**Foreign Investment and M&A Legal Overviews for PERU**

1. **Foreign Direct Investment (Greenfield Investment)**
	1. **Are there any governmental and regulatory approvals required for FDI? If so, please give brief details (e.g. trigger threshold, relevant authority and timing requirements)?**

The legal framework for private investment in Peru has evolved in favor of active private sector participation in the past three decades. During the first half of the 1990s the Peruvian government embarked in a privatization regime of public companies. The 1993 Peruvian Constitution provides the cornerstones and principles that support the legal framework to protect and promote the private investments and foreign investments. Within this structure, it is established that, for instance, there must not be a discriminatory treatment among national and foreign investors. Likewise, it guarantees the free possession and use of foreign currencies and to use the most favorable exchange rate available in the market. There are also special regulations for certain industries, such as mining, hydrocarbons, telecommunications, fishing, aviation, agriculture, among others that provide benefits and incentives.

Foreign investors (and the companies that receive foreign investment) who meet certain requirements will qualify to benefit from the Peruvian legal stability regime, by virtue of which the State guarantees the stability of the rules in force at the time of execution of the investment in connection with certain relevant regimes and rights (such as the tax regime in connection to the income tax on dividends and profits, non-discrimination rights, right to use the most favorable exchange rate in the foreign exchange market, and regime allowing the free availability of currencies and remittance of profits), during a 10-year term; except if executed by a concessionaire of public infrastructure and utility works or by investors therein, in which case the duration will be linked to the term of the concession.

To benefit from the legal stability regime, investors must fulfill the following requirements:

1. Invest, through monetary contributions made to the capital stock of a company incorporated or to be incorporated in Peru, a minimum of US$5,000,000.00.
2. Perform the monetary contributions through the Peruvian financial system.
3. Carry out the aforementioned contributions in not more than two (2) years from the date of entering into a legal stability agreement with the Peruvian State. Exceptionally, in case the investor had carried out capital stock contributions prior to the execution of the legal stability agreement, the investment may be covered by the legal stability regime only in case the legal stability agreement is executed within twelve (12) months from the date of the capitalization accounting entry, considered the enabling title for the capital stock contribution.
4. Accredit before the Peruvian State that the contributions and their corresponding capitalizations have been carried out.

Additionally, the Peruvian company that receives a “stabilized” capital contribution (this is, a contribution made under a legal stability agreement) can also enter into a stability agreement with the Peruvian state. In case the recipient company seeks to obtain legal stability for its tax regime, the amount of the investments received by the recipient corporation must exceed fifty percent (50%) of its capital and reserves and must be destined towards the increase of production capacity or towards technological improvements.

The benefits granted by a legal stability agreement to a recipient company are the following:

1. Legal stability of the tax regime in connection to the income tax in force at the moment of the execution of the legal stability agreement. Therefore, while the legal stability agreement is in force, investors will not be affected by changes to the income tax regime, and will maintain the same terms, as well as the same percentages, deductions and scale for the calculation of the tax base, that were in force at the moment of the execution of the legal stability agreement.
2. Stability in the labor contracts regime under all modalities in force at the time of the execution of the legal stability agreement.

Furthermore, disputes arising from a contractual relationship between the Peruvian government and a company of the private sector may be submitted to the jurisdiction established in international treaties in force, as well as to national or international arbitration. Similarly, private investors are free to choose the law that will rule their contractual relationships, provided that, in case disputes are submitted to foreign law and jurisdiction, said law shall not be incompatible with international public policy, good moral or with specific limitations set forth by the Peruvian applicable laws.

* 1. **Are there any industry sector controls on foreign investment?**

As per the Peruvian Constitution, foreign investors can carry out any economic activity provided they comply with all constitutional precepts, laws, and treaties. However, exceptions exist, such as exclusion of foreign investment activities in protected natural reserves (unless expressly authorized) and manufacturing of military weapons.

