THE NEW WORLD OF FOREIGN DIRECT INVESTMENT

Law Over Borders Comparative Guide 2023

Edited by Dennis Unkovic, Meyer, Unkovic & Scott LLP

THE GLOBAL LEGAL POST

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Editor: Dennis Unkovic
Editorial Director: Mary Heaney
Associate Publisher: Claudia Tan
Editorial and Production Manager: Debbie Knowles
Commercial Director: Maria Sunderland
Digital: Elanganathapillai Sivakanthan
Digital Content: Marion Stobie

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EDITOR'S OVERVIEW

Dennis Unkovic

Meyer, Unkovic & Scott LLP

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When World War II ended, the global economy lay in ruins. While the United States emerged relatively unscathed as compared to the rest of the world, world trade necessary to repair the global economy was basically non-existent.

In a rare display of true international cooperation, world leaders came together in 1944 to brainstorm ways to jumpstart post-war rebuilding. With the creation of multinational organizations such as the United Nations and financial organizations such as the International Monetary Fund (IMF), countries slowly began to recover from the massive war-wrought devastation. Fiscally focused organizations such as the Asian Development Bank, the African Development Bank, the European Central Bank, the Islamic Development Bank and others emerged to focus on the revival of targeted economic regions. Their efforts were supplemented by more politically focused organizations like the European Union (EU), the Association of Southeast Asian Nations (ASEAN), the Common Market for Eastern and Southern Africa (COMESA), the Commonwealth of Nations, and the Andean Community (CAN).

At the core of all of these initiatives is the World Trade Organization (WTO). Established in 1995, the WTO's primary goal is to formulate and enforce rules of trade to assist those producing goods and services and those facilitating importing and exporting around the world. In short, the freer and less constrained world trade is, the better the chances of growing the global economy.

This global integration has been responsible for one amazing accomplishment. Between 1990 and 2019, the world poverty rate[1] plummeted from 38% to 8.4%. This was an extraordinary result. However, some countries did pay a high cost. For example, non-farm payroll jobs (e.g., U.S. manufacturing jobs) dropped from 16% in January 1990 to about 8.4% in August 2022 as manufacturing was increasingly outsourced.

As this book is going to press, inflation has soared, financial security is uncertain, consumer confidence is waning, and military tensions are on the rise throughout the world. Growing pressures from a fractured global supply chain are forcing countries everywhere to question their historical approaches to global trade. For decades, a key component contributing to positive economic growth has been foreign direct investment (FDI). Given today's economic climate, is FDI viewed as a positive or a negative? Will globalization as we have known it for decades continue or recede? This book will examine FDI from the perspective of fifteen countries on six continents. We have gathered from some of the best legal minds in the world what we hope are clear and helpful insights into what is happening now and what to expect in the future.

Dennis Unkovic
Partner
Meyer, Unkovic & Scott LLP

[1] *The percentage of individuals living on less than USD 3.65 per day.*

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AUSTRALIA

Angela Harvey, Mary Digiglio & James Skelton
Swaab

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

In the short term, high commodity prices and improved terms of trade will see growth in existing trade patterns continue in Australia. Most of Australia's primary export partners are in Southeast and Northeast Asia and existing free trade agreements give Australia access to these fast-growing Asian markets.

However, consumer confidence remains pessimistic due to the recent conflict in Ukraine, higher global energy prices, lingering supply chain issues and high cost of living pressures, combined with domestic and global inflationary pressures.

If global inflationary pressures remain the Reserve Bank of Australia may tighten monetary policy more aggressively, with potentially negative implications for consumption, investment, and economic growth more generally in the short term.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Australia's government adopted an aggressive posture in regulating foreign investors?

Foreign investment has always been critical to Australia's economy. In June 2020, the Government announced the most comprehensive reforms to Australia's foreign investment review framework since the introduction of the Foreign Acquisitions and Takeovers Act 1975.

The reforms update the foreign investment review framework in three broad ways, to:

- address national security risks;
- strengthen the existing system; and
- streamline investment in non-sensitive businesses.

Over the past two-decades, foreign investment has grown by about 8% year on year. Despite droughts, bushfires, COVID-19 lockdowns and, more recently, floods, foreign investment still grew by 2.5%. Overseas investment continues to play a dominant part in Australia's economic success.

3. Are there specific sectors of Australia's economy or industries where foreign direct investment is barred or highly regulated?

Australia takes a case-by-case approach to each foreign direct investment proposal as they must be assessed and approved by the Foreign Investment Review Board (FIRB). However, there are several sectors of Australian economy and industries that are classified as 'sensitive' structures in which foreign direct investment can be prohibited or restricted. This is on the grounds of it being against Australia's national interest or security. Therefore, different rules apply for the sectors of transport, telecommunications, media, defence and military related industries, encryption and securities technologies and communications systems, mining, and land (see section 22 of the Foreign Acquisitions and Takeovers Regulation 2015). Whether a proposed foreign investment exceeds certain monetary thresholds also impacts likelihood of FIRB approval.

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The Foreign Acquisitions and Takeovers Act 1975 specifies a percentage of interest and monetary threshold available for such investments. For example, foreign persons generally require approval before acquiring a substantial interest (typically being at least 20%), in an Australian entity that is valued above the relevant monetary threshold. For a national security business, the interest is set at 10%, regardless of the value of the business or country of the investor. Investment in land is also specifically regulated, as vacant commercial land and residential real estate require prior FIRB approval regardless of the value of the property. Agricultural land requires prior approval where the land owned by the foreign person is worth more than AUD 15 million.

For investors from counties that have free trade agreements with Australia, such as Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and United States, higher foreign investments thresholds apply. For 'sensitive' businesses the standard threshold is AUD 289 million, rather than AUD 1,250 million for less highly regulated businesses.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Australia and what steps has the government taken to respond?

The Australian Government has introduced a three-pronged approach in addressing the impacts of worldwide supply chain issues:

- the introduction of a AUD 15 billion National Reconstruction Fund which aims to drive co-investments into projects that address vulnerabilities in critical supply chains;
- a 'Buy Australia Plan' that will ensure that the Australian Government can make use of government procurement as a major economic lever to strategically address supply chain risk; and
- a 'Supply Chain Resilience Initiative' that provides grants to establish or scale a manufacturing capability or a related activity to address supply chain vulnerabilities for a critical product or input identified in Australia's 'Sovereign Manufacturing Capability Plan'.

5. In M&A transactions as well as joint ventures in Australia, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Whilst the level of due diligence undertaken is often in response to the size or significance of a venture or acquisition, there are several required searches and considerations for the Australian business landscape. It is highly encouraged that comprehensive searches and investigations be conducted regarding corporate registers, identifying key business contacts, confirming validity of intellectual property rights and licence structuring, past tax returns, any leases or titles over property, current workplace agreements, insurance policies, history of disputes, and IT and privacy agreements.

Specifically, this would include searching:

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- the Australian Securities and Investment Commission's public registers to determine the identity of shareholders, directors and officers;
- the Personal Property Securities Register to determine whether there are any registered security interests over the assets of the target business;
- the local land office, for example the NSW Land Registry, to determine the title to real property;
- IP Australia's public register of registered trademarks, patents and designs to confirm ownership of intellectual property rights;
- the local court register, such as the NSW Caselaw site, for any current litigation or winding up proceedings;
- the work health and safety obligations and the business' register of notifiable incidents; and
- if relevant, the environmental status of the land, to establish if land has been contaminated by a hazardous industry and if there are clean-up costs, as the different state environment protection authorities have strict requirements and sanctions.

Australia also has specific protections and considerations regarding the disclosure of information between companies. The seller has no positive duty to disclose information to a buyer, however they can face liability under the Corporations Act 2001 (Cth) or Schedule 2 of the Competition and Consumer Act 2010 (Cth) for engaging in any misleading or deceptive conduct. Insider trading laws also prohibit a seller from providing information that is material, price sensitive, and not generally available to the public, so, if an investor was aware of such information, they could not acquire shares.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Australia? Is this more difficult for foreign investors?

Effective Tax Structuring

There are various structures utilised to acquire assets in Australia, including:

- individual;
- multiple individuals as joint tenants (non-divisible shares) or tenants in common (divisible shares);
- company in its own right; and
- individual(s) or company in the capacity as trustee of a trust (e.g. unit, fixed, hybrid or discretionary/family trust).

The purpose of the acquisition influences any advice given by the purchaser's tax advisor regarding the most effective ownership structure to manage direct taxes including income tax, capital gains tax, company tax, land tax and transfer duty.

Ownership structures have little or no influence on indirect taxes, such as GST (Australia's value added tax). However, GST is exempt from certain real estate acquisition transactions including existing residential properties, farming properties and properties the subject of leasing enterprises, or which include an operating business.

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Asset Protection

The desire to protect wealth and assets from matrimonial breakdown, litigation against the owner or an insolvency event influences ownership structures. For instance, if a property is owned in an individual's name, such property can be used to satisfy judgment against that individual. However, the discretionary/family trust structure can be used to protect assets from becoming embroiled in litigation against individuals with a potential interest in the trust.

Foreign Persons

In Australia, the Foreign Acquisitions and Takeovers Act 1975 governs foreign acquisition and investment. Certain acquisitions of property (both residential and commercial) and business interests require approval by the Australian Government. The application fee is a factor of the price to be paid for the property. It is a significant fee. There are strict constraints such as milestones, timing, reporting and disposal. A foreign person will need to consider whether approval is required, and if required approval must be obtained prior to acquiring the property or, alternatively, the contract must be conditional upon approval being granted.

Foreign persons are levied with a surcharge on some direct taxes including land tax and transfer duty. The surcharge is a significant cost.

7. What laws or regulations exist in Australia to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The Privacy Act 1988 is a key law that governs the collection, use, disclosure and transfer of personal and health information in Australia. However, there is also state-based legislation that should be considered, for example the Health Records and Information Privacy Act 2002 in the state of New South Wales. The Spam Act 2003 and the Do Not Call Register Act 2006 also regulate commercial electronic messages and telemarketing in Australia.

Under the Privacy Act, there are a set of Australian Privacy Principles that help guide businesses on the correct way to deal with such information. The Australian Privacy Principles apply to private-sector organisations with an annual turnover of more than AUD 3 million and their related companies, as well as some other types of organisation, including health service providers and organisations that trade in personal information. The Australian Privacy Principles also apply to Australian Federal government agencies. The 13 Australian Privacy Principles regulate the manner in which any regulated organisation can collect, store, use and disclose personal information. Special provision is made with respect to health and other sensitive information.

Foreign investors should be aware of the differences between 'personal information' and 'sensitive information'. Personal information is defined under the Privacy Act as information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information is true or not and whether the information or opinion is recorded in a material form or not. Sensitive information is subject to stronger protection under the Privacy Act and refers to information that one would ordinarily expect to be singled out

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for special treatment and information or opinion about an individual's racial or ethnic origin, political opinion, religious beliefs, sexual orientation or criminal record, provided the information or opinion otherwise meets the definition of personal information.

Relevantly for foreign investors, the Privacy Act extends to the activities of foreign companies in Australia and the activities of foreign companies outside of Australia, where such companies carry on business in Australia, and collect or hold personal information in Australia. The Privacy Act also includes a scheme for notification of 'eligible data breaches' so foreign investors should make sure that they seek specific advice in relation to their business dealings in Australia.

The Australian Federal Government is in the process of reviewing Australia's privacy regulations given the increase in large corporate data breaches. Foreign investors should anticipate an increase in regulatory obligations and investigations by the Office of the Australian Information Commissioner in 2023, along with an increase in penalties for non-compliance.

Regarding intellectual property protection generally, as Australia is a signatory to several international conventions regarding intellectual property registration and protection, foreign investors should find protecting and enforcing IP rights in Australia to be quite straightforward. IP Australia is the regulatory body that administers the registration of trademarks, designs, patents, and plant breeders' rights. Action to enforce these rights is usually taken in the Federal Court of Australia.

8. Describe the most common legal structures used by foreign investors when doing business in Australia.

The most common legal structure for foreign investors setting up a business in Australia is either registering as a foreign company carrying on business in Australia or establishing an Australian subsidiary which also operates as an Australian company. The Australian company structure is an incorporated business that is also a distinct legal entity which comes with legal protection via limited liability for members and can have more suitable tax implications. It is important to set up a company, as unincorporated bodies and corporations sole that were formed outside Australia cannot hold property and cannot sue or be sued in accordance with the law of their place of formation.

To carry on business as an Australian branch of a foreign company, the company must register as a foreign company with the Australian Securities and Investments Commission (ASIC), the authority responsible for the administration and enforcement of Australian company law. Upon registration as a foreign company, ASIC will issue a unique nine digit identifying number known as an Australian Registered Body Number (ARBN). The name of the foreign company, followed by 'ARBN' and the unique number must be quoted on every public document issued, signed or published by, or on behalf of, the foreign company. ASIC outlines several other requirements for foreign companies, such as reserving a company name, making an application, providing a certified copy of the entity's constitution, appointing a local agent, lodging copies of financial statements, as well as other continuing notification obligations.

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Alternatively, if foreign investors have a foreign company registered outside Australia and choose to incorporate an Australian subsidiary company to conduct business in Australia, they do not need to register as a foreign company. They instead register the subsidiary as a new company with ASIC and begin the process from there. Incorporating a local Australian subsidiary proprietary limited company, or purchasing an existing company, is usually the preferred method of establishing a business presence in Australia for foreign investors.

9. What are the most attractive opportunities for foreign investors in Australia at this time?

Historically, investments have been largely oriented towards the mining sector, manufacturing, real estate, wholesale and retail trade, construction, and communication. Australia's resources sector has traditionally been attractive for foreign investment.

However, Austrade, the Australian Government's investment promotion agency aiming to inform investors of future growth opportunities, lists the most attractive growth opportunities in agribusiness and food, digital technologies, fintech, major infrastructure, materials science and technologies, medical science and technologies, resources and energy and tourism infrastructure.

10. Do specific laws or mechanisms exist in Australia to protect foreign direct investors?

The protection of direct foreign investors is the remit of Austrade which provides coordinated government assistance to attract and facilitate productive foreign direct investment (FDI) into Australia.

In the first instance, Australia's foreign investment policy provides guidance for all foreign investors on the Government's approach to administering the Foreign Acquisitions and Takeovers Act 1975 (FATA). Specific types of investment proposals are required to be notified to the Government even if the FATA does not appear to apply. Investors also need to be mindful of separate legislation that covers Australia's banking sector, airports, shipping industry and telecommunications sectors when it comes to foreign investment. In addition, investors should be aware of the role that the Australian Federal Treasurer ultimately plays in reviewing investment proposals to decide if they are contrary to the Australian national interest.

The Australian Government and state and territory governments do provide support mechanisms to assist investors establish and run a business in Australia. These mechanisms, and forms of assistance available, will vary by location, industry, and the nature of the business activity. However, assistance can include business grants, finding and training employees, R&D tax incentives, major project facilitation, and for exporting.

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AUTHOR BIOGRAPHIES

Angela Harvey

Angela provides advice on a broad range of Australian and cross border business transactions, including mergers, business sales and acquisitions, joint ventures and partnerships. Her clients benefit from her skills as a negotiator and expertise in creating structures for tax effectiveness and asset protection. She advises clients in a variety of industries, including pharmaceutical, food manufacturing, wholesale, transport, retail, construction materials, property and cosmetics. She also leads Swaab's private client team, with a focus on asset protection, trusts, succession planning, analysing and advising on established family office and family business structures.

Whether you are a foreign investor looking to enter the Australian market or an existing Australian subsidiary looking to grow business in Australia, Angela provides pragmatic and commercial advice to help achieve your desired outcome.

Mary Digiglio

Mary is an experienced accredited specialist in property law and a graduate of the Australian Institute of Company Directors. Having been listed as a leading NSW lawyer in the esteemed Doyle's Guide since 2017, most recently she has been recognised as a 'Recommended' NSW Property & Real Estate Lawyer and 'Recommended' NSW Leasing Lawyer for 2022.

Mary is also the Managing Partner of Swaab, and leads the Property, Planning & Projects team. She provides clients with expertise and property industry knowledge supported by her experience working in the real estate industry prior to practicing law. Her practice focuses on mixed-use commercial, retail, rural and residential real estate, hospital developments, joint ventures, mixed title structuring, disposals and acquisitions and leasing for both landlords and tenants.

James Skelton

As a member of Swaab's corporate, commercial and intellectual property practice, James is passionate about helping clients achieve their goals. His focus is on business advice, corporate and commercial transactions, commercialisation of intellectual property rights and brand protection strategies. He has industry focuses in the pharmacy, health care, luxury goods, FMCG and technology spaces, and acts for a number of multi-national companies looking to expand into Australia, as well as a number of local SME and ASX listed companies looking to grow both in Australia and overseas. Having worked for an international luxury fashion house for eight years prior to legal practice, James provides guidance and advice to clients that is well considered and commercial.

