlawful. It awarded damages and interest of

half a billion US dollars.

Robles: The principal negotiations in congress took place over the bylaws of the telecoms and energy areas and their success will be dependent on the government’s ability to strengthen the rule of law, clamp down on corruption, deal more effectively with organised crime and boost capital investment in fossil fuels. Positive steps in this direction would enhance energy security and raise the country’s profile as a reliable producer of hydrocarbons.

12. How can an organisation effectively measure the economic and political risk before entering a new jurisdiction?

Ganie: Retaining lawyers with a combination of experience in the Indonesian market and of working with International firms is the critical element, as well as lawyers’ international experience and ability to work with clients and counterparts from other jurisdictions, which usually means different legal systems and different expectations than those prevalent in the home market of the investors.

In this regard, we have entered into an association with Clyde & Co., an international law firm based in the United

Kingdom with offices throughout the world. The goal of the association is to provide a seamless service to foreign investors entering the Indonesian market, to serve our clients throughout Indonesia and to cater to Indonesian businesses that conduct business abroad.

Primerus: A good way to effectively measure the economic and political risk a new jurisdiction holds is to contact a local expert lawyer. Russell Advocaten (www.russell.law) provides specialised legal services to guide you through the corporate and commercial rules and regulations in the Netherlands.

Volterra: Economic and political risk analysis addresses two fundamentally different questions. Economic risk analysis tells corporate leaders whether a particular State can pay its debt. Political risk analysis tells them whether the State will pay its debt.

Economic risk can be measured by:

- i. Inflation rate
- ii. Balance of payment deficits
- iii. Growth of per capita GDP
- iv. Business Environment
- v. Capital flight
- vi. Inability to service foreign debt.

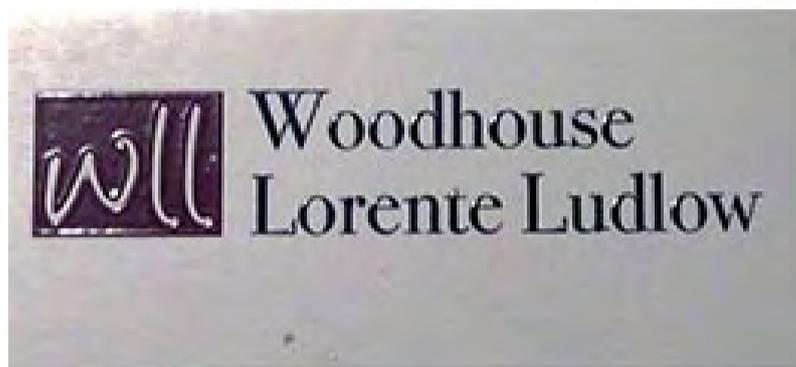
Political risk can be measured by:

- i. Frequency of government changes

- ii. Frequency of regulatory changes
- iii. Level of violence
- iv. High levels of corruption.

Investment treaties can mitigate the political risks associated with host countries. They cannot necessarily prevent the government or other State actor from violating the property rights of a foreign investor. However, if the investment is structured properly, so as to obtain their protection, and if their terms and conditions are followed when a dispute arises, they provide enormous benefits to an investor. Not the least of these is that they usually allow a foreign investor to pursue international litigation directly against a State in order to obtain a final and binding arbitral award that can be enforced around the globe.

Robles: Depending on the area and size of investment, it can be considered wise to hire a firm of reliable consultants (e.g. McKinsey and Company) to examine economic and political risk in any particular jurisdiction. Of course, meetings with the various chambers of commerce (by sector, e.g., insurance, finance, manufacturing, etc.) or by nationality (e.g., American, French, Spanish, Italian, or British chambers of Commerce in Mexico) will bring valuable advice and experience on the ground.



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