Moreover, the following restrictions regarding specific sectors apply:

1. Law No. 28278, Law of Radio and Television, sets forth that only Peruvian nationals or legal entities organized and domiciled in Peru can be authorized or licensed to operate broadcast services.
2. Law No. 27261 and Supreme Decree No. 050-2001-MTC, the Civil Aviation Law and its regulation, establishes that ownership of Peruvian commercial airplanes is reserved for Peruvian individuals, legal entities or foreigners with a permanent residence in Peru. Also, commercial national aviation is reserved for Peruvian individuals and legal entities. For a legal entity to be considered Peruvian at least 51% of the company's shares must be under the real and effective control of Peruvian nationals or permanent residents, and at least half of the directors must be Peruvian or foreigners with a permanent residence in Peru. The percentage of shares owned by Peruvians must be maintained for six months after the authorization date, after which the percentage of shares owned by foreign citizens can be increased to up to 70%.
3. Law No. 28583, Law of Reactivation and Promotion of the National Merchant Navy, sets forth that 25% of maritime transport of hydrocarbons in Peruvian territory is reserved for Peruvian Navy vessels.

Supreme Decree No. 014-2011-MTC, the Regulation of Law No. 28583, sets forth that maritime transport in Peruvian harbors is reserved for vessels owned or leased by Peruvian shipping companies. To obtain an operating permit, a national shipping company must certify that:

* at least 51% of its shares are owned by Peruvian nationals. If the shareholders or partners are legal entities, at least 51% percent of their shares or participations must be owned by Peruvian citizens.
* the general manager, the chairman of the board of directors and the majority of the directors are Peruvian nationals residing in Peru.

Additionally, prior approval from regulators for company incorporation or acquisitions may be required in certain cases when the company operates or will operate in the financial, capital markets, telecommunications and defense-related sectors.

Finally, under the Constitution, foreign interests cannot acquire or possess under any title, mines, lands, forests, waters, or fuel or energy sources within 50 kilometers of Peru's international borders. However, foreigners can obtain concessions and rights within the restricted areas with the authorization of a supreme resolution approved by the Ministerial Cabinet and the Joint Command of the Armed Forces.

* 1. **Are there any localization requirements for FDI in your jurisdiction (e.g. minimum ratio of local employees, minimum ratio of local procurement)?**

Yes. Legislative Decree No. 689, Law on Hiring of Foreign Workers ("**LCPE**") sets forth, as a general principle, the preference for hiring local employees. Consequently, the hiring of foreign employees is subject to the following limitations:

1. Related to the number of foreign employees: a company cannot hire foreign personnel in a proportion that exceeds 20% of the total number of employees.
2. Related to compensation: salaries corresponding to foreign personnel cannot exceed 30% of the total salaries paid by the company in favor of its total number of employees.

These requirements and limitations will not be applicable in the following exception or exemption events, as established in articles 3 and 6 of LCPE:

1. An exemption occurs when:
* The foreign employee is considered as professional staff or a specialized technician.
* The foreign employee is part of the management team involved in a new business activity or involved in business conversion (replacement, expansion or modification of the activities carried out by the company).
* The foreign employee is a professor hired for higher education.
1. An exception occurs when:
* The foreign employee has a Peruvian spouse, ascendant, offspring or siblings.
* The foreign employee has a permanent visa to reside in Peru.
* The foreign employee’s country of origin has an agreement of labor reciprocity or dual nationality with Peru.

Aside from the aforementioned, companies must comply with the following two requirements:

1. the employment contract entered into between the company and the foreign employee must be approved by the Ministry of Labor; and
2. the contract can only be executed (meaning that the employee be included in the payroll) once his corresponding immigration status in Peru has been granted. Therefore, no foreign citizen may work for a company in Peru until:
3. he/she obtains the corresponding work visa enabling him/her to render services in Peru; and
4. his/her work contract is registered before the Peruvian Ministry of Labor.

The National Superintendence of Immigration is the Peruvian entity in charge of issuing residence authorizations and work permits to foreign citizens. Visa procedures have an approximate duration of 30 to 50 business days.

* 1. **What are the requirements for granting foreign employees work visas?**

In order to obtain a work visa, foreign citizens may opt for either of the following procedures: the “obtain visa” procedure or the “change immigration status” procedure. Foreign citizens may choose between these two procedures based on their location when submitting their request before the National Superintendence of Immigration.