James was previously named 'Australian Young Lawyer of the Year' by the Law Council of Australia, having also won and been a finalist in the Lawyers Weekly '30 Under 30' Awards for commercial law and intellectual property law in Australia.

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BRAZIL

Hermano de Villemor Amaral (neto), Eduardo Tranjan, Gabriel Bon de Macedo & Mariana Rossi
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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

Further liberalization – by both industrial and developing countries – is essential to solidify trade's potential as a driving force for economic growth and development. With the advent of globalization, Brazil followed the – almost universal/global – trend of celebrating bilateral investment treaties, known as TBIs. During this period, Brazil was characterized, above all, as a leading recipient of foreign capital, having the highest record of foreign direct investment between the years 2009 and 2011.

During the following years, there was a slowdown in foreign direct investment in Brazil. However, the Brazilian economy strengthened, favoring the environment for the internationalization of Brazilian companies – especially in countries in South America, Africa and tax haven countries such as the Cayman Islands and Panama. There was a growing movement of direct investment abroad by Brazilian residents, recording financial flows of external assets by participation in capital and intercompany operations. As proof of this new wave of investments, the Central Bank of Brazil (BACEN) stated that the assets of Brazilian companies and individuals abroad reached USD 529.221 billion in 2019 and USD 558.387 billion in 2020. It is also worth mentioning that 80% of the total volume are direct investments in Brazilian companies that have subsidiaries abroad.

In the distribution of resources by invested sectors, financial services companies and ancillary activities should be highlighted, with USD 62.9 billion in oil and natural gas extraction activities, and USD 12 billion in direct Brazilian investment capital.

In line with global trends, Brazil's deal activity reached a 10-year peak after a strong 2020. Transaction value totaled USD 66 billion in 2021, which is less than the value reached in 2010, but that was a banner year in which the concession of pre-salt to Petrobras and multiple consolidations in the telecom industry pushed the numbers sky-high. The total deal value in 2021 is considered a 10-year record, even if one considers Brazilian Real depreciation against the US dollar.

Despite the recent COVID-19 crisis, Brazil's business environment is booming with foreign investors confident in the investment climate that the country has cultivated. This success is tied into specific stand-out industries in Brazilian infrastructure. In recent years, the Brazilian government introduced several reforms that have helped to decrease the cost of doing business in Brazil. These included the Sanitation Law, which ended restrictions on private sector investments for sanitary projects, as well as the New Highway Concession Program and Design, which has introduced a strengthened risk sharing and incentives framework for highway development projects specifically. With Brazil's new legal framework for infrastructure and the creation of a more business-friendly environment, the expectation is that we will see increased M&A activity during the next few years.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Brazil's government adopted an aggressive posture in regulating foreign investors?

In the last few years, Brazil has facilitated foreign direct investment. Brazil closed

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the year 2021 occupying the 7th highest position among countries that attracted the most Foreign Direct Investment (FDI), according to estimates assessed by the United Nations Conference on Trade and Development (UNCTAD). There were USD 58 billion in investments in the country, an increase of more than 100% compared to 2020, with an inflow of USD 28 billion – this shows that Brazil is still attractive for business.

According to BACEN, a direct investment is defined as such by its intention to remain for the long-term in the country and by its acquisition outside stock or over-the-counter markets. Foreign direct investment can be made through the opening or expansion of companies, mergers and acquisitions, reinvestment of profits made in operations abroad, among other means.

Investments of foreign capital in Brazil must be carried out formally, through the traditional banking system. Foreign capital may enter freely, with only minor exceptions and restrictions. All foreign investments must be registered through the Central Bank Information System.

Brazil has taken the lead in the area of investment facilitation, having established a single government institution – the office of the Direct Investments Ombudsman – to facilitate interactions between foreign investors and all other Brazilian government agencies. The Direct Investments Ombudsman (DIO) (see *https://oid.economia.gov.br/en/menus/8*) is a "single window" for foreign investors, provided by the Executive Secretariat of Chamber of Foreign Trade (CAMEX). It is responsible for receiving requests and inquiries about foreign investments, to be answered jointly with the public agency responsible for the matter (at the Federal, State and Municipal levels) as the case may be (the Focal Points Network). This new structure allows better and more efficient support for the investor.

Among the DIO's competencies, the following stand out:

- to support and guide investors, recommending solutions to their grievances (Policy Advocacy); and
- to propose to public agencies possible improvements in the legislation or in their administrative procedures.

3. Are there specific sectors of Brazil's economy or industries where foreign direct investment is barred or highly regulated?

The investment of foreign capital is expressly prohibited in the participation of activities involving:

- nuclear energy (as established in Art. 21, inc. XXIII c/c Art. 177, V of the Brazilian Federal Constitution (CF/88) and Law No. 4.118/1962);
- postal and telegraph services (as established in Art. 21, inc. X, of CF/88 and Law No. 6.538/1978);
- the disposition, concession, or transfer of Union properties to any foreign corporate entity or individual, located on its boundary zone, within 100 meters extending from the coastline or inside a circumference of 1,320 meters of ray around fortifications and military constructions, except when previously authorized by the Brazilian President, pursuant articles 205 and 100 of the Law No. 9.760/1946; and

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- newspaper companies, sound broadcasting companies, or sound and image broadcasting companies, which shall be owned exclusively by native Brazilians or those naturalized for more than 10 years, or by legal entities incorporated under Brazilian laws and headquartered in Brazil (pursuant to article 222 of the CF/88).

Alongside those strict regulations, it is worth mentioning there are also restrictions in place for:

- the acquisition of rural land by a foreign individual who does not have regular permission to stay in Brazil and restrictions on the acquisition of rural land by Brazilian companies controlled by foreigners, by a foreigner resident in the country or by a foreign legal entity authorized to operate in Brazil, as they are subject to conditions provided for by law and, in some cases, authorization by the Brazilian Congress (Law No. 5709/1971 and Regulatory Decree No. 74965/1974); and
- the participation of foreign capital in financial institutions, although such restrictions may be waived in the national interest (provision of article 52, items I and II, Act of Transitory Constitutional Provisions (ADCT)).

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Brazil and what steps has the government taken to respond?

In 2023, significant risks remain in this highly uncertain environment. The global economic backdrop further weighed on Brazil's recovery, including inflation and rising indexation policy rates – both in Brazil and worldwide – and supply bottlenecks related to the ongoing war in Ukraine are causing commodities prices to soar and thus further reinforcing the inflation pressures.

In Brazil, the inflow of foreign capital decreased by 35.4%, which in absolute terms represents an approximate drop of USD 24 billion in foreign investments, becoming the worst scenario of the last 12 years. It was also observed that even Brazilian companies headquartered abroad lost space, as they began to repatriate resources from their subsidiaries abroad.

As a reversal of this scenario, the federal government issued the Provisional Measure No. 1137/2022, which brought relevant changes to the Brazilian investment scenario, reducing to zero the withholding tax (WHT) levied as of 1 January 2023 on certain income earned by non-resident investors in the Brazilian financial and capital markets.

5. In M&A transactions as well as joint ventures in Brazil, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Before the due diligence process begins, it is advisable to have a plan of action in place for the transaction in terms of tax. In Brazil, acquisitions of assets usually burdens sellers with income tax (Imposto de Renda) on the capital gain, understood as the positive difference between the sale value and its previous acquisition cost.

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The (legal) due diligence is a must/mandatory to identify business risks and quantify liabilities that may impact on the acquisition price. The most common matters to be investigated in Brazil are labor, tax, compliance, anti-corruption, environmental and civil lawsuits and their impacts must be correctly addressed in the transaction agreements.

Depending on the transaction, an authorization from the Administrative Council for Economic Defense (CADE) might be necessary. In case the transaction involves a regulated activity, authorization may be required from other agencies such as the National Agency of Petroleum, Natural Gas and Biofuels (ANP) and National Electric Energy Agency (ANEEL) among others.

It is also worth pointing out that foreign direct investments in Brazil must be registered, as above mentioned, through the Electronic Declaratory Registration System, in the Foreign Direct Investment Module (RDE-IED), regulated by BACEN. These investments are also subject to the National Monetary Council (CMN) and by the Securities Exchange Commission (CVM) monitoring.

Brazilian companies with foreign investments are subject to periodic obligations before BACEN. As of this year, Brazilian companies receiving foreign investments whose net worth or assets are equal to or greater than BRL 250 million, must prepare an Economic-Financial Statement (DEF) on a quarterly basis.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Brazil? Is this more difficult for foreign investors?

Brazilian legislation imposes certain limitations/restrictions on the acquisition of real estate by foreigners. Foreigners must observe the procedures and restrictions regarding the location and extension of the property.

In Brazil, the general rule regarding urban real estate is that there is no restriction on the acquisition of property in any capacity (purchase, donation or inheritance) by a foreigner, whether or not they reside in Brazil. The exception applies to property belonging to the Union, in the cases of the disposition, concession, or transfer of Union properties to any foreign corporate entity or individual, located on its boundary zone, within 100 meters extending from the coastline or inside a circumference of 1,320 meters of ray around fortifications and military constructions, except when previously authorized by the Brazilian President, pursuant to articles 205 and 100 of the Law No. 9.760/1946.

With respect to rural properties, certain restrictions may be applicable. For foreign individuals who do not have regular permission to stay in Brazil, rural property cannot be purchased under any circumstances. However, Law No. 5,709/71 provides an exception for the acquisition of property by foreign legal entities when they have authorization to operate in Brazil. According to Article 5 of such Law, they may only acquire properties that are intended for the implementation of agricultural, livestock, industrial, or colonization projects linked to their objectives, and these must be approved by the Ministry of Agriculture. And, in the case of implementation of an industrial project, the Ministry of Industry and Development will be consulted.

In addition, it should be noted that there is a specific limitation regarding the area that can be acquired by a foreign legal entity, in addition to the prohibitions relating

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to individuals, given that the sum of rural areas acquired by the legal entity cannot exceed 25% of the surface of the municipalities where they are located.

Finally, besides limitations indicated above, if a foreign investor decides to acquire a property or tangible assets in Brazil, they will be also required to register the foreign investment before the RDE-IED system, as mentioned above.

7. What laws or regulations exist in Brazil to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The exchange of data and the fundamental rights inherent to privacy are protected in Brazil by Law No. 13709/2018 (LGPD), which sets forth rules for the processing of personal data, including in digital media, by natural persons or legal entities governed by public or private law, in order to protect the fundamental rights of freedom and privacy and the free personality development of the natural person.

The protected data covers not only Brazilians' but also foreigners' information in Brazil at the time of collection. The data are processed within the national territory, regardless of the means applied, the operator's headquarter country or the country where the data is located or if the data is used to provide goods or services. Therefore, there is no challenge for foreign investors in the face of the LGPD. On the contrary, with the advent of this legislation, it is an undisputed fact that the protection of the fundamental rights of freedom and privacy of foreign investors has been guaranteed.

However, it is important to highlight that the LGPD does not apply to data outside Brazil and data which are not subject to international transfer, nor will it apply exclusively for public security purposes, of national defense, state security, investigation and prosecution of criminal offences and private individuals (that is, the law only applies to individuals or legal entities that manage bases for so-called economic purposes).

8. Describe the most common legal structures used by foreign investors when doing business in Brazil.

The most common corporate structures used by foreign investors are:

- **Sociedade Anônima (corporation).** Regulated by Federal Law No. 6,404/76 (Lei das SAs). The Brazilian corporation is the form that most closely resembles US subchapter C corps, and are classified according to capital management: publicly or privately held. Corporations are allowed to issue different classes of shares, such as voting and non-voting shares. The shareholders liability is limited to the payment of the shares to which the shareholders have subscribed.
- **Limited Liability Company.** Share capital is divided into quotas. The main characteristic of this structure is the limitation of the responsibility of each quotaholder: as per the article 1.052 of the Brazilian Civil Code, the responsibility of each quotaholder is limited to the amount of their quota, however all quotaholders are solidary liable for the payment of the corporate capital.
- **A Specific Purpose Company (SCP).** The SCP has a determined purpose and the duration of the company will be for the period necessary for fulfilling such

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purpose. Therefore the SCP limits the risk of loss of capital to a certain project/activity and can be either a Limited Liability Company or a Sociedade Anônima.

9. What are the most attractive opportunities for foreign investors in Brazil at this time?

In Brazil, the agribusiness, automotive, electronics manufacturing, technology and information and financial services sectors were responsible for attracting and consequently increasing total Foreign Direct Investment (FDI), according to the "World Investment Report 2022", but the highlight in relation to receptivity has been in relation to investments in renewable energy. Despite the fact that greenfield projects remain in decline worldwide, Brazil continues to attract foreign investment in this sector.

The infrastructure sector is also an important sector to highlight. The private sector investments in infrastructure in Brazil have increased sharply in recent years, due to regulatory changes at the Federal and State levels and there are several auctions that have been held or implemented.

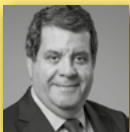
10. Do specific laws or mechanisms exist in Brazil to protect foreign direct investors?

Brazil still does not have a specific regulation on the subject. However, it should be noted that in 2015 Brazil signed six Investment Cooperation and Favoring Agreements (ACFIs) to guarantee the protection of foreign investors in Brazil and Brazilians abroad.

It so happens that such agreements lack regulation in some points, which include remedying the absence of a rule on fair and equitable treatment, the application of the most favored nation clause only for benefits unilaterally offered by a party to a third State, and mainly, remedying the absence of an international system of dispute settlement between investor and State.

Thus, in view of the self-execution of the agreements, foreign investors may make use of the material provisions to support claims made in Brazil, but there is no doubt that there are legal gaps for the protection of foreign investors, which are still subject to political and legal uncertainties, dependent on diplomatic protection.

AUTHOR BIOGRAPHIES



Hermano De Villemor Amaral (neto)

With over 40 years of experience, Hermano works in Corporate, Mergers & Acquisitions, Contracts, Administrative Law, among others.

The grandson of the firm's founding partner, Hermano has extensive legal experience advising domestic and international companies from the most diverse industries and economic sectors. He has a Law degree from the Faculty of Law of the University of Rio de Janeiro (1981) and a Master's degree in Comparative Law from the Interamerican Law Institute at New York University (1982/1983). In the 1980s, he improved his international knowledge by moving to

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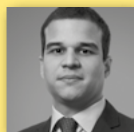
New York and joining the offices of Reid & Pries (1983) and Seward & Kissel (1984). In 2002, he was appointed Honorary Vice-President of the Association of Young Lawyers, based in Brussels, Belgium, for the relevant work done for the Association. In 2021 and 2020 he was recognized by the Análise Advocacia directory, being highlighted in the Food, Drinks and Tobacco sector and for his regional performance in São Paulo. He is admitted to the Brazilian Bar in São Paulo and Rio de Janeiro. He is a board member of the Conselheiro do Centro de Estudos das Sociedades de Advogados (CESA). Other memberships include the Integrity Committee of the Brazilian Olympic Committee (COB), Executive Committee of the International Association of Young Lawyers (1991 to 1994 and 1999 to 2002), National Vice-President of the International Association of Young Lawyers (1995 to 1999), International Bar Association and São Paulo Lawyers Association (AASP).



Gabriel Bon de Macedo
Gabriel graduated in Law from Universidade Federal do Rio de Janeiro (2017) and is admitted to the Brazilian Bar in São Paulo and Rio de Janeiro

Eduardo Tranjan
With almost 20 years of experience, Eduardo frequently works on infrastructure projects, mainly in the electricity and oil and gas industry and especially in matters related to the midstream and downstream sectors of the natural gas chain.
In the electricity sector, Eduardo advises clients on the structuring and implementation of projects in electricity generation (mainly from renewable sources), actively participating in the negotiation of construction contracts and conducting regulatory risk assessments considering the specifics of each project. He also has relevant experience in the mergers and acquisitions sector, having advised clients in transactions involving the purchase and sale of equity interests, mainly in the electricity, logistic and oil and gas industries.
Eduardo graduated in Law from Pontifícia Universidade Católica do Rio de Janeiro (2004) and is admitted to the Brazilian Bar in São Paulo and Rio de Janeiro. He was recognized in Latin Lawyer 250 (2023) in the Corporate and M&A area and for his performance in the Oil and Gas market.