Foreign citizens who are not physically in Peru may request a visa through the “obtain visa” procedure. The request shall be submitted before the administrative offices of the National Superintendence of Immigration in Peru; therefore, foreign citizens shall need to grant powers of attorney in favor of a third party so that said third party may submit the corresponding documentation on their behalf. Once the request has been approved, the visa will be sent to the Peruvian Consulate located in the country of residence of the foreign citizen.

Foreign citizens who are physically in Peru with a “tourist”, “business” or any other immigration status different from a work visa, may request a visa through the “change immigration status” procedure. The request shall be submitted before the administrative offices of the National Superintendence of Immigration. As in the “obtain visa” procedure, the specific type of immigration status to be granted to foreign citizens will vary depending on the supporting documentation submitted and the evaluation made by the National Superintendence of Immigration.

The main requirements to obtain a work visa, which is renewable on an annual basis, are:

1. Proof of no criminal record in the country of origin.
2. Proof of employment by a Peruvian company through an employment contract duly registered before the Peruvian Ministry of Labor.
3. Proof of no criminal record in Peru through a search carried out by INTERPOL.
	1. **Are there any exchange control restrictions for remittance of capital, profits and dividends?**

There are no exchange control restricting for remittance of capital, profit or dividends from the Republic of Peru; except as set forth in Law 30737 that establishes prohibitions and restrictions for the transfer of funds abroad by legal entities:

1. which have been convicted, or whose officers or representatives have been convicted, in Peru or abroad, for corruption related crimes in detriment of the Government of Peru or have admitted to and/or acknowledged committing any of the abovementioned crimes to any domestic or foreign competent authority; and
2. which were shareholders or consortium partners of the legal entities referred in (i) above at the time the abovementioned crimes were committed.
	1. **What are the most common types of corporate legal entities established for FDI? For each type of corporate legal entity, please introduce the internal corporate governance structure.**

In order to carry out economic activities, foreign investors may choose to incorporate a permanent company or establish a branch in the Republic of Peru. Both figures are recognized and ruled by the Peruvian General Corporations Act.

Although the law recognizes up to seven corporate forms, the following four are currently mainly used:

1. Closed Stock Corporation (*Sociedad Anónima Cerrada –* ***SAC***);
2. Stock Corporation (*Sociedad Anónima*);
3. Public Stock Corporation (*Sociedad Anónima Abierta –* ***SAA***) and,
4. Limited Liability Company (*Sociedad de Responsabilidad Limitada -* ***SRL***).

To set up a company at least two shareholders or partners are required, and, with certain exceptions, no minimum capital will be required. Broadly, regulations applicable to corporations are similar to those found in other jurisdictions.

Ordinary stock corporations are among the most popular types of legal structures. As mentioned before, a minimum of two shareholders is required, and the initial capital contribution must be deposited in a local bank. Furthermore, there is no minimum capital amount required by law, but financial institutions require a minimum initial deposit of PEN1,000.00 (approximately, US$250.00). The company’s name must include the terms “*Sociedad Anónima*” or the abbreviation “**S.A.**”. Shareholders’ liability is limited to the amount of the par value of the shares the shareholders hold, and the company must have a General Manager and a Board of Directors.

Closed stock corporation must have a minimum of 2 and a maximum of 20 shareholders. Shares cannot be registered before the Capital Market’s Registry nor listed on the Stock Exchange. The initial capital contribution must be deposited in a local bank. Furthermore, there is no minimum capital amount required by law, but financial institutions require a minimum initial deposit of PEN1,000.00 (approximately, US$250.00). The company’s name must include the terms “Sociedad Anónima Cerrada” or the abbreviation “**S.A.C.**”. Shareholders’ liability is limited to the amount of the par value of the shares the shareholders hold, and the company must have a General Manager, but a Board of Directors is optional.

Public stock corporations are an option when the number of shareholders will be large, as it allows for the company to have more than 750 shareholders. The company’s name must include the terms “*Sociedad Anónima Abierta*” or the abbreviation “**S.A.A.**”, and its shares must be registered in the Capital Market’s Registry and listed on the Stock Exchange. Shareholders’ liability is limited to the amount of the par value of the shares the shareholders hold, and the company must have a General Manager and a Board of Directors

Limited liability companies require a minimum of 2 and cannot exceed a maximum of 20 partners. Limited liability companies do not issue shares, as the capital is divided into ownership interests or participations. Also, all partners have a limited liability. The company’s name must include the terms “*Sociedad de Resonsabilidad Limitada*” or the abbreviation “**S.R.L.**”.

Below is a chart comparing the mentioned types of companies:

|  |
| --- |
| **Main features** |
| Corporate forms | Limited liability | Maximum number of shareholders/partners | Transferability restrictions | Governing bodies |
| Closed Stock Corporation | Yes | 20 | Right of first refusal, unless the bylaws set forth otherwise. | * Shareholders meeting.
* Board of directors (optional).
 |
| Ordinary Stock Corporation | Yes | 750 | None, unless the bylaws set forth otherwise. | * Shareholders meeting.
* Board of directors (mandatory).
 |
| Public Stock Corporation | Yes | Not limited | None. | * Shareholders meeting.
* Board of directors (mandatory).
 |
| Limited Liability Company  | Yes | 20 | Right of first refusal, unless the bylaws set forth otherwise. | General board of partners. |

Foreign companies may also establish branches in Peru to the extent it is permitted in their bylaws and articles of incorporation. In general terms, it is mandatory to assign capital to the branch and to appoint a permanent legal representative in the country. Since the branch will not have its own legal personality, the parent company will be liable for the obligations incurred by the branch; however, for tax purposes, branches are deemed as independent entities.

* 1. **What is the procedure of registration and incorporation of foreign-owned companies?**

The incorporation procedure is the same for all companies, including foreign-owned companies.

The first recommended step is searching and reserving the company’s name before the National Public Registry. This is not a mandatory step, but it gives the shareholders the certainty that the name they have chosen for the company has not already been registered for another company. To search and reserve a name a request is filed before the National Public Registry. This request is assessed, and a Public Registrar issues an answer to said request either reserving the name or indicating that reservation is not possible due to an identical or similar name already being registered.

The second step, which is mandatory, is drafting the articles/minutes of incorporation, which must contain at least the following items:

1. the company’s name,
2. the company’s corporate purpose,
3. the company’s domicile,
4. the company’s term of duration,
5. the company’s initial share capital,
6. the company’s governing bodies, among others.

The articles of incorporation must be authorized by an attorney registered before one of Peru’s Bar Associations.

After the minutes of incorporation have been drafted, the share capital is deposited in a special account opened with a local bank. Then, a Notary Public must issue the company’s deed of incorporation and file it before the Public Registry. After a Public Registrar reviews the submitted document, he will proceed to registered the incorporation on the Public Registry.

Once the company has been registered before the Public Registry, a taxpayer identification number must be obtained from the Peruvian Tax Authority (“**SUNAT**”). For this, the following documents will be required:

1. public deed of incorporation of the company,
2. copy of the company’s registry before the Public Registry,
3. duly executed SUNAT registration forms,
4. a public or private document that evidences the company’s address in Peru for tax purposes, among others.

As part of this process, the tax regime applicable to the company must be chosen.

After this, the company’s corporate and accounting books must be legalized by a Notary Public.

Depending on the company’s operations, different licenses will be required.

1. **M&A Laws and Regulations**
	1. **What are the principal laws and regulations applicable to M&A transactions?**

The main laws and regulations are Law No. 31112, Merger Control Law, and its Regulations approved by Supreme Decree No. 039-2021-PCM, the Peruvian Corporations Act and the Civil Code.

* 1. **Are M&A transactions subject to foreign investment screening? If so, please give brief details (e.g. trigger threshold, relevant authority and timing requirements).**

Not aside from the restrictions indicated in questions 1.2 above and 2.3 below.

However, prior approval from regulators for company incorporation or acquisitions may be required in certain cases when the company operates or will operate in the financial, capital market, telecommunications and defense-related sectors.