Mariana Rossi
Mariana focuses her practice primarily on M&A, infrasctruture and corporate law. She often represents Brazilian and foreign clients – buyers, sellers and target companies – in a variety of Brazilian and cross-border corporate transactions.
Mariana holds a Law degree from Universidade Cândido Mendes, Rio de Janeiro, 2017 and post-graduate degree in Corporate Law from the University of Lisbon (2018). Between 2017 and 2018 Mariana acted as international legal counsel for DLA Piper in Lisbon, Portugal, where she actively participed of several M&A transactions. She is admitted to the Brazilian Bar Association (OAB) - Rio de Janeiro.

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BULGARIA

Trayan Targov
BOYANOV & Co.

This chapter forms part of:

THE NEW WORLD OF FOREIGN DIRECT INVESTMENT
Law Over Borders Comparative Guide 2023

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

World trade has seriously slowed since the onset of COVID-19 and the conflict in Ukraine. The lingering pandemic combined with the ramifications of the war resulted in disrupted supply chains, high inflation, and declining trade growth. Even the economic interdependence system that until recently was generally seen as a key element of the sustainable economic growth and peace around the world has been called into question. Considering current events and the sharp deterioration in the forecasting environment entailed by them, the evolution of world trade patterns is rather difficult to predict.

On a positive note, it is reassuring to see that international trade has shown considerable resilience to the latest economic shocks. Despite the global trade conflicts, the extended COVID-19 disruptions, and the war in Ukraine, world trade continued to grow, albeit with some hesitation.

The situation in Bulgaria does not differ to any significant extent from that picture. The Bulgarian economy remained quite resilient until the first half of 2022 and is now set to slow down in line with global and regional trends. For more than 30 years outside the sphere of influence of the Soviet bloc and 15 years as part the European Union (EU), Bulgaria has made some important steps towards integrating into European and global production networks. Nowadays, the country falls within the ambit of the EU investment environment, among the most open and secure in the world.

The attractiveness of Bulgaria as an investment destination lies in the combination of three main factors: the committed and skilled workforce; the low costs for doing business; and the full openness to trade and investment. For many of our foreign clients Bulgaria is expected to continue to serve as an entry point to the EU single market that, with its over 440 million consumers, is the largest single market in the world. There are also various EU and non-EU companies that are deciding to set up operations in the country to benefit from its comparative advantages.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Bulgaria's government adopted an aggressive posture in regulating foreign investors?

Quite the reverse – over the last three decades Bulgaria's government has been continuously seeking to attract foreign investors by offering them national treatment, state financing, favourable tax treatment (including a 10% flat income tax rate), options for preferential purchases of land and many other types of assistance and advantages, as well as by building a sound business environment in which foreign investors can start, invest, expand, and exit. There are no general limits on foreign ownership or control of companies, nor is there screening at local level or restricting of foreign investment.

Certain restrictions exist with respect to foreign investments made by offshore companies from tax havens, as well as in the gambling business and

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when it comes to the acquisition of farmland, but they are rather limited in scope and effect (see Question 3, below). Regulatory restrictions on business activities such as licensing, registration and permission requirements sometimes imply corporate registration under the laws of Bulgaria or another member state of the EU or the European Economic Area (EEA), but this is not in itself an obstacle to investment because foreign investors are free to incorporate or participate in Bulgarian companies without local partners or other similar restrictions.

3. Are there specific sectors of Bulgaria's economy or industries where foreign direct investment is barred or highly regulated?

There are no general restrictions upon foreign investors wishing to invest in Bulgaria either by acquiring an existing business or by establishing a new business. Certain limited exceptions to this general principle are addressed below.

Restrictions on investments by offshore companies and entities under their control

The Offshore Companies Act was enacted in 2014. It prohibits companies registered in jurisdictions with preferential tax regimes (also called tax havens), and the entities under their control, from directly or indirectly engaging in 27 different types of economic activity in Bulgaria (mostly in traditionally highly regulated sectors such as banking and finance, insurance, gambling, energy, waste management, and public procurements).

The current list of tax havens is approved by the Minister of Finance and indicates 26 countries or territories, which are considered tax havens from the point of view of Bulgarian law. Companies and other forms of business, corporate or unincorporated, registered there, such as offshore companies, and the entities under their control, are subject to the prohibitions against carrying on business in Bulgaria under the Offshore Companies Act.

There are eight groups of exceptions to the prohibitions introduced by the Offshore Companies Act, which could be applied by the offshore companies, or the entities under their control, to be allowed to carry on the otherwise prohibited activities. These exceptions are in any case subject to disclosure of the individuals who are the ultimate beneficial owners of the company and certain preliminary registrations in the Bulgarian Commercial Register.

Restrictions on foreign investments in the gambling industry

The 2012 Gambling Act stipulates that gambling operations may be performed in Bulgaria only after the issuance of a game-specific licence. In general, companies registered under the laws of Bulgaria, another EEA member state or Switzerland are deemed eligible to apply for such licences. In early 2020, however, by way of amendments to the Gambling Act, Bulgaria's Parliament, the National Assembly, granted the state-owned enterprise Bulgarian Sports Totalisator a legal monopoly over lottery products and restricted all private lottery operations in the country, except for raffle, bingo and keno games.

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Furthermore, pursuant to the Gambling Act, foreign persons (i.e., persons other than companies or individuals registered in or citizens of an EEA Member State or Switzerland) may not have any interest in a locally licensed company unless they have invested at least EUR 10 million in other activities in Bulgaria and have created more than 500 jobs or unless they own a hotel rated with four stars or more and operate a casino in it.

Restrictions on foreign investments in farmland

Bulgarian law and, in particular, the Agricultural Land Ownership and Use Act, enacted in 1991, provides for restrictions on foreign ownership of agricultural land. Foreign (non-EEA) nationals and legal entities as well as commercial companies held by them are generally prohibited from acquiring farmland in the country, unless expressly permitted by an international treaty to which Bulgaria is a party. Companies that are directly or indirectly held by offshore companies, political organisations and foreign states are also prohibited from acquiring agricultural land in Bulgaria.

Pursuant to the terms of accession of Bulgaria to the EU, from 2014 onwards the EU or EEA citizens must enjoy national treatment in respect of the acquisition of agricultural land in Bulgaria. Despite this, in 2014 Bulgaria modified its national regime by introducing long-term residence requirements for Bulgarian nationals and legal entities wishing to acquire farmland, thus also creating acquisition barriers for EEA companies and citizens. In particular, the Agricultural Land Ownership and Use Act stipulates that ownership rights over agricultural land may be acquired by individuals or legal entities that have resided or been established in Bulgaria for more than five years. Legal entities that have been registered under the laws of Bulgaria for less than five years are allowed to acquire farmland provided that their shareholders are natural persons who have resided in Bulgaria for more than five years.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Bulgaria and what steps has the government taken to respond?

It is important to first understand the role played by Bulgaria in the global supply chains. In essence, global value chains capitalize on the comparative advantages offered by different countries, thus leading to fragmentation and internationalization of the manufacturing process. Bulgaria in turn has been offering a skilled and committed workforce, low costs for doing business, diversified economy, a safe investment environment brought about by the EU and close proximity to the more developed European countries. This has helped Bulgaria become an integral part of the European and global supply chains, mainly on account of its manufacturing industry.

Given that the country is rather low on natural resources, it has become deeply involved in the assembly and processing of goods within certain European and global value chains characterized by higher fragmentation of the production process. Bulgaria produces and exports predominantly intermediate products such as parts, components and other items used as an input in the production of products for the end-consumers.

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According to the European Commission's 2022 Country Report for Bulgaria, the Bulgarian economy has been less affected by the global supply chain disruptions compared to other EU countries: in 2022, shortages of materials are reported by 7% of the Bulgarian companies, compared to an EU average of 26%. Most probably this is due to the manufacturing production in Bulgaria being relatively diversified.

In response to the COVID-19 pandemic and the current economic turmoil related to the war in Ukraine, the Bulgarian government adopted various measures to stimulate economic activity and safeguard the current business climate, including among others: monetary compensations for the high electricity and gas prices; reduced VAT rates; higher unemployment benefits; job protection schemes; and state financing. Since these measures are applied on a provisional basis, those that are currently in effect should be checked before contemplating an investment in Bulgaria.

5. In M&A transactions as well as joint ventures in Bulgaria, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Foreign investors contemplating a transaction in Bulgaria should not expect to face any abnormal legal challenges because Bulgarian law is safely rooted in the European continental legal system and for 15 years has been part of the EU legal order too.

The main legislative act setting out the legal framework for M&A transactions in Bulgaria is the 1991 Commerce Act, which contains the general rules for formation of companies, sales of shares, sales of businesses as going concerns, and company reorganisations. In certain cases, there are stricter regulations such as, for example, in respect of public companies, which are heavily regulated and any M&A transaction involving public companies is subject to specific regulatory requirements. M&A transactions that relate to state-owned and municipality-owned shares, or separate parts of the property of companies with more than 50% equity interest owned by the state or municipality, are also regulated by a special procedure for privatisation. In specific regulated sectors such as banking, energy, insurance and social security, M&A transactions may be subject to special regulation and close scrutiny.

Joint ventures as commercial projects jointly undertaken by two or more parties are not specifically regulated under Bulgarian law so both the general civil law and the corporate laws apply. In most cases, the parties establish a new commercial company under the Commerce Act (as a new legal entity), and then share in the revenues, expenses and control of the enterprise. Contractual joint ventures, in the form of general partnerships, are more suitable for joint ventures with a specific purpose that can be achieved in a shorter period of time.

One of the most critical steps that foreign investors should take prior to proceeding with an M&A transaction or joint venture in the country is to conduct a thorough legal, economic and tax due diligence. To this end, it is recommended to seek support from local advisors with a strong track record of providing such services. Nowadays, finding a trusted advisor in Bulgaria is not in any

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way a barrier to investment because on the Bulgarian market there already are internationally recognised advisors with 20-30 years of relevant experience who can easily facilitate such an exercise and help foreign investors with their first steps in the country.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Bulgaria? Is this more difficult for foreign investors?

The acquisition of interests in real estate or other tangible property in Bulgaria can generally be structured as an asset deal by acquiring the specific property, or as a share deal by acquiring the shares in a legal entity that holds ownership of the property. Before deciding how to proceed, the foreign investor should carefully examine the advantages and disadvantages each option will entail.

In real estate transactions taking place in Bulgaria the performance of an ownership due diligence is a vital step and should cover a period of at least 10 years before the transaction. Further investigations may be deemed necessary considering the circumstances of the case: e.g., the acquisition of farmland in areas with industrial background may necessitate environmental checks, or the acquisition of land plots for construction purposes in areas with high density of cultural values (such as the city center of Sofia, the capital of Bulgaria) may require the performance of cultural heritage checks.

At the practical level, the due diligence exercise is preceded either by a letter of intent or by a binding preliminary contract between the parties, based on which the seller provides the buyer with the respective legal documents about the real estate (this is necessary as the publicly available information in the land registry would be generally insufficient to conclusively determine ownership).

Although not mandatory, the conclusion of a preliminary contract is strongly recommended and is considered standard practice for large-scale transactions. Preliminary contracts lay down, among others, the framework of the legal and economic relations of the parties, the conditions precedent to closing and clauses allowing for the preliminary contract to be declared as final by the court if the seller refuses to transfer title over the real estate.

As a rule, real estate in Bulgaria is to be transferred by means of a notary deed with the assistance of a notary with territorial jurisdiction at the location of the property. In financial terms, it is customary to use escrow agents (financial institutions or notaries) to facilitate the closing in respect of the payment of the purchase price. The acquisition of property from the municipalities and the state is subject to specificities compared to the purchase of real estate from private individuals and legal entities.

Foreign nationals or legal entities are generally free to acquire ownership of buildings or parts thereof, as well as limited rights *in rem* (e.g., right of use and construction right) over land plots in Bulgaria. However, they may not directly acquire full legal ownership of land plots (except if not specifically permitted under international treaty effective for Bulgaria); that restriction does not apply to foreign nationals and legal entities from member states of the EU and the EEA. There also is no legal prohibition for non-EU/EEA entities or nationals to incorporate entity in Bulgaria or in another EU/EEA member state for the

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purpose of acquiring full legal ownership over land plots in Bulgaria. Thus, at the practical level, the main restrictions on foreign investments in real estate are those addressed in the response to Question 3, above.

7. What laws or regulations exist in Bulgaria to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The main legislative act on personal data protection at EU level is Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) which became directly applicable in Bulgaria as of 25 May 2018. The main act at country level supplementing the GDPR is the Personal Data Protection Act which ensures the effective enforcement of the EU rules by the local supervisory authority – the Bulgarian Commission on Personal Data Protection, contains a few locally-specific rules on data protection, and implements the Law Enforcement Directive (EU) 2016/680. Further rules protecting privacy may be found in other sector specific pieces of legislation (e.g., in respect of electronic communications, health, employment, gambling, private security).

As regards intellectual property protection, there are various remedies at the disposal of foreign investors against infringements of intellectual property rights under the Bulgarian civil and criminal law. The main remedy is filing a civil litigation case for IP rights infringement where the right holder may request from the court to:

- establish the infringing activity;
- issue against the defendant an injunction prohibiting the continuation of the infringement;
- order the destruction of infringing goods; and
- award a compensation for the damages suffered by the plaintiff because of the infringement.

In the course of such litigation, it is also possible to file an application for a preliminary injunction requesting the court to impose certain injunctive measures, such as prohibition on a provisional basis of the continuation of the infringement.

Brands and other trademarks can be protected either by registration of national trademarks with the Bulgarian Patent Office or by registration of EU trademarks with the EU Intellectual Property Office. Certain logo designs may also be protected by copyright as artistic works. The Bulgarian law does not provide for a copyright registration regime or any other administrative measures for the copyright to occur. Copyright arises automatically from the moment of creation of the work, provided that the work is original and the other requirements of the law are fulfilled. Bulgarian law offers also other types of IP protection such as for patents, industrial designs, and trade secrets.

8. Describe the most common legal structures used by foreign investors when doing business in Bulgaria.

Investments in Bulgaria are usually carried out either through establishment

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of a local subsidiary or branch office, or through entering a joint venture with a local or another foreign partner. These points are covered in more detail below.

Establishment of a local subsidiary

Foreign investors may freely set up a local company through which they can conduct business in Bulgaria. Bulgarian law allows for the incorporation of several different types of companies, but the most frequently used are the limited liability company (OOD) and the joint-stock company (AD).

A limited liability company may be formed by one or more shareholders who, subject to limited exceptions, are not liable for the company's liabilities. The minimum registered capital of a limited liability company is BGN 2. The capital contributions may be monetary or in kind. The company's affairs are administered by its manager or managers and by the general meeting of the shareholders. The managers legally represent the company and do not need to be shareholders. There are no restrictions on the participation of foreigners in the management of the company or as shareholders. A transfer of shares in a limited liability company requires a sale and purchase agreement in notarised form. The transfer must be registered in the Commercial Register. If the transferee is a non-shareholder, the transfer must be approved by at least three-quarters of the shareholders in the company. Because of the existence of potentially serious risks for expulsion by the other shareholders, it is advisable that foreign investors avoid using limited liability companies when they do not hold 100% of their share capital.

Joint-stock companies are generally preferred by foreign investors because of their greater flexibility in management and decision-taking. The minimum registered share capital of a joint-stock company is BGN 50,000. Shares of a joint-stock company may be physical (evidenced by transferable share certificates) or non-physical (book-entry form) shares existing in the form of entries in a registry maintained by the Central Depository. There are two systems of management: the one-tier system (with a board of directors); and the two-tier system (with a supervisory board, and a management board appointed by the supervisory board). The ultimate managing body for both systems is the general shareholders' meeting, which approves certain decisions of the utmost importance for the company. In practice, the two-tier system is preferred for companies with many shareholders and complicated activities. Physical shares are transferred by endorsement on the back of the share certificates, which, to be binding on the company, must be recorded in its shareholders' book. Non-physical shares are transferred by way of registration of the transfer with the Central Depository. Joint-stock companies are widely used by foreign investors because of the straightforward process of share transfers, flexible majorities for decision-making, flexibility in management and the impossibility of expelling shareholders (which exists in limited liability companies). Joint-stock companies are particularly suitable for joint ventures.

Setting up a branch office

Foreign companies may open a branch office in Bulgaria. A branch office must be registered with the Commercial Register, based on an application indicating

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the seat and purposes of the branch, the person who manages the branch and the scope of their representative powers. Branches, including those of foreign companies, are not independent legal entities. All contracts to which a branch is a party are in fact contracts with the principal. Therefore, the decision whether to open a branch office or a company (independent legal entity) is also an element of the risk management policy of the foreign investor.

Joint venture with a local or foreign partner

A foreign investor may choose to establish a joint venture with a local or foreign partner or partners to carry on business in Bulgaria and there are no specific statutory requirements in respect of arrangements of this kind. Usually, the joint venture is established and governed by a joint venture agreement (or a shareholders' agreement, when the joint venture is in the form of a jointly owned company).