* 1. **Are M&A transactions subject to merger control? If so, please give brief details (e.g. trigger threshold, relevant authority and timing requirements).**

Yes, M&A transactions are subject to merger control as is established in Law No. 31112 and its Regulations approved by Supreme Decree No. 039-2021-PCM if certain thresholds are exceeded. This regime covers all economic activities.

Regarding thresholds, the merger control has two concurrent financial thresholds determined by the value of the Peruvian Tax Unit (“**UIT**”). Such thresholds are:

1. the parties must have a combined turnover (gross revenue), or asset valued on at least 118,000 UIT (approximately US$134.85 million using an exchange rate of PEN3.85 per US dollar) in Peru and
2. at least two of the parties in the transaction must independently have a turnover (gross revenue) or assets valued on at least 18,000 UIT (approximately US$20.57 million using an exchange rate of PEN3.85 per US dollar).

The applicable UIT value used for calculating the thresholds will be the one of the year prior to the operation. In 2022, the applicable UIT is PEN4,600 equivalent to US$1,193.00 using an exchange rate of PEN3.85 per US dollar. The value of the UIT is updated (usually increased) annually. The filing fee is set at PEN91,629.40 (approximately US$24,000 using an exchange rate of PEN3.85 per US dollar) and applies to any notified transaction.

With respect to the relevant authorities, the National Institute for the Defense of Competition and the Protection of Intellectual Property (“**INDECOPI**”), which is an independent body attached to the Executive Branch, is the competent authority regarding merger control. The Competition Commission of INDECOPI conducts the merger assessment in first instance and its decisions may be appealed before the Competition Tribunal.

The procedure before the Competition Commission is divided into two phases preceded by a preliminary review stage. Phase 1 lasts 30 business days counted from the day on which the filing is deemed complete. Whether the filing is complete or not is assessed on the mentioned previous stage, and it may take up to 25 business days. Phase 2 covers transactions which are considered to potentially raise “serious concerns”, and this phase may last 120 business days (initially, 90 business days and a potential extension of 30 business days).

* 1. **Are there any other approvals required for foreign buyers in M&A transactions? If so, please give brief details (e.g. trigger threshold, relevant authority and timing requirements)?**

No.

* 1. **Do labor unions play a role in M&A? Are there customary practices for human resources management post-M&A?**

There are no legal provisions that establish obligations before the labor unions at the time of an M&A.

However, if the labor union considers that the M&A operation will affect its functioning, it could inform the relevant authorities that acts of hostility and non-compliance with applicable regulations have taken place. After this, the relevant authorities would have to start an investigation to determine if, in fact, the company has carried out acts of hostility against the unions and/or has not complied with applicable regulations. In this scenario, the company would be allowed to present arguments and supporting documents.

* 1. **What are the principal minority shareholder rights?**

In accordance with the Peruvian Corporations Act, minority shareholders have, in general, the following rights:

* + 1. Shareholders who hold, at least, 20% of the share capital may demand that a general shareholders’ meeting is called. In this case, said demand must be complied with or the shareholders will have the right to call the meeting via a Notary Public or Judge.
		2. Shareholders who hold, at least, 20% of the share capital can make (force) the company to distribute at least 50% of the year’s distributable profit is effectively distributed in favor of the shareholders.
		3. Shareholders who hold, at least, 10% of the share capital can cause that the company’s financial statements are reviewed by external auditors.
		4. Shareholders who hold, at least, 10% of the share capital can demand the review and audit of specific management acts or the company’s accounts.
		5. Shareholders who hold, at least, 5% of the share capital are entitled to demand and receive at any time information regarding the company and its operations, unless the requested information deals with sensitive issues regarding the company or issues that could have a negative effect on the company if disclosed.
		6. Shareholders who hold any number of shares have the right to attend shareholders’ meetings, vote in shareholders’ meetings, receive dividends when distribution is approved by the shareholders meeting and transfer their shares in the company.
1. **Special Topics for Chinese Investors**

**3.1. What is the latest regulatory news related to lithium mining? If there are no lithium projects, are there developments in other key electric car battery minerals like nickel, manganese, cobalt, and graphite? (Bauxite (aluminum), copper, and iron are also components in electric car batteries.)**

According to the 2022 US State Department's Mineral Commodity Summaries Publication, Peru has 880,000 tons of resources of lithium. However, currently, there are no lithium exploitation operations. There is one exploration operation in the Puno region (south of Peru), which is in the process of obtaining its environmental certification.