Joint venture projects are usually implemented through the incorporation of a local company (typically a joint-stock company) in which the joint venture partners hold shares. Another option is to have the joint venture established in the form of a contractual general partnership (therefore, it is not a separate legal entity), and this is usually established by a general partnership agreement for completion of special projects (e.g., infrastructure construction projects or concession award procedures). In the latter case, the partners are responsible for the obligations of the partnership in relation to third parties.

9. What are the most attractive opportunities for foreign investors in Bulgaria at this time?

After the Ministry of Transport successfully finalised a EUR 37 million concession procedure for the civil airport in the capital city of Sofia, it announced further plans for concessions for public transport of national importance including seaports in Varna and Burgas, a river port in Ruse and an intermodal terminal in Dragoman.

In 2018, the Bulgarian Financial Supervision Commission granted an approval to the Bulgarian Stock Exchange (BSE) to create the new Small and Medium Enterprises Growth Market (BEAM), which is a special new market allowing for small and medium companies in Bulgaria to receive financing. More information on the current investment opportunities through the SME Growth Market is available on the website of the BSE at *https://beam.bse-sofia.bg/en*.

For some time now, Bulgaria has been trying to attract new greenfield investments by, among other things, stimulating the development of industrial parks. An important step towards this was the adoption of special legislation, which came into force in March 2021, regulating the status and conditions for the establishment, construction, operation and development of industrial parks.

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10. Do specific laws or mechanisms exist in Bulgaria to protect foreign direct investors?

At the international level, Bulgaria is a party to, among others, the Convention on the Settlement of Investment Disputes between State and Nationals of Other States, the Agreement establishing the World Trade Organization, as well as more than 130 agreements on mutual encouragement and protection of investments or avoidance of double taxation. Domestically, the principle of protection of foreign investment and economic activity is enshrined in the Constitution of 1991 and forms part of the substantive foundation of fundamental principles underpinning the Bulgarian legal order.

Bulgarian law offers foreign investors protection from unfavourable changes in national legislation. Pursuant to the Investments Promotion Act (IPA) enacted in 1997, any foreign investment made prior to the adoption of legislative changes imposing legal restrictions solely on foreign investments is to be governed by the legal provisions that were effective at the time of implementation of the investment.

There is special legal framework for promotion and certification of foreign investments, which is provided for mainly in the IPA and the Regulation for the Implementation of the IPA adopted in 2007. The IPA supports foreign investments by introducing a system of incentives for certified investments in tangible and intangible assets and the creation of new jobs related thereto. The Minister of Innovation and Growth, with the support of the Invest Bulgaria Agency, is directly responsible for implementing government policy on foreign investments.

AUTHOR BIOGRAPHY

Trayan Targov

Trayan Targov is a senior associate at BOYANOV & Co. specialising in aviation and transport law, information and communications technology law and food law. His other areas of practice include banking and finance, travel and hospitality, and corporate and commercial law. Trayan joined BOYANOV & Co.'s legal team in 2012. Four years later, Trayan completed an international secondment in Allen & Overy's global projects, energy and infrastructure group in Warsaw, Poland. In 2019, Trayan was awarded a scholarship from the European Regional Forum of the International Bar Association. In the 2019–2022 editions of The Legal 500: EMEA, Trayan Targov has been continuously recognised as a 'noteworthy practitioner' and a 'rising star' for transport as part of BOYANOV & Co.'s Tier 1-rated transport law practice.

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CHINA

Yao RAO, Sijia ZHANG, Shuaijie LU,
Shihao XIAO, Lu DANG & Junzhou JIN
HHP Attorneys-At-Law

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

According to the WTO Goods Trade Barometer (August 2022), the global trade volume plateaued, and year-on-year trade growth slowed to 3.2% in Q1, down from 5.7% in Q4 of 2021. The impact of COVID-19, which introduced extraordinary epidemic control measures such as lockdowns and quarantines as well as travel restrictions, along with the conflict in Ukraine, had dramatic effects on world trade.

It is against this background that some new trends and directions of world trade have emerged in recent years:

- **Supply chain reconfiguration.** The war in Ukraine and affected energy supply issues have drawn attention to balancing the efficiency, security, and resilience of supply chains, especially in key energy and resource supply chains for all jurisdictions, as well as in all areas of business.
- **Trade decarbonization.** The climate crisis, resource crisis, pollution, and other environmental issues should be tackled urgently for sustainable development. China has also committed to strive to achieve a carbon peak by 2030 and carbon neutrality by 2060.
- **Digital service trade transformation.** According to the report issued by the China Academy of Information and Communications Technology, from 2011 to 2020, the compound growth rates of global digital service trade, service trade, and goods trade are 5.4%, 2.3%, and 1.4% respectively, and the growth rate of digital service trade is significantly higher. By the end of 2020, the proportion of global digital trade in services trade increased to more than 60%.

For those intending to do business in China, it is advisable to pay attention to such trends as well as related local laws, regulations, and policies. An investor might be encouraged to invest in certain sectors, such as environment-friendly businesses and digital service trade. An investor should also prepare for the challenges of the supply chain due to the uncertainty of the global environment and it might be wise to build a backup supply chain in advance.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has China's government adopted an aggressive posture in regulating foreign investors?

China takes a friendly attitude towards foreign investment. The PRC Foreign Investment Law (FIL) stipulates a "pre-establishment national treatment rule" plus a "negative list system" for foreign investment. Foreign investors enjoy the same treatment in most industries as domestic investors. The negative list system regulates certain sensitive industries which are restricted or prohibited from foreign investment.

To determine if an investment in a specific industry is permitted, it is advisable to check if it involves an industry as prohibited, restricted, or eliminated in the negative lists and laws. The major negative lists include:

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1) Foreign Investment Negative List (FINL);
2) Market Access Negative List; and
3) Catalogue for Guiding Industry Restructuring.

The first list is only applicable to foreign investment, while the latter two are applicable to both foreign and domestic investment. Investment in a prohibited or eliminated industry is not permitted. Investment in a restricted industry is permitted, as long as it meets applicable restrictive requirements. Investments outside the above three lists are generally permitted without restrictive measures.

If an investment is permitted, no matter whether there are any restrictive measures, to establish a foreign-invested enterprise (FIE) it is necessary to file an online report with the competent foreign investment authority simultaneously with an application for company registration with the competent company registry.

3. Are there specific sectors of China's economy or industries where foreign direct investment is barred or highly regulated?

According to the 2021 FINL, foreign investment is **barred** in the following Prohibited Industries:

- R&D, culture, and cultivation of rare or unique valuable fine varieties of living creatures in China, and production of propagation materials.
- Breeding and production of transgenic varieties of seeds/larvae of crops, livestock, poultry, and aquatic living.
- Fishing of aquatic products in the sea area and inland waters under China's jurisdiction.
- Prospecting, mining, and dressing rare earth, radioactive minerals, and tungsten.
- Application of techniques for the processing of Chinese traditional medicines and the production of secret formulations of proprietary Chinese traditional medicines.
- Wholesale and retail of tobacco products.
- Postal service companies and domestic express mail delivery.
- Internet news information services, online publishing services, network audio and video program services, internet culture business (except music), and internet public information release services.
- China legal affairs consulting (except for providing information on the impact of the legal environment in China).
- Social surveys.
- Development and application of human stem cell and gene diagnostic and treatment technologies.
- Humanities and social sciences research institutions.
- Marine, land, aviation, and another industry mapping; map preparation; regional geological and geological survey operations; and other types of maps and related survey work (except for mining rights holders within the scope of the relevant mapping work).
- Mandatory education institutions and religious education institutions.
- News agencies.

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- Editing, publication, and production of books, newspapers, periodicals, audio and video products, and electronic publications.
- Radio and television stations/channels/on-demand services and installation of satellite television broadcasting ground receiving facilities.
- Production and operation of radio or television programs.
- Film production, distribution, and release.
- Cultural relics trading and state-owned cultural relics museums.
- Artistic performance groups.

According to the 2021 FINL, foreign investment is **restricted** in the following industries:

- Selecting and breeding new varieties of wheat and the production of seeds: Chinese shareholding should be no less than 34%.
- Selecting and breeding new varieties of corn and the production of seeds: Chinese shareholding should be the majority.
- Publication printing: Chinese shareholding should be the majority.
- Construction and operation of nuclear power plants: Chinese shareholding should be the majority.
- Public air transportation companies: (a) Chinese shareholding should be the majority; (b) the investment proportion of a foreign enterprise and its affiliates must not exceed 25%; and (c) the legal representative must be Chinese.
- General aviation companies: (a) the legal representative must be Chinese; (b) for general aviation companies in agriculture, forestry, and fisheries industries, the investment must be in the form of equity joint ventures; and (c) for general aviation companies in other industries, Chinese shareholding should be the majority.
- Construction and operation of civil airports: (a) Chinese shareholding should be relatively major; and (b) foreign investors are not allowed to participate in the construction and operation of airport towers.
- Domestic water transportation companies: Chinese shareholding should be the majority.
- Telecommunication services: (a) should be limited only to WTO commitments; (b) for value-added telecommunication services (excluding e-commerce, domestic multi-party communication, storage and forwarding, and call centers), the foreign shareholding should not exceed 50%; and (c) for basic telecommunication services, the Chinese shareholding should be the majority.
- Market surveys: (a) should be limited only to equity joint ventures; and (b) for surveys of radio and television audiences, the Chinese shareholding should be the majority.
- Institutes for pre-school, high school, and higher education: (a) should be limited only to contractual joint ventures; and (b) should be led by Chinese partners.
- Medical institutions: should be limited only to equity joint ventures.

Further, if a domestic Chinese enterprise engages in a business that is prohibited from foreign investment, the overseas listing of the enterprise shall get the prior approval of the Chinese authority. The foreign investor shall not participate in the operation of the enterprise. The foreign shareholding ratio is also subject to Chinese laws.

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4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in China and what steps has the government taken to respond?

The supply chain crisis impedes production, increases the costs for materials, and logistics, and slows down the development of the economy.

To tackle these issues, China has adopted targeted domestic policies. For instance, China encourages banks to strengthen financial support to "stabilize foreign trade". The banks shall postpone loan repayment requests for foreign trade enterprises. The authority also provides relief funds to qualified promising enterprises facing temporary difficulties. Further, the authority lowers the tax burden and expenses for small enterprises.

China is also building up a cross-border supply chain system. It focuses on cooperation with neighbouring countries and regions along the "Belt and Road Initiative". China has been setting up overseas warehouses and overseas settlements. Further, to expedite customs clearance, China has implemented a pilot program of "direct pick-up beside ship" for imported goods and "direct loading" for exported goods in eligible ports. Additionally, China offers tariff benefits for exports to RCEP members.

5. In M&A transactions as well as joint ventures in China, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

In a similar way to approaching green-field investment, it is critical that an investor assesses if the law permits the business after M&A. If the law prohibits such business, the investor has to abandon the M&A. If the law restricts foreign investment, the investor will need to consider whether to accept it, for example, a cap for foreign shareholding ratio. To get a rough idea of this issue, the investor may check the Negative Lists and Catalogue (see Question 2). For more accurate and detailed analyses, it is advisable to consult with an attorney.

If the law permits the business, the investor needs to further check if the M&A requires special approvals. The typical approvals are concentration review and national security scrutiny. An M&A requires approval by the Antitrust Bureau if the turnover of the controlled businesses after the M&A reaches certain thresholds. If a foreign-related M&A involves military areas, key resources, key infrastructures, etc., it is very likely to trigger such scrutiny.

If there is no significant legal obstacle to the M&A, the investor must conduct a due diligence investigation on the target company/assets. During the investigation, the investor will identify the risks/issues. Based on the due diligence results, the investor may require the seller/target company to rectify issues to mitigate the risks and better bargain on the price and contractual terms of M&A.

6. What is the best strategy for acquiring interests in real estate or other tangible property in China? Is this more difficult for foreign investors?

China restricts a foreign company or individual from directly buying and holding real estate in China. For instance, a foreigner is permitted to buy

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only one property after working or studying in China for more than one year. Such a property must be used for themselves and the maximum size of the property is limited. Therefore, it is advisable to buy real estate or a similar via a domestic business vehicle. A popular vehicle is a foreign-invested company. The law offers almost equal treatment of foreign-invested companies and domestic ones.

In China, common real estate refers to land use rights and property ownership. An individual or entity may not get ownership of the land. Instead, governmental authorities own the land on behalf of the people except in certain rural areas where the communities own the land. The authority may grant a land use right of certain years to an individual or entity. Property ownership belongs to the one who can use the land legally and builds the property.

To own property by building it, a company needs to get the correct land use from the authority first. The company must ensure that the land purpose, the area planning, and the support of local authorities permit future business. For the grant of land use rights, the authority will focus on the company's tax revenue commitment, business influence, etc.

To own a built property, a company may buy the property ownership and the remaining land use right from the seller. However, such transactions may still be subject to the review of the local authority on land use. So, it is advisable to consult with the authority before contracting with the seller. And the company must undertake due diligence on the real estate before the transaction. This is to mitigate potential flaws or risks such as mortgage, seizure, or other third-party claims.

However, to progress real estate development and sales in China, a company must get a special business permit. To apply for such a permit, the company should meet certain requirements, such as minimum registered capital, and professional personnel.

7. What laws or regulations exist in China to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

In recent years, China has paid more and more attention to protecting data exchange and personal information. Cyber Security Law (CSL) took effect in 2017. Personal Information Protection Law (PIPL) and Data Security Law took effect in 2021. Currently, they are the most important laws on this topic. The authority has also enacted regulations and standards on data protection. More legislation is on the way.

Like personal data in GDPR, personal information in PIPL is a very broad definition. It refers to all kinds of information related to identified or identifiable individuals. And PIPL governs every aspect to process personal information, from the collection and storage to all kinds of use and processing. Any entities or individuals that can determine the purpose and method of processing are referred to as "processors" under PIPL. The processor is like the "controller" under GDPR. When processing personal information, processors must follow the principles of lawfulness, justification, and necessity.

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China has also established a legal system to protect intellectual property rights. The system consists of international treaties and domestic IP laws and regulations. The law provides the same level of protection for both foreign investors and local entities. Domestic IP laws include Patent Law, Trademark Law, Copyright Law, Anti-Unfair Competition Law, etc. Further, FIL stresses: (1) the protection of IP rights of foreign-invested enterprises and investors; and (2) the prohibition of forced technology transfers.

8. Describe the most common legal structures used by foreign investors when doing business in China.

The most popular legal structure selected by foreign investors is a wholly foreign-owned enterprise (WFOE). In such a structure, the foreign investor gets full control of the WFOE.

In addition to a WFOE, a foreign investor may select a Sino-foreign Joint Venture if: (1) the intended business is restricted from foreign investment where foreign ownership is subject to a cap; or (2) a Chinese partner has the capability and resources to facilitate the business.

In most cases, investors will form a WFOE or a Joint Venture in a form of a limited company. In a limited company, an investor's liability is limited to the subscribed registered capital. According to the PRC Company Law, a limited company shall have a shareholders' meeting (in case of two or more shareholders or, just one sole shareholder), a board of directors (or an executive director), a supervisors' meeting (or, one or two supervisors), and a manager (appointed by the board or executive director). The sole shareholder or the shareholders' meeting shall be the highest authority of the company. The board shall be accountable to the sole shareholder or the shareholders' meeting and make resolutions on the basic management matters of the company.

9. What are the most attractive opportunities for foreign investors in China at this time?

The Catalogue of Industries to Encourage Foreign Investment (2022 version) (the "Encourage Catalogue") issued by the Ministry of Commerce (MOC) outlines the attractive investment opportunities and encourages foreign investment in specific industries and regions. Foreign investors in these projects can benefit from preferential policies, such as tariff exemptions, reduced taxes and land supply.

The new Encourage Catalogue reflects several trends that present significant opportunities for foreign investors:

- **Continue encouraging foreign investment in advanced manufacturing.** Compared to the previous version, in the field of end products, the latest Encourage Catalogue adds or modifies items for aviation ground equipment, glow discharge mass spectrometer, transmission electron microscope, industrial water-saving related equipment, etc. In the field of parts, it adds or modifies items for shield machine bearings, key components related to automatic driving, high-performance light metals, etc. In the field of materials,

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it adds or modifies items for consumables related to the pharmaceutical manufacturing industry, high-purity electronic chemicals, high-performance coatings and organic polymer materials.

- **Continue encouraging foreign investment in modern service industries, particularly in promotion of integration of the service and manufacturing industries.** New or modified investment opportunities include environmental protection technology development, professional design services, vocational colleges, human resources services, clean production evaluation certification and review, etc.
- **Continue encouraging foreign investment in the central and western regions, also applicable in the Northeast and Hainan.** The Encourage Catalogue has significantly increased the number of investment items encouraged in these regions, tailored to each province's unique conditions. For instance, Shanxi, Liaoning, Anhui and Ningxia have added the production of smartphones, tablet PCs and their key components, the research and development and production of functional and environmentally friendly recycled polyester filaments, and the manufacture of liquid crystal display materials and organic electroluminescent display materials. In Tibet, Xinjiang, Yunnan, and Qinghai, investment in commercial chain operations, desert economy industries, cross-border logistics, and ecological tourism resource protection development and operation are encouraged.

Moreover, the National Development and Reform Commission (NDRC) has issued Several Measures for Encouraging Foreign Investment in the Establishment of R&D Centers. These measures offer various policy initiatives to promote scientific and technological innovation, R&D convenience, overseas talents introduction, and IP protection, to create a more favourable environment for foreign investment in R&D centers.

10. Do specific laws or mechanisms exist in China to protect foreign direct investors?

As a general principle stipulated by FIL, foreign investors enjoy national treatment and are protected by Chinese laws. The most specific laws to protect foreign investors include:

- FIL and its implementation rules;
- the Measures for Complaint Work of Foreign Invested Enterprises; and
- the Regulations of the Supreme People's Court on Several Issues Concerning the Hearing of Dispute Cases of Foreign Invested Enterprises.

To summarise the most important elements of the above laws, they offer:

- **Equal protection.** The laws offer foreign investors and foreign investment a treatment no lower than that of domestic investors and their investment. The law stresses IP protection for foreign investors and foreign-invested enterprises.
- **Freedom on fund remittance.** Foreign investors may freely remit their capital contributions, profits, capital gains, income from asset disposal, intellectual property licensing fees, legally obtained compensation, and liquidation income in and out of China in Renminbi or foreign exchange according to law.

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- **Special complaint mechanism.** In addition to normal protection for both domestic and foreign enterprises, China has set up a special complaint mechanism for FIEs and foreign investors. If an FIE or a foreign investor believes the conduct of the administrative authority or the officer infringes their legitimate rights and interests, the FIE or the investor may apply to the special complaint working body for coordination and resolution.

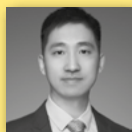
AUTHOR BIOGRAPHIES

Yao RAO

Yao Rao has been providing legal services for multinational companies in China since 2002, specializing in providing solutions for M&As in highly regulated industries, such as medical device, medical institution, medical packaging, nutrition food and mining. Yao has assisted many Chinese enterprises in outbound investments including M&A and construction projects. Yao has extensive experience in comprehensive labour law matters. He also represents a great number of multinational companies in setting up their various commercial presences in China, and provides consultation in the areas of data compliance, construction, competition, tax, foreign exchange, customs, environmental protection, anti-monopoly etc. Yao has been selected by the PRC MOJ as a member of the National 1000 Outstanding Foreign-related Lawyers and recommended as a leading individual by many international legal directories including Chambers and the Legal 500.

Sijia ZHANG

Sijia joined HHP in 2011 upon her graduation from the Law School of Fudan University. Her main practice areas encompass Corporate and M&A, Foreign direct investment, Compliance and Construction. She specializes in providing solutions in M&A and restructuring, upgrading, compliance and risk control of corporate matters, inbound and outbound investments as well as construction projects. She provides a full range of legal services to foreign and domestic clients in various industries including furniture, machinery equipment, chemicals, food and catering, cosmetics, medical device, new energy, software, and so on.



Shuaijie LU

Shuaijie joined HHP in 2015 upon his graduation from the Law School of Nanjing University. He provides a wide and full range of legal services for both foreign and domestic clients in various sectors, mainly equipment manufacturing, chemical, food & beverage, cosmetics, international trade, healthcare and pharmaceuticals, real estate, engineering, banking, privately offered funds, financial lease, sports and so on. His main practice areas include Corporate and M&A, Data compliance, Construction and related contentious legal services. Shuaijie has been ranked as a Rising Star by the Legal 500.

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Shihao XIAO
Shihao joined HHP in 2016 upon his graduation from the Law School of Nanjing University. He is dedicated to the practice areas of Corporate and M&A and Data compliance and regularly advises multinational clients of diverse industries on inbound and outbound investment, data and privacy risk assessment, establishment of cybersecurity and data management systems. He also has extensive experience in providing contentious and non-contentious legal services in labour law and intellectual property rights.

Junzhou JIN
Junzhou obtained his LL.B from East China University of Political Science and Law and joined HHP in 2022. As a paralegal, he provided valuable assistance for the drafting of this Chapter.

Lu DANG
Lu obtained her LL.B from Fudan University and joined HHP in 2022. As a paralegal, she provided valuable assistance for the drafting of this Chapter.

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FINLAND

Peter Jaari
Lexia

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see the world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

Finland has strived for a certain level of security of maintenance ever since the Second World War. More recently, the COVID-19 pandemic has affected supply chains in several different industries in Finland, particularly because of shortages in electrical components and medical devices, which created a need to evaluate and develop domestic manufacturing processes and self-sufficiency. Following the 2022 Russian invasion of Ukraine, and the resulting sanctions imposed by the West, there is an even greater focus on security of maintenance and supply. One of the key industries to consider is the energy sector.

Geopolitically, although export to Russia had not been as significant as before the collapse of the Soviet Union in the early 1990s, Finland had maintained economic ties to the East until the spring of 2022 (although declining from 2014 following Russia's illegal annexation of Crimea). The other growing risk to global security and growth is China. Due to the current situation with COVID-19 and Chinese political instability, in connection with a growing conflict of interest between the East and the West, other growth areas and export opportunities need to be reviewed.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Finland's government adopted an aggressive posture in regulating foreign investors?

Foreign direct investment (FDI) in Finland is generally welcomed. Finland is considered to be one of the most open economies amongst the Organisation for Economic Co-operation and Development (OECD) member countries. Stable economy, and society, strong institutions and low corruption levels are all attracting foreign investors to Finland. Finland has a strong reputation for economic stability (see *www.investmentmonitor.ai/global/fdi-drivers-and-political-stability) along with a business-friendly environment (see www.investmentmonitor.ai/global/fdi-drivers-and-barriers-in-the-business-environment*), both enticing factors for foreign direct investment. The country has also become established as a sought-after destination for research, development and innovation (see *www.investmentmonitor.ai/finland/how-finland-is-growing-its-status-as-a-world-leading-healthcare-innovation-hub*). In 2021, the Global Innovation Index (*www.globalinnovationindex.org*), which ranks the most innovative countries in the world, ranked Finland seventh globally, and fifth in Europe, out of 126 economies.

However, FDI screening has increased significantly in recent years and has become more of a consideration for investors. The 2012 Act on the Monitoring of Foreign Corporate Acquisitions, 172/2012 (amended in 2014 and 2020) allows the Ministry of Employment and Economy (MEAE) to monitor and (if required) propose restrictions on the transfer of influence over key entities to foreign owners (see Question 3).

Further issues exist around an exceptional increase in the number of FDI filings, the limited state resources available to process the increasingly complex screening procedure (requiring more detailed information from the investor) along with there being no judicial deadline for the State to grant FDI approval. This has led to the completion of transactions being delayed.

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Given the situation in Ukraine, the European Commission has also advised that Member States should ensure close cooperation between screening authorities and national financial institutions to identify transactions which might threaten EU-wide security, currently aimed at FDI originating from Russia and Belarus (but certainly not limited to those countries).

Since January 2020 direct acquisitions of real estate assets by foreign investors have also been subject to a screening process, particularly regarding property transactions close to strategic locations, where the State can exercise a pre-emption right (see Question 6).

3. Are there specific sectors of Finland's economy or industries where foreign direct investment is barred or highly regulated?

Foreign investment is generally encouraged and welcomed in Finland. However, the Act on the Monitoring of Foreign Corporate Acquisitions 172/2012, allows the Ministry of Employment and Economy (MEAE) to monitor and, if in the national interest, propose restrictions on the transfer of influence over key entities to foreign investors.

Acquisitions in the defense sector (including defense equipment and dual-use products) and the security industries are always subject to mandatory screening and require prior approval.

Finland's 2018 Government Decision on the Objectives of Security of Supply lists business sectors deemed to be part of the vital infrastructure necessary for a functioning society, and provides a comprehensive view of security of supply. With that in mind, in recent years, FDI screening in Finland has concentrated on critical industries such as technology, pharmaceuticals, healthcare and energy.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Finland and what steps has the government taken to respond?

Finland has experienced shortages in many industries, particularly involving the supply of electrical components and medical devices. This has created a need to evaluate and develop domestic manufacturing processes and self-sufficiency.

5. In M&A transactions as well as joint ventures in Finland, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

No specific issues.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Finland? Is this more difficult for foreign investors?

The strategy for acquiring interests in real estate in Finland is similar to other EU or Nordic countries.

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However, from 1 January 2020 and regulated by the Act on Permission Requirements in Certain Real Estate Acquisitions, 470/2019, foreign purchasers of real estate in Finland have been subject to a screening process.

Non-EU or EEA entities and citizens as well as EU or EEA entities, in which a non-EU or EEA natural person or entity holds at least 10% of the total voting rights or exercises equivalent actual control, need a permit from the Ministry of Defence in order to acquire real estate in mainland Finland (to ensure any purchase would not threaten national security). However, the Ministry of Defence has reviewed hundreds of applications between 2020 and 2022 and none have been rejected (although the existence of the screening rules has been a useful deterrent to unsuitable investors). In June 2022, the Finnish Government published a draft legislative proposal allowing the Ministry of Defence powers to request further information regarding potential purchasers and their funds, following principles in the Screening Regulation (Regulation (EU) 2019/452).

Additionally, the Finnish State has been granted (by the Act on the State's Right of Pre-emption in Certain Areas, 469/2019) a pre-emption right to acquire real estate assets located within a certain distance of areas designated to or serving the Finnish Defence Forces or Border Guard. To date, this pre-emption right has only been exercised in two instances (for property close to an air base and a military base), and, according to media, both potential investors had links to Russia (both decisions are pending appeal).

7. What laws or regulations exist in Finland to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

In Finland, data privacy is protected by several different laws. The General Data Protection Regulation (GDPR) is a general law, but in addition, national special legislation must be considered, especially with regard to electronic communication and employee protection. Processing of electronic communication is regulated in the Information Society Act (917/2013) and the processing of employees' personal data is regulated in the Act on the Protection of Privacy in Working Life (759/2004). In these cases, the processing basis is basically the voluntary consent of the party.

There is also other sector-specific special legislation, such as the processing of patient data.

Regarding intellectual property rights, there is no such special regulation in Finland that would cause major challenges for foreign investors.

8. Describe the most common legal structures used by foreign investors when doing business in Finland.

Limited company (*Oy/Ab*) is the most used, or listed limited companies (public) (*Oyj/Abp*). A limited company can be established alone or with other shareholders and is suitable for all types of business operation. A shareholder's voting power, profit and liability is dependent on their number of shares.

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Every new limited liability company should file a start-up notification with the Finnish Trade Register (PRH) and the Finnish Tax Administration. Limited liability companies are established through registration (see *www.prh.fi/en/kaupparekisteri/yrityksen_perustaminen/osakeyhtio.html*).

9. What are the most attractive opportunities for foreign investors in Finland at this time?

In 2022, the government announced significant tax incentives for foreign investors to conduct **research and development** (R&D) activities in Finland. Corporation tax of 20% (the lowest in the Nordic region) along with the new tax legislation offering a 150% tax deduction on joint R&D projects conducted between 2021 and 2025, makes this area of investment extremely attractive.

In addition, with the aim of providing funding and network support to businesses operating in the **healthcare and well-being industries**, Business Finland has introduced the Smart Life Finland programme, (see *www.businessfinland.fi/en/for-finnish-customers/services/programs/smart-life-finland*).

The ease of doing business in Finland, along with these generous incentives, will continue to attract significant levels of FDI in the future.

10. Do specific laws or mechanisms exist in Finland to protect foreign direct investors?

No specific laws exist.

AUTHOR BIOGRAPHY

Peter Jaari

Peter Jaari is an attorney at law, partner at Lexia Attorneys Ltd, Helsinki Finland (since 2008). Previously he worked in another law firm and also in commercial positions in import business. He has a master in law from Helsinki University and trained on the bench at Helsinki District court 2006-2007. He is specialized in dispute resolution, especially commercial liabilities.

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FRANCE

Neil Robertson
Bignon Lebray

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

The tide of ever-increasing globalisation and economic integration is receding. The imposition of trade tariffs between the US and China, events such as Brexit, and trends such as the rampant popularity of advocates for greater protectionism in Europe, are all signs that the golden age of globalisation could be behind us.

Ceasing dangerous dependencies amid increasingly tense geopolitical contexts

The shortage of PPE equipment at the start of the COVID-19 pandemic, the race to get hold of vaccines, and the extensive and lasting disruption to the global supply chain were recent reminders that global economies are dangerously reliant on the fluid movement of goods around the world for their economic and social wellbeing.

The recent trade sanctions imposed on Russia made Europe realise that its dependence on Russia for its energy supply was problematic. Similarly, European countries fear getting caught in the middle of the increasingly tense US-China political relationship.

Within this context, France aims to become more self-reliant in certain key industries. In January 2022, for instance, the French Ministry for the Ecological Transition vowed to secure France's supply of mineral raw materials used in the electric mobility and renewable energy sectors by supporting "initiatives that can be rapidly industrialised on the French territory".

The French government may also seek to import from a wider variety of countries, to become less dependent on any one of them, which could represent opportunities for foreign companies to enter the French market. It could also advantage lesser-known French companies, by allowing them to secure French public procurement contracts which might previously have been won only by industry leaders.

Favouring short supply chains to avoid shortages

France will still wish to reap the benefits of open trade, but it is likely to favour shorter supply chains to avoid shortages. This means not only increasing imports from geographically close fellow EU Member States, but also encouraging domestic production of certain goods and services, by investing in French companies and French branches of foreign companies. Foreign investors could make the most of this trend by investing in France.

Not all investors, however, may be in a position to do so. Many European companies still have no other choice than to produce some of their goods outside of the EU, where labour and raw materials are cheap. By contrast, the industries for which this trend may be particularly relevant, are those that require highly skilled workers to operate.

"Globalisation among friends"

While previously the reasoning was that more trade between countries would

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result in co-dependencies and ultimately less geopolitical rivalry, countries are now choosing to trade with blocks they can trust.

France will increasingly want to deal with national and European companies, and with trade partners that share the fundamental values of the West, creating a tendency for "Globalisation among friends" (as Janet Yellen, the US secretary of the treasury, called it).

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has France's government adopted an aggressive posture in regulating foreign investors?

Under the French FDI rules, a foreign investment in France requires the prior authorisation of the Ministry of Economy (MOE) if it fulfils the following three cumulative conditions:

- it is carried out by a "foreign investor";
- it is a "regulated investment"; and
- it is carried out in a sector considered to be "sensitive".

These terms are defined below. The scope of some of these categories was broadened in 2020, in order to prevent foreign companies from taking over French companies that were struggling during the COVID-19 pandemic.

Foreign investors are defined as:

- foreign individuals;
- French individuals who are not tax residents in France;
- foreign legal entities; and
- French legal entities "controlled" by a foreign individual or entity. The definition of "control" is very wide and can even encompass minority shareholdings that are significant, such as if they hold "decisive influence".

A **regulated investment** is defined as:

- the acquisition of control;
- the partial or total acquisition of a branch of activity of a French company; and
- those resulting in a non-EU or non-EEA investor holding 10% of voting rights in a French listed company or 25% of voting rights in a non-listed French company. The threshold was set at 25% of voting rights for all French companies before 6th August 2020 but was lowered for French listed companies during the COVID-19 pandemic in order to prevent minority interests from having too much influence. The 10% threshold will remain applicable until the end of 2023.

Finally, foreign investments in any sector considered to be sensitive (such as public safety and national defence), are subject to the prior approval procedure. The French FDI regulation of May 2019 considerably broadened the list of sensitive sectors, adding, for instance, research into technologies such as cybersecurity, AI and robotics. During the COVID-19 pandemic, investments in biotechnology, and R&D into renewable energy were added to the list.

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Only foreign investments that fall within the scope of all three criteria (on investors, investments and sectors) are subject to prior authorisation. Nonetheless, even if the investment does not fall within the scope of those categories, the French government may still make it conditional upon the fulfilment of specific conditions, or it can reject it altogether, for instance if it considers that national interests will not be sufficiently safeguarded if the investment were made.