Lithium mining has been identified as an interest worth developing by the Peruvian government. In 2021, Law No. 31283 was published, which declared of national interest and public necessity the exploration, exploitation and industrialization of lithium, with the purpose of guaranteeing its sustainable development. Law No. 31283 also established that commercialization of lithium and its derivatives are strategic resources for Peru.

Issue of the regulations of Law No. 31283 is still pending. However, a special committee, which includes members of the Ministry of Energy and Mines, the Geological, Mining and Metallurgical Institute and the Institute of Nuclear Energy, has been created for this purpose.

According to the Peruvian Geological, Mining and Metallurgical Institute, two regions in the south of Peru (Cusco and Puno) have lithium exploration areas with great potential. Said institute has carried out two studies to assess the lithium reserves in Peru, and from 328 analyzed samples from the regions of Ica, Huancavelica, Ayacucho, Arequipa, Cusco, Puno, Moquegua and Tacna, 316 obtained results of geochemical analysis in rock form, 3 in sediments and 9 in water. Three samples reported values of 1,096ppm, 2,815ppm and 3,070ppm of lithium (1 in Cusco and 2 in Puno); two samples with values of 747ppm and 665ppm of lithium (Puno) and six samples with values between 267ppm and 485ppm of lithium (4 in Puno and 2 in Cusco).

Peru does not have a battery industry. As for other minerals, according to the 2022 US State Department's Mineral Commodity Summaries Publication, Peru’s mining industry ranked as follows, among others:

1. Peru is the leading global producer of arsenic trioxide. Peru, China and Morocco account for 98% of arsenic trioxide production.
2. Peru is one of the top producers of copper.
3. Peru is between the top seven producers of diatomite.
4. Peru is an important producer of gold.
5. Peru is an important producer of iron ore.
6. Peru has significant resources of andalusite.
7. Peru is an important producer of lead.
8. Peru is a top producer of phosphate rock.
9. Peru is a top producer of silver.
10. Peru has relevant reserves of mercury, molybdenum, rubidium, tin, and zinc.

**3.2. Is there any debate by the competition authority about limiting M&A by Chinese SOEs in certain sectors (e.g. electricity)?**

Although the Competition Commission has preliminary covered the role of the State-owned Assets Supervision and Administration Commission of the State Council (“**SASAC**”) on a merger control case related to a transaction in the electricity sector, it did not limit or restrict M&A activities executed by Chinese SOEs in the Peruvian electricity sector.

In the Resolution No. 007-2020/CLC-INDECOPI, the Competition Commission stated on its control assessment of the involved parties the following:

1. Chinese SOEs are supervised by SASAC and
2. from a preliminary point of view, it may seem that SASAC possesses a degree of control regarding the competitive strategy of Chinese SOEs due to SASAC’s management and operation powers on these companies.

Please note, however, that INDECOPI will probably analyze the concept of control by SASAC in a case by case basis.

***The above answers are prepared by 26th, December, 2022.***

***Author:***

* ***Alan García Nores, Partner***

***Payet, Rey, Cauvi, Pérez Abogados in Peru***

***Disclaimer:***

*The information provided herein do not constitute formal legal advice from DeHeng Law Offices and its lawyers, nor by the law firms and their lawyers involved in the overviews.*

*The overviews are only high-level summaries. The application of the specific laws will differ depending upon, amongst other things, the structure of the investment, and the business of the target, etc. Specific legal advice should be sought from a qualified law firm before making any investment.*

*The content here is provided "as is" no representations are made that the content is error-free. All information, content, and materials in the overviews are for general informational purposes and for your reference only. Please contact us directly for formal legal advice or further discussion about the relevant issues.*