If the foreign investment is subject to prior authorisation, the following procedure applies:

1) The investor may submit a preliminary enquiry to the MOE, to ask if the sector of proposed investment would fall within the list of "sensitive" sectors. Regardless of the MOE's answer, the investor must still go through the entire approval procedure. Nonetheless, submitting a preliminary enquiry may help the investor plan ahead and save time.
2) The investor submits an investment application to the French MOE who must decide within 30 business days whether to reject it, approve it, or carry out a more thorough review which can last up to 45 business days. The review results in either a rejection or approval, subject to conditions. A lack of answer from the MOE within those timeframes is deemed to be a silent rejection. A rejection can be appealed within 2 months, in front of the MOE itself or the administrative courts. The application itself requires submitting a vast amount of information to the MOE, such as the chain of control and ultimate beneficiary of the target company, and its main French and EU clients. Since 1st January 2022, the list of documents to be submitted has been extended and investors are now also required to disclose, for instance, the investor's strategy within the EU.
3) Post-completion filings are to be carried out within 2 months of completion.

3. Are there specific sectors of France's economy or industries where foreign direct investment is barred or highly regulated?

Foreign investment into the activities listed below is highly regulated, and may require prior authorisation from the French MOE:

- activities relating to arms, ammunition, powders and explosive substances for military purposes or to war material and the like;
- activities relating to dual-use items and technologies listed in Annex IV of Council Regulation (EC) No 428/2009 of 5th May 2009;
- activities carried out by entities holding national defence secrets;
- activities carried out in the IT security sector, including as a subcontractor, for the benefit of a public or private operator managing vitally important installations;
- activities carried out by entities that have signed a contract, either directly or by subcontracting, for the benefit of the Ministry of Defence for the production of a good or service falling within a sensitive activity;
- activities relating to the study of coded messages;
- activities relating to technical equipment or devices likely to allow the

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interception of correspondence or designed for the remote detection of conversations or the capture of computer data;
- activities relating to the provision of services by assessment centres approved under the conditions set out in Decree No. 2002-535 of 18th April 2002 on the assessment and certification of the security offered by information technology products and systems;
- activities in the gambling sector — with the exception of casinos;
- activities to counter the illicit use of pathogens or toxic agents in terrorist activities;
- activities involving the processing, transmission or storage of data, if their jeopardy or disclosure is likely to affect the carrying out of sensitive activities;
- activities relating to infrastructure, goods or services that are essential in order to safeguard:
  - energy supply;
  - water supply;
  - the operation of transport networks and services;
  - space operations;
  - the operation of electronic communications networks and services;
  - missions carried out by the national police, the "gendarmerie", civil security services, as well as the exercise of the public security missions of customs and those of companies approved as private security companies;
  - the operation of establishments, installations and works of vital importance within the meaning of the Defence Code (and their information systems);
  - the protection of public health;
  - food safety;
  - publishing, printing or the distribution of political and general information press publications;
- research and development activities relating to critical technologies (cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, energy storage and biotechnologies and technologies involved in the production of renewable energy); and
- research and development activities involving dual-use goods and technologies.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in France and what steps has the government taken to respond?

The global supply chain collapse led to shortages in France, especially of raw materials, electronic components and medicine. Having identified areas of vulnerability, the French government decided to diversify its supply sources to improve its autonomy.

It realised, for instance, that the Cloud computing sector is led by non-European players and therefore launched the "GAIA-X project" with Germany to try and facilitate access to the market for various other Cloud computing operators.

The Government also aimed to increase the production of strategic goods on French territory, through its "France Revival" plan, which provides support

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to French companies. It hoped to reduce France's industrial and technological dependency on non-European countries in the following sectors: health products, agri-food, critical inputs for industry, electronics and telecommunications. A paracetamol manufacturing facility will, for example, be repatriated to France by 2024, which will reduce Europe's dependency on the international market by one third.

Increasing stock for certain key products was also seen as essential, and, since 30th March 2021, the French government requires operators of medicine and medical devices that are intended for the French market to hold a certain amount of stock.

5. In M&A transactions as well as joint ventures in France, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Prior to contemplating a transaction, foreign investors should:

- Check if the contemplated transaction could require prior authorisation from the French MOE. A preliminary enquiry with the MOE can be launched very early on in the investment process, even before a letter of intent is signed. While it will not shorten the investment application procedure itself, knowing in advance whether prior authorisation will be necessary should allow investors to save time by compiling information early.
- Verify whether there will be a requirement to inform and consult the employees, any trade union or other internal employment organisation within the French target company, in connection with the contemplated transaction.
- Comply with EU or French antitrust regulations: if the thresholds specified in the relevant law are met, the French (or European, depending on the transaction) Competition Authority must be notified prior to the transaction, to avoid incurring fines.

6. What is the best strategy for acquiring interests in real estate or other tangible property in France? Is this more difficult for foreign investors?

In France, the services of a Notary are required to register any purchase, lease or mortgage over real estate. If the target company owns significant real estate, it would be advisable to instruct a Notary to investigate and/or certify the title to the property.

Clients acquiring real estate are often advised to do this through a corporate structure rather than directly, which can give both protection from liability and flexibility in any subsequent sale process. There can also be tax and registration duty advantages.

Depending on the nationality of the foreign investor, opening a bank account and completing a KYC check may take time and potentially slow down the investment process. Documents evidencing the origin of funds should be compiled early.

Non-French speaking foreign investors would be well advised to use advisors who are bilingual to assist them in the investment process, as French civil servants are unlikely to speak another language than French.

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7. What laws or regulations exist in France to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

In France, the main legislation governing data protection is Regulation (EU) 2016/679 that came into force on 25th May 2018 (the GDPR), and the French Data Protection Act.

The following laws also deal with data protection in France:

- Directive 2022/58/EC (as amended by directive 2009/136/EC), the "ePrivacy Directive", implemented under French law in 2004;
- Directive 2016/680 on the processing of personal data by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, implemented under French law in 2018;
- Articles L.34-1 *et seq*. of the post and electronic communications Code; and
- Articles 226-16 *et seq.* of the French criminal Code on criminal sanction and fines for infringement of an individual's data protection rights.

Trademarks and patents can be registered with the French National Institute of Industrial Property. All procedures relating to industrial property rights are dealt with online, making processing more efficient and allowing applicants to track the progress of their applications in real time.

The French data protection authority (CNIL) and the authority responsible for competition and consumer law (DGCCRF) ensure that the various stakeholders comply with data protection regulations, and can impose sanctions for non-compliance.

The robustness of these laws and the sanctions applicable in case of infringement, provide foreign investors with the certainty that their IP rights are well protected.

8. Describe the most common legal structures used by foreign investors when doing business in France.

There are many different types of companies in France (both civil and commercial) and the choice of legal structure determines the structure and terms of the transaction. The most common types of companies used by foreign investors are the following:

- The *société par actions simplifiée* (SAS) which is the most standard form of entity for private companies. It is possible for it to have only one shareholder, and the minimum share capital required is just EUR 1. An SAS can operate in a variety of ways, and its by-laws can be tailored to meet specific business needs. For instance, the management structure can vary from having just one director, to having a more traditional governing body, such as a board of directors. Importantly, no share certificates are issued in an SAS or in an SA. Instead, shareholders and shareholdings are registered in the shareholder accounts and share transfer books, which are usually kept by the company itself. Transfers of shares are implemented by way of signature of a transfer form and recorded in the share transfer books.

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- The *société anonyme* (SA). This is the appropriate form for a public (i.e., listed) company, and requires a minimum of two shareholders and a share capital of at least EUR 37,000. An SA can only be managed either by a CEO and a board of directors, or by an executive committee and a supervisory board. The operating and management rules of an SA are strictly defined in the French commercial Code.
- The *société à responsabilité limitée* (SARL) (private limited liability company). Traditionally, this type of company was used mainly by entrepreneurs. Its shares are known as interest shares (*parts sociales*). The identity of the shareholders is available to the public as their names appear in the by-laws, which must be filed at the Commercial Registry. A change of shareholder therefore usually entails amending the by-laws. Transfers of shares to third parties are restricted and require the prior approval of the shareholders (*clause d'agrément*). When an individual purchases shares in an SARL, the consent of their spouse may be required, depending on their matrimonial regime.

9. What are the most attractive opportunities for foreign investors in France at this time?

According to the 2021 EY Attractiveness Survey for France, the logistics domain is proving attractive, as it is driven by the boom in the e-commerce and health sectors, especially since the COVID-19 crisis.

Investing in France in sectors linked to the ecological transition could also be attractive to foreign investors. The French government intends to roll out tax breaks and other incentives to encourage companies and individuals to transition to greener energy and will ultimately adopt legislation that will make such transitions compulsory.

Projects relating to manufacturing could also present attractive investment opportunities for foreign investors, for many reasons. The French labour force is highly skilled and productive, tax relief is available to companies that invest in research and development (called *Crédit d'Impôt Recherche*), and the government provides young and innovative firms with certain exemptions from social security contributions. The country's infrastructure is well developed, allowing for the smooth shipping of raw materials and goods produced, and movement of people, both domestically and internationally. France being the second largest consumer market in Europe, domestic demand for manufactured goods would be high.

Healthcare is currently another attractive industry to invest in. International investment in this sector has grown, and France is the European country that received the most investment in healthcare in 2020. Moreover, in 2021, the number of foreign investment projects in the French pharmaceutical industry was up by 123% compared to 2019, illustrating the boom in the industry. Importantly, the French government will invest close to EUR 7 billion as part of its "Health Innovation 2030" strategy, to foster innovative investment in healthcare, and also plans on making the process of reviewing and authorising clinical trials and granting market access, more competitive and predictable. It will also support

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industrial investment in the sector, with the aim of making France a leader in health-tech. According to 2019 OECD statistics, France is ranked first among OECD countries in terms of access to healthcare, making it an attractive market for foreign pharmaceutical companies.

Finally, the French Ministry for Ecological Transition aims to increase domestic production of materials used in the electric mobility and renewable energy sectors in particular, to increase France's independence. To do so, it will invest extensively to help companies produce such products on the French territory, so investment in those sectors could be promising.

10. Do specific laws or mechanisms exist in France to protect foreign direct investors?

France has signed bilateral investment agreements with 115 countries, which provides foreign investors from those countries with an additional level of protection, on top of their commercial contracts, in relation to government policies that could impact their activities. In practice those agreements protect foreign investors against unfair or inequitable treatment, such as, for example, arbitrary expropriation by the host country.

Foreign investment in France is also protected thanks to France's strict anti-corruption laws. The severe penalties inflicted in case of breach of the provisions act as strong deterrents. For instance, the law "Sapin II" introduced on 9th November 2016 relating to transparency, modernisation of the economy and the fight against bribery, created the "French Anti-Corruption Agency". It helps prevent and detect acts of corruption, extortion, misappropriation of public funds, and other related misconduct, with significant financial sanctions in case of breach.

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Foreign investors in France also benefit from the country's robust legal framework to protect and enforce their IP rights. For instance, copyrighted works in France are protected during the author's life and for 70 years after their death, whereas the length of the protection offered under the Agreement on Trade-Related Aspects of IP Rights (ADPIC) is just 50 years after the death of the author. Similarly, a registered trademark is protected for 10 years under French law, as opposed to only 7 years under ADPIC.

AUTHOR BIOGRAPHY

Neil Robertson

Neil Robertson is a member of the Corporate Law, Mergers & Acquisitions and Private Equity departments of Bignon Lebray. He is admitted to practice both in France and England & Wales. He has advised on multiple transactions in the wine and spirits sector, both for private companies and for listed companies. He has also advised clients in the cosmetics, perfume and media sectors. Many of the transactions he has advised on are of a "cross-border" nature.

Furthermore, he has developed significant expertise in sports law, labour law, property law and banking law. He regularly advises sports clients, clubs and event organisers.

In 2022, Neil was referenced by Legal 500 EMEA, IFLR 1000 and Palmarès du Droit.

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GERMANY

Dr. Anton M. Ostler
Arnecke Sibeth Dabelstein

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

The German economy has experienced a considerable upswing during the liberalization of world trade over the last 50 years.

German companies benefited from global production opportunities at low-cost. The increased importance of foreign trade came with new forms of business organization and production, particularly the concepts of outsourcing and lean production. In conjunction with the growing demand for low-cost, high-quality consumer goods, domestic sales opportunities multiplied. The increase in goods exports led to a steady rise in gross domestic product. Due to its above-average foreign trade ratio, the country is the third strongest exporter in an international comparison.

However, the strong dependence on foreign trade is not exclusively advantageous for domestic companies. For example, the global economic crisis of 2008/2009 and the accompanying global economic downturn led to major challenges for German companies.

In 2020, the COVID-19 global pandemic triggered a severe recession. Pandemic-related protective measures such as plant closures, short-time work and hiring freezes drastically restricted the growth of companies based in the manufacturing sector. In the tourism and hospitality sectors, development came to a complete standstill in some cases. Thanks to the country's expansive monetary and fiscal policy, the consequences of these crises have so far been mitigated by the state. Compared to other countries in the European Economic and Monetary Union (EMU), Germany has therefore largely recovered from the consequences of the pandemic.

However, the domestic economy is already facing new problems. The persistent shortage of important trade goods continues to cause delivery delays. War-related trade embargoes, especially for German domestic trade with Russia and Belarus, as well as between China and Taiwan, have had a significant impact on the generation of intermediate goods and the energy supply of domestic companies.

In addition, protests regarding global climate development have come to a head. Sustainable production, reduction of CO_2 emissions and the conservation of resources demand a change in corporate thinking and call for new concepts.

In this context, consultation on international trade conditions, sustainable corporate development, and corporate restructuring is of crucial importance for organisations to successfully participate in the global markets.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Germany's government adopted an aggressive posture in regulating foreign investors?

As the largest economy in Europe, Germany is an attractive destination for foreign investors.

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According to §1 of the Foreign Trade and Payments Act (AWG), "The trade in goods, services, capital, payment transactions and other types of trade with foreign territories, as well as the trade in foreign valuables and gold between residents (foreign trade and payments) is, in principle, not restricted. It is subject to the restrictions contained in this Act or prescribed by ordinances issued on the basis of this Act."

In order to protect domestic security from the negative effects of foreign direct investment, acquisitions by non-EU and non-EFTA investors are subject to a cross-sectoral review by the Federal Ministry of Economics and Climate Protection. In accordance with the EU Screening Regulation, the other member states and the European Commission are also at liberty to submit statements and comments on public safety and order, which are considered in the screening decision.

3. Are there specific sectors of Germany's economy or industries where foreign direct investment is barred or highly regulated?

In sectors that are particularly sensitive to security, such as military technology, governmental IT security and confidential patents, a sector-specific review process is carried out. If a foreign investor acquires 10% or more of the company's shares, the Federal Ministry of Economics and Climate Protection must be informed and the acquisition is subject to a comprehensive audit, regardless of the investor's citizenship.

This includes an evaluation of expected risks to essential security concerns. If the outcome is likely to endanger domestic safety and order, the acquisition will be prohibited by the state.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Germany and what steps has the government taken to respond?

In 2020, the COVID-19 pandemic in Germany highlighted the fragility of global supply chains. In the past, many companies focused on the optimization of their processes. In minimizing operational costs, reduction of stock levels and increment of plant utilization, as well as through relocation of entire manufacturing sectors to foreign countries and just-in-time production, the dependency of German companies on other economies was more evident than ever. Finally, the pandemic revealed that sustainable entrepreneurial decisions cannot rely solely on profit-oriented economic factors.

In addition, the United Kingdom's exit from the European Union on January 31, 2020, also had devastating consequences for the German sales market, as the UK was the third most important export market for German products, especially in the automotive industry.

In order to provide financial support for domestic companies and protect them from the risk of insolvency, the German government launched a series of programs, such as interim and restart grants. The main focus was on recapitalizing businesses and providing state credits to companies. In addition, companies

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received temporary support and were granted guarantees and export credits. Taxation of domestic companies was simplified in various ways, such as the extension of the tax deferral period, the return and adjustment of advance tax payments and the extension of the loss carryback period.

5. In M&A transactions as well as joint ventures in Germany, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

The acquisition of, or the participation in, a German company requires a well-defined concept. These are the critical issues to consider:

- **Risk assessment.** In order to avoid risks, it is necessary to determine earnings, liquidity, equity and debt capital, existing financing structure and related value enhancement potentials as well as the legal situation of the target company, in particular pending legal disputes, in advance within the scope of a due diligence review.
- **Examination under antitrust law.** A competition and market analysis must be carried out with regards to the subject of the company and the business model. If the fusion is subject to antitrust law, it must be reported to the Federal Cartel Office for further monitoring.
- **Protection of intellectual property.** If the target company holds intellectual property rights such as patents, trademarks and designs or related licenses, their coverage must be identified.
- **Company acquisition.** Finally, the target company is transferred as part of an asset deal, through the acquisition of individual assets, or a share deal, by acquiring the majority shares of the company. Depending on tax and liability advantages, the two separate companies either merge to a single company or are combined as independent subsidiaries under a holding group. The acquisition of a corporation listed on the stock market must also be reported to the BaFin (Federal Financial Supervisory Authority). A stock prospectus must be published for the initial public offering.

It is important to find efficient solutions oriented on a company's objectives in order to create a corporate structure that is the most sustainable as possible.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Germany? Is this more difficult for foreign investors?

The purchase of German real estate is independent of the buyer's nationality. Domestic and foreign individuals and companies follow the same requirements. The transaction is divided into three steps:

- A notarized contract of sale.
- A notarized agreement in kind.
- The entry of the new owner in the register of real estate.

In a preliminary step, it would be recommended to inspect the register of real estate in order to obtain an overview of existing liens on real property, such as land charges and mortgages, or easements, such as rights of passage and other servitudes. These are occasionally transferred to the purchaser.

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When land is transferred, real estate transfer tax is charged at different rates, depending on the state in which the property is located. This should also be included in the purchase decision.

If the buyer's objective is the conversion of the property, its feasibility should also be clarified. By means of consultation and professional interpretation of the zoning plans and development plans available at the local authority, a statement can be made in this regard.

7. What laws or regulations exist in Germany to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

With the development of digital technology, the importance of data security in Germany has increased rapidly. As data storage, processing, collection, transfer and analysis become increasingly simple, it is important to provide a framework for this development in order to protect the privacy of the individual.

In order to create regulations that are the most uniform possible and to promote a free exchange of information between individual nations, German regulations are based on the international guidelines of the "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data".

On a European legal basis, the protection of personal data is a fundamental right that is directly applicable in Germany through the General Data Protection Regulation and is monitored by the European Convention on Data Protection.

In accordance with the case law of the German Federal Constitutional Court, data privacy is to be classified as a fundamental right, as an embodiment of the individual's right to informational self-determination (Article 1 I in conjunction with Article 2 I of the German Constitution (GG)). At a national level, the Federal Data Protection Law (BDSG) regulates data protection for federal authorities and the private sector. In addition, data privacy regulations can be found in the German Telecommunications Act and the German Telemedia Act, as well as in individual laws of the German states. Companies that provide telecommunications and postal services on a commercial basis are subject to supervision by the Federal Commissioner for Data Protection. Corporations operating in other sectors are supervised by the data protection commissioner of the respective federal state.

The protection of intellectual property is a different issue. This also represents a fundamental right and is protected at both the German and the European legislative level (see Article 14 I of the German Constitution (GG) and Article 17 II of the Charter of Fundamental Rights of the European Union (GrCh)).

On a national basis, a distinction must be carried out between copyright and industrial property rights. Copyright arises naturally, simply through the creation of a work, whereas industrial property rights, such as patents, trademarks and designs, require registration with the German Patent and Trademark Office.

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Intellectual property is also protected under the law of the European Union. Agreements under EU law, such as the Paris Convention for the Protection of Industrial Property, the TRIPS Agreement and the Patent Convention, set minimum standards of protection in this respect. It is conceivable to register an EU trademark under European law, or a cross-state bundle trademark, bundle patent or bundle design by applying the law of the respective member state.

Unlike data protection, however, compliance with the protection rights is not automatically checked by a protection supervisor, but is subject to judicial reprimand in the event of violation by the affected individual.

In order to avoid high compensation and sanction payments, we therefore advise our clients to take legal precautions in the advance of a measure that is sensitive to data protection or possibly interferes with intellectual property.

8. Describe the most common legal structures used by foreign investors when doing business in Germany.

The companies involved in the economy are subject to a mandatory legal framework. German law essentially distinguishes between partnerships and corporations:

Partnerships include:

- Civil law partnership.
- General partnership.
- Limited partnership, especially Limited liability company and Co. Limited partnership.
- Silent Society.
- Partnership Company.

Corporations are divided into:

- Limited liability company, especially Entrepreneurial Company.
- Public limited company.
- Partnership limited by shares.

A suitable form of company must be selected according to the company's objectives and the respective founding requirements. Partnerships and corporations essentially differ in the following characteristics:

- **Number of partners.** While at least two different shareholders are required to form a partnership, a corporation can also be formed by a single person.
- **Management.** Within the partnership, the business must primarily be managed by the partners themselves (so-called self-organization). In the case of corporations, an external managing director may be employed for the business management (so-called principle of foreign organisation).
- **Partners' liability.** Besides the company itself, the partners of partnerships are also fully liable for the company's obligations with their private capital. Such liabilities do not exist for corporations in general.
- **Founding capital.** In order to compensate for the lack of shareholder liability in the case of corporations, the prerequisite for their formation is the payment of a certain share or founding capital, such as EUR 25,000 for the German limited liability company (GmbH) and EUR 50,000 for the German stock corporation (AG).

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- **Formation of will.** Since the structure of partnerships is highly personalized, decisions made on behalf of the company must always be taken unanimously. In the case of corporations, on the other hand, the decision-making process is based on the principle of multiple votes.
- **Taxation.** Corporations are subject to the German Corporate Income Tax Act (KStG) and therefore to independent taxation. The profit shares distributed in favor of the shareholders are only taxed according to the German Income Tax Act (EStG) if they are not already covered by the capital income tax (so-called separation principle). The situation is different in the case of partnerships. The partners themselves are subject to taxation in accordance with the German Income Tax (EStG) on the basis of their profit shares (the so-called transparency principle). Further taxation of the partnership will not take place.

In order to find an appropriate solution for our clients' objectives, we consult them on finding a suitable business form as well as on concretizing and customizing the particular legal regulations by means of signing the articles of association.

9. What are the most attractive opportunities for foreign investors in Germany at this time?

Considering the rising inflation rate and the resulting economic recession, it is currently a balancing act to make reliable investment predictions. Finding solid, crisis-proof investments with stable values and decent profits is a challenge for both small and wealthy investors as well as for business owners. Since negative interest rates and rising inflation significantly erode any financial assets investment in tangible assets is to be recommended. These values are stable and enduring, unaffected by the stock markets and the overall development of interest rates. Moreover, they are crisis proof and unaffected by inflation.

- **Real estate.** The value of real estate is not subject to short-term fluctuations in stock prices. In most cases, real estate is acquired as an investment property, which generates income through ongoing rental income and long-term growth of value. Especially in fast-growing and metropolitan areas, real estate prices are increasing rapidly. Due to the inflationary trend, the rents for apartments are also expected to rise. Nevertheless, every purchase of real estate in Germany is subject to real estate transfer tax, whose rate of assessment is set by the individual federal state. Moreover, real estate is subject to property tax no matter what the owner's financial circumstances are. Selling a property is a private sale transaction, which is subject to income tax. From a long-term point of view, the acquisition of real estate, as a rare and desirable asset, means a significant value increment. On top of that, there are low mortgage interest rates, which currently offer attractive financing options. But tax disadvantages and regional real estate price developments must also be taken into account.
- **Equities and ETFs.** Equities that are able to impose their selling price on customers in times of increasing purchase prices provide the best

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protection against inflation. These companies act as price setters and thus maintain their profit margins. Due to their favorable competitive situation, shares in German companies, particularly those in innovative sectors, are at the top of the list in this context. For long-term investments, the annual return covers more than the inflation rate, and can even exceed it if the investment is diversified widely. Despite the levying of capital gains taxes, a portfolio of shares and ETFs spread over many companies and sectors, particularly in the sector of German research and development, proves to be highly beneficial.

- **Know How.** Germany is a country of research and development. In hardly any other country do science and innovation experience this kind of public funding. German development, whether within the automotive industry, environmental or medical technology, provides milestones for worldwide progress. Besides public funding, domestic research is mainly financed by disposing patents and licenses. By acquiring these, investors are not only assured of a long-term income source, but also participate in technical and medical progress.

Despite the current economic situation, it is therefore possible to profitably invest in a long-term perspective.

10. Do specific laws or mechanisms exist in Germany to protect foreign direct investors?

A fundamental instrument for protecting foreign investors is the multilateral investment promotion and protection agreements. More than 130 such agreements are maintained by Germany, especially with third-party countries.

Foreign investments in German companies regularly contribute to secure and expand domestic employment. These projects frequently serve to improve the country's market development and the corresponding enhancement of sales opportunities and facilitation of access to foreign markets.

Considering the above, the German Ministry of Economy and Climate Protection has consistently advocated for the establishment of uniform and transparent regulations within the scope of an FTA with cross-cutting investment protection. The Free Trade Agreement (FTA) of the European Union and Member States of the European Union with Canada (CETA), the EU and EU member states' Investment Protection Agreement with Singapore and Vietnam, as well as the Free Trade Agreement (FTA) with Mexico and Chile, are all of German origin.

The European Commission has adopted these approaches broadly and launched the TTIP transatlantic trade and investment partnership agreement between the European Union and the United States. After the presidential election of Donald Trump, however, negotiations initially stalled. Facing current circumstances, the German Chancellor's Office chief once again advocated for their resumption in October 2022.

As of August 13, 2021, all existing bilateral investment contracts between member states within the European Union were cancelled and replaced by a single EU-wide agreement.

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Investment and free trade disputes have until now been settled in the context of arbitration procedures by the parties to the respective agreements, i.e. the investment courts or, within the European Union, the European Court of Justice (EuGH). Germany, as a member state of the European Union, together with the European Commission, plays a key role in establishing a uniform investment court for international commercial law.

Today, multilateral collaboration and interstate commerce contribute more than ever to international economic growth. The direction in which the transnational investment structure evolves is yet to be seen. However, Germany, as the third largest export nation, is particularly interested in expanding this structure, hence global involvement is to be expected in future as well.

AUTHOR BIOGRAPHY

Dr. Anton M. Ostler

Dr. Ostler has been practising law for over 30 years, after studying in Munich and London (LSE) and also passing an MBA exam, in German "Diplomkaufmann". These two qualifications allow him to provide his clients not only excellent legal advice, but he also understands the economic needs and entrepreneurial cornerstones of his mandators.

He is counsel to national and international corporations, especially real estate developers, the hospitality industry, airports, automotive and high tech market leaders. Amongst his long term clients are Munich Airport Corporation (FMG), Avery, Acer Computer and ThyssenKruppElevator, now known as TKE. He is well connected to lawyers all over the globe, being a member of Meritas legal network for more than 20 years.

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JAPAN

Hiromasa Ogawa, Naoki Takahashi & Darcy Kishida
Kojima Law Offices

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

Japan famously benefited from the free-trade trend that the world saw after World War II. Although Japan protected many of its markets in the latter half of the 20th century, Japan's markets are now mostly free from tariff-based trade barriers, with certain notable exceptions such as Japan's rice market, which remains protected, as well as Japan's leather and footwear markets.

With the recent trade friction between the US and China, and the trade sanctions against Russia in response to its invasion of Ukraine, the trend towards more restricted world trade appears to be with us for the foreseeable future. This will undoubtedly pose challenges for Japan. However, Japan's political stability, combined with its increasing affordability (in part due to the weak yen), may create opportunities that did not seem possible just a few years ago. For example, Taiwan Semiconductor Manufacturing Company (TSMC) is building an advanced chipmaking factory in Kumamoto with some funding from Japan. TSMC expects to begin producing chips in 2024. As one publication noted, this effort is aimed at dealing with the "growing tensions between the United States and China over technology development." Many companies are learning too late that a heavy reliance on China for their technology and manufacturing is untenable. Japan, with its technological and manufacturing prowess, may be an attractive alternative to China, especially for high-end products.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Japan's government adopted an aggressive posture in regulating foreign investors?

Not at all. Japan has liberalized most of its industries, which are now largely open to foreign investors except for certain specific areas, as discussed below. As a result, the Japanese government's role in foreign direct investment is, for the most part, limited to monitoring transactions and investments for foreign exchange purposes through various post-transaction notification requirements under the Foreign Exchange and Foreign Trade Act (FEFT Act).

3. Are there specific sectors of Japan's economy or industries where foreign direct investment is barred or highly regulated?

In a nutshell, yes. The FEFT Act requires foreign investors to submit written notification to the government prior to investing in industries that involve national security, the maintenance of public order, public safety, or industries that Japan has not yet liberalized. Under the FEFT Act, these industries include: (i) agriculture; (ii) forestry; (iii) fisheries; (iv) mining; (v) electricity, gas, heating, and water; (vi) information and communications; and (vii) transportation. The list also includes manufacturing in connection with aircraft, weapons, nuclear power, and space development. Moreover, due to the increasing importance of cybersecurity, Japan added industries such as integrated circuit manufacturing, personal computer manufacturing, and

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certain types of software development. In addition, the prior notification requirement applies to foreign direct investment from certain countries listed in the FEFT Act (such as North Korea and Iraq). The government has a maximum of five months to assess whether the contemplated transaction poses any risk in terms of national security, public order, or public safety. If necessary, the government can suspend the investment and/or take any steps required to eliminate the risk.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Japan and what steps has the government taken to respond?

The collapse of the global supply chain has had serious adverse effects on the Japanese economy, especially on industries that rely heavily on parts and materials from other countries. Japan is attempting to alleviate the impact by encouraging investment in domestic manufacturing, specifically by offering subsidies to companies that establish facilities in Japan to manufacture products seriously affected by supply chain disruptions (such as semiconductors).

5. In M&A transactions as well as joint ventures in Japan, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Apart from the restricted industries described above in Question 3, foreign and domestic investors face the same legal issues with M&A deals in Japan. For instance, prior to any M&A transaction, both foreign and domestic investors should check whether the deal will trigger a prior filing requirement with the Japan Fair Trade Commission (JFTC). Part of the JFTC's job is to determine if a contemplated deal will have anti-competitive effects on the market. Naturally, there are also issues that foreign investors will discover only through their due diligence on a target company.

Under Japan's Antimonopoly Act, a company that plans on acquiring or merging with another company is required to notify the JFTC prior to the contemplated deal when that company:

- has gross sales revenue in Japan of JPY 20 billion or more;
- acquires at least 20% of the shares in another company (that figure is 50% if the acquiring company already holds at least 20% of the shares in the company being acquired); and
- the company being acquired has revenue in Japan of at least JPY 5 billion.

If notification is required, the acquisition or merger cannot proceed until at least 30 days have passed from the date that the JFTC receives the notification. (However, the JFTC may shorten this period if it believes it is necessary or appropriate to do so.) During this 30-day period, the JFTC decides whether it needs to perform a more in-depth review of the deal and, if so, will obtain more information and documentation in order to evaluate whether the acquisition will have anticompetitive effects on the market. The JFTC must complete this evaluation no later than 120 days after it receives the notification, or 90 days after it receives all of the necessary information and documentation, whichever is later.

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When the JFTC finds that a merger or acquisition will negatively affect competition, it will notify the company of its tentative decision. This decision will typically require the company to dispose of all or some of its shares, transfer a part of its business, or take other measures necessary to eliminate the negative effects on competition. The company has the opportunity to challenge this decision before the JFTC issues its final decision.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Japan? Is this more difficult for foreign investors?

There are no legal restrictions on foreign investors acquiring Japanese real estate or other tangible property. With no citizenship requirements or obligations to establish a joint venture with a local partner, foreign investors can purchase real estate and other property as freely as Japanese citizens.

However, language and cultural issues often pose challenges. For this reason, there are real estate agents and brokers that specialize in assisting foreign investors. These services include serving as an intermediary between the foreign investor and Japanese speaking owners, performing title searches and on-site inspections, and providing advice on the relevant regulations. Because purchasing real estate and some types of tangible property can be high-risk, complex transactions, foreign investors should consider retaining legal counsel and tax advisors as early in the process as possible.

7. What laws or regulations exist in Japan to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The Personal Information Protection Law regulates data exchange and privacy. This law imposes several obligations on "business operators handling personal information." These obligations include:

- specifying the purpose of obtaining and storing the personal information;
- avoiding use of the personal information for purposes other than those specified unless the business operator has obtained consent;
- avoiding obtaining personal information in an inappropriate manner;
- immediately disclosing a person's personal information to them when they request disclosure;
- deleting personal information when an individual points out that the information was obtained in an inappropriate manner; and
- taking steps to ensure that the business operator safely manages and stores the personal information.

In addition, "business operators handling personal information" assume several obligations regarding sensitive personal information such as race, religion, medical history, and criminal history. These obligations include:

- obtaining consent prior to collecting this type of information or providing it a third party;
- recording the date, recipient, and other information when providing this type of information to a third party; and

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- when receiving sensitive personal information from a third-party provider, verifying certain details about that provider, such as the provider's identity and how they came into possession of the information.

Some multinational companies use an office located outside of Japan as the HR department for their Japanese subsidiary (instead of having the Japan office itself be in charge of HR). Compliance may be more difficult for these companies, as they may wish to store the personal information of their Japanese employees at a subsidiary or a parent company located outside of Japan. The problem with this approach is that an overseas parent or subsidiary is legally considered a third party subject to additional requirements. As such, companies that store personal information outside of Japan should be especially careful to avoid violating the law. The maximum penalty for failing to comply with the requirements is two years' imprisonment and a fine of JPY 1 million.

There are no unique aspects to intellectual property protection in Japan that foreign investors need to pay special attention to. One possible exception is the issue of moral rights, which are afforded greater protection in Japan than in certain jurisdictions like the United States (see discussion below).

Japan's Patent Act, Utility Model Act, Design Act, Trademark Act, and Copyright Act together form a comprehensive intellectual property legal regime. As in many other jurisdictions, patents, utility models, designs, and trademarks need to be registered in order to receive protection, while copyright protection is provided without registration.

Japan protects an author's moral rights, which include the right to make the work public, the right to determine how the author's name appears on a work, and the right to maintain the integrity of the author's works (moral rights are not assignable). The protection of moral rights in Japan is generally greater than that of countries such as the United States and the United Kingdom. Trade secrets may be protected if the information satisfies the requirements under the Unfair Competition Prevention Act. In addition, the layout of integrated semiconductor circuits is protected under the Act Concerning the Circuit Layout of a Semiconductor Integrated Circuit, and new plant varieties are protected under the Seeds and Seedlings Act.

Japan is a signatory to all major intellectual property treaties. Among these are the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

8. Describe the most common legal structures used by foreign investors when doing business in Japan.

Foreign investors in Japan typically use one of two limited liability entities – a *kabushiki kaisha* (KK) or a *goudou kaisha* (GK). With either a KK or a GK, the shareholders/equity holders are personally liable only for their investment in the company except in extraordinary circumstances where the corporate veil is pierced. Other legal structures exist under Japanese law but are not widely used because they do not offer limited liability.

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Kabushiki kaisha or *goudou kaisha*?

KKs have historically been the *de facto* default, as GKs are relatively new. KKs are flexible enough to work for both start-ups and large companies. Moreover, the prevalence of KKs makes it easier to obtain credit and helps put business associates and customers in Japan at ease. The company's owners may structure the KK in a number of ways to meet the needs of the company. Although a KK needs to have at least one director, it may instead have a board made up of at least three directors and a statutory auditor, who oversees the board and provides advice on various issues.

With every passing year, however, foreign investors are increasingly opting for GKs due to their lower costs and simplified incorporation procedures. In addition, GKs offer their owners more flexibility than KKs. Because the owner of a GK also manages the company, there are fewer corporate requirements to satisfy. This is different from a KK, which by law must hold shareholders meetings to make important corporate decisions and adequately maintain and operate the company. Because of these advantages, several high-profile multinational companies such as Amazon, Apple, and Google have chosen to incorporate as GKs.

Incorporation process

Except for certain specific industries that are subject to foreign ownership restrictions (as discussed in Question 3), a foreign investor does not need to form a joint venture with a local investor in order to incorporate a new legal entity. In fact, a foreign investor may own 100% of the company, and the incorporation process usually takes only a couple of weeks. Except for prior notification that may be required for investors from certain restricted countries, a foreign investor will not need to take any other specific steps for incorporation besides registering with the legal affairs bureau.

Both a KK and a GK require initial capital of only JPY 1. Besides the initial capital, the cost to form a KK and a GK differs. On top of the required attorneys' fees, the various fees and costs to incorporate a KK are approximately JPY 270,000, while those for a GK will total around JPY 80,000.

Unlike in the past, all directors may reside outside of Japan. In practice, however, most companies are in fact set up by at least one director who resides in Japan. This is due to the practical challenges in handling banking transactions. Notably, it is especially difficult for a newly incorporated company to open a bank account if the company has only non-resident directors.

9. What are the most attractive opportunities for foreign investors in Japan at this time?

Observers view Japanese properties, such as hotels and residential apartments, as undervalued. Compared to other countries, real estate in Japan can be a relatively inexpensive, stable source of income. With the current historically weak yen, investors from countries with strong currencies may find real estate investment opportunities in Japan to be doubly attractive.

Japan's aging population, combined with its historically low birth rate, will likely result in a severe shortage of low-skilled workers, especially in the area of elder care.

The post-COVID-19 return of foreign tourists to Japan may create opportunities for foreign investors. Pre-pandemic, Japan's tourism industry had made great

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strides to better accommodate foreign tourists. However, Japan can do a lot more to remove the various pain points for foreign tourists, allowing them to explore and enjoy all of Japan beyond well-known cities such as Tokyo and Kyoto. Foreign investors may be in a better position to satisfy the needs of foreign tourists and provide superior services that are better tailored to them.

10. Do specific laws or mechanisms exist in Japan to protect foreign direct investors?

Japan does not have any specific laws to protect foreign direct investors. However, Japan is a party to both bilateral and multi-national treaties that offer some protection to foreign direct investors. Among other things, these treaties allow foreign direct investors to file an arbitration claim against the government and seek damages resulting from a country's treaty violations.

AUTHOR BIOGRAPHIES

Hiromasa Ogawa, Mr.

Hiromasa Ogawa, a graduate of Chuo University's faculty of law, serves as Kojima Law Offices' managing partner. As the head of the firm's Corporate and M&A practice group, Mr. Ogawa has been the lead attorney in most of KLO's major cases in this area. Mr. Ogawa is adept at finding realistic solutions to difficult problems by individually evaluating the unique challenges of each matter and coming up with practical advice that will move the process forward and close the deal. Mr. Ogawa has been recognized for his expertise and the quality of his work, being named in 2020 by the Asia Business Law Journal as one of the top 100 lawyers in Japan.

Naoki Takahashi, Mr.

Naoki Takahashi is partner at Kojima Law Offices. He graduated from the Kyoto University Faculty of Law and thereafter received his law degree from Kyoto University Law School. From 2013 to 2015, Mr. Takahashi was temporarily assigned to the Ministry of Economy Trade and Industry to help Japan negotiate various trade agreements. Mr. Takahashi received an LL.M. from New York University School of Law and is licensed to practice law in New York. Mr. Takahashi has represented Japanese corporations in several international commercial arbitrations in both the ICC and JCAA. He is also a member of the Japan Association of Arbitrators (JCAA).

Darcy H. Kishida, Mr.

Darcy H. Kishida has been a practicing lawyer since 2001 and serves as a foreign attorney at Kojima Law Offices. Mr. Kishida is licensed to practice in Hawaii, New York and Washington, D.C., and is admitted in Japan as a Registered Foreign Lawyer (gaikokuho jimu bengoshi). His areas of practice include international business, corporate law, and employment law. Prior to joining Kojima Law Offices, Mr. Kishida worked in private practice in Honolulu, and served as a deputy attorney general for the State of Hawaii from 2007-2010.

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KENYA

Jinaro Kipkemoi Kibet, SC and Lorraine Igoki
TRIPLEOKLAW LLP

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

The success of African countries in the global markets is tied to regional integration which is central to scaling up supply capacity and building regional value chains. The Africa Continental Free Trade Area (AfCFTA) Agreement has now been signed by 54 member states. Kenya launched an implementation strategy which outlines a broad and inclusive list of prioritised AfCFTA sectors for goods and services that build on sectors identified in Kenya's Integrated National Export Development and Promotion Strategy.

Kenya was among six countries selected to participate in the pilot phase of the AfCFTA Initiative on Guided Trade, formulated on realization that no trading was taking place one-and-a-half years after the launch of AfCFTA preferential trading on January 1, 2021. Consequently, Kenya officially began trading under the Agreement in September 2022 when it first exported locally made batteries to Ghana. This was shortly followed by the commencement of exportation of a consignment of tea in October 2022 to Ghana as well. The overall implementation of the AfCFTA provides an opportunity for foreign investors, from within and outside Africa, who are interested in supplying goods and services in the value chain of products and services covered under the list of prioritised sectors. Kenya will have a broad market base as it will have access to the Central and West African market which will subsequently increase trade within the continent.

Kenya is also a beneficiary of the African Growth and Opportunity Act (AGOA). The aim of AGOA is to expand U.S. trade and investment with sub-Saharan Africa to stimulate economic growth, encourage economic integration and facilitate the region's integration into the global economy. AGOA is a trade agreement between the United States and eligible countries in Africa. The Act, which was signed into law in 2000, aims to increase trade and investment between the US and Africa by providing duty-free access to the US market for certain eligible African countries. The Act also includes provisions for economic growth and development, such as technical assistance and capacity building programs. To be eligible for AGOA benefits, a country must meet certain criteria related to market access, economic policies, and human rights. The act is currently set to expire in 2025, but it can be renewed by the US Congress.

On July 14, 2022, the United States and Kenya launched a strategic trade and investment partnership (STIP) to pursue commitments to boost economic growth, support African regional economic integration and deepen trade cooperation. Both countries aim to commence, within a three-month period, development of a road map for engagement in trade and investment. An impending trade agreement between the United States and Kenya would be the first between the United States and a Sub-Saharan African country and would complement the African Continental Free Trade Area (AfCFTA).

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Kenya's government adopted an aggressive posture in regulating foreign investors?

The regulatory framework in Kenya reflects pro-investment policies and legislation

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alongside national interest protection provisions. It seeks to establish a delicate balance between positive economic impact and impact to national interest as a result of Foreign Direct Investment (FDI). For instance, according to data from the United Nations Conference on Trade and Development (UNCTAD), during pre-pandemic trade, Kenya received an estimated USD 1.2 billion in FDI inflows in 2019, which represented a 2% increase compared to the previous year. The top sectors attracting FDI in Kenya include real estate, manufacturing, wholesale and retail trade, and transport and storage.

Kenya has put in place a raft of regulations and incentives to promote FDI. The Kenya Investment Authority ("KenInvest") which is a statutory body, promotes and facilitates investment in Kenya. Kenya established KenTrade which seeks to address trading partners concerns regarding the complexity of trade regulations and procedures. In 2019, Kenya launched an Investment Policy which seeks to mitigate challenges faced by foreign investors as well as improve the overall ease of doing business and competitiveness in the economy. Kenya is actively working to attract FDI and promote bilateral relationships around the world.

Some of the ongoing efforts the Kenyan government has put in place to encourage FDI include:

- Establishing a "One Stop Shop" for investors: In 2018, the Kenyan government established a "One Stop Shop" (OSS) to streamline the investment process and reduce bureaucracy. The OSS is responsible for coordinating and consolidating all investment-related services and approvals, which makes it easier and faster for investors to set up businesses in Kenya.
- Organizing Investment conferences and roadshows: The Kenyan government regularly organizes investment conferences and roadshows both locally and internationally to showcase investment opportunities in the country. These events provide a platform for investors to interact with government officials and business leaders and learn more about the investment climate in Kenya.
- Offering incentives to investors: Kenya offers a range of incentives to foreign investors, including tax holidays, duty exemptions, and streamlined investment processes. Additionally, the government has established export processing zones (EPZs) throughout the country, which offer investors a range of benefits such as tax holidays and duty exemptions.

In terms of promoting bilateral relationships, Kenya is actively engaging with other countries through diplomatic and trade initiatives. Some examples of this include:

- Signing Bilateral Investment Treaties (BITs) with other countries, which provide legal protection for foreign investors and promote mutual investment. Kenya has signed BITs with over 30 countries.
- Joining regional trade blocs such as AfCFTA and further participating in the Guided Trade Initiative (GTI) which seeks to allow commercially meaningful trading, and test the operational, institutional, legal and trade policy environment under the AfCFTA.

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- Signing Free Trade Agreements (FTAs) with other countries to promote trade and investment. Kenya has signed an FTA with the United States under the African Growth and Opportunity Act (AGOA) which allows for duty-free access to the US market for certain eligible products.
- Participating in international trade fairs and expositions to showcase Kenyan products and services and promote trade and investment opportunities.

Kenya, therefore, seeks to provide an environment that facilitates and promotes FDI, while still keeping in mind national interest considerations.

3. Are there specific sectors of Kenya's economy or industries where foreign direct investment is barred or highly regulated?

There are very few restrictions on foreign ownership of businesses in Kenya. The following sectors are restricted:

- **Aviation:** 51% shareholding of a company or partnership must be held by the state or a citizen or both.
- **Maritime:** A license can only be granted to a maritime service provider who is a citizen, or in case of a company, where 51% of the share capital is held directly by a Kenyan.
- **Insurance:** One third of the paid-up capital of an insurer should be owned by citizens of the East African Community Partner States. An Insurance Broker shall be owned by Kenyan citizens or partnerships whose partners are all citizens of Kenya or by corporate bodies whose shares are wholly owned by citizens of Kenya or wholly owned by the Government of Kenya.
- **Telecommunications:** At least 30% of the shares in all licensed companies in the ICT sector should be held by Kenyan citizens.
- **Land:** Ownership of land by non-citizens can only be by way of 99-year Leases. There is also restriction on ownership of agricultural land by non-citizens.
- **Financial institutions:** Only banks, financial institutions, the Government of Kenya, foreign governments, state corporations, foreign companies licensed to operate as financial institutions, and non-operating holding companies approved by the Central Bank of Kenya (CBK), may hold more than 25% of the share capital of a financial institution.
- **Mining:** Persons applying for a license relating to small scale mining operations should be a Kenyan citizen or a body corporate where 60% of the shares are held by Kenyan citizens. With respect to large scale mining operations, the licensee is required to list at least 20% of its equity on a local stock exchange within three years after commencement of production.
- **Engineering:** A foreign firm may only be registered as an engineering consulting firm if the firm is incorporated in Kenya and a minimum of 51% of its shares are held by Kenyan citizens. Individuals may only be registered as professional engineers if they are resident in Kenya and hold a valid working permit.
- **Construction:** Foreign contractors are required to give an undertaking that it will subcontract or enter into a joint venture with a local person or local firm for not less than thirty percent of the value.

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4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Kenya and what steps has the government taken to respond?

The pandemic adversely affected the global supply chain which resulted in input shortages causing most manufacturing plants and retailers to suspend operations or increase prices to exorbitant levels which in turn reduced consumer spending. According to a 2021 industry report by the Kenya Association of Manufacturers and KPMG, the manufacturing sector contracted in two consecutive quarters of 2020. The value added by the sector dropped to KES 183 billion in quarter three from KES 191 billion in quarter one.

Proactive Government measures to support businesses included implementation of the third phase of the Economic Stimulus Program, which focused strategic interventions towards agriculture, health, education, drought response, policy, infrastructure, financial inclusion, energy, and environmental conservation. The government implemented a fuel cost stabilization programme as well as several consumption subsidies and a raft of tax, economic and monetary adjustments. There was lowering of the Central Bank Rate (CBR) to 7.25% from 8.25% to enhance access to credit facilities by Micro, Small and Medium Enterprises (MSMEs) (this has since been revised to 9.50% effective 29th March 2023) and lowering of the Cash Reserve Ratio (CRR) to 4.25% from 5.25%. In addition, a number of monetary measures were instituted, such as lowering the cash reserve requirements and extending the maximum tenor of repurchase agreements from 28 to 91 days and banks renegotiated terms and restructure of loans.

5. In M&A transactions as well as joint ventures in Kenya, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

The Deal Drivers Africa Report, published by Merger Market, ranks Kenya among Africa's most sought-after country for Mergers and Acquisitions (M&A) transactions. Like in many emerging markets, private equity-driven transactions are one of the main drivers of M&A activity in Kenya. The regulatory environment is an essential consideration as M&A transactions are subject to the capital markets regulatory regime and parties operating in certain sectors may also be subject to sector-specific regulation. Investors must evaluate the following:

- **Companies Act No. 17 of 2015.** Investors or their advisors should always familiarize themselves with the provisions of the Companies Act, particularly those that deal with entry and exit into businesses which are referred to as "squeezing-in" and "selling-out".
- **Capital Markets regulatory regime.** With respect to listed entities, the Capital Markets Act CAP 485A and the Capital Markets (Take-Overs and Mergers) Regulations, 2002 have various rules and regulations relating to requirements for approvals necessary to effect a takeover or acquisition of a controlling interest in a listed entity. The Capital Markets (Foreign Investors) Regulations, 2002 allow the Cabinet Secretary, by notice in the gazette, to

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prescribe a maximum threshold for foreign shareholding in an issuer or listed company. There are various other Regulations which investors should acquaint themselves with.

- **Competition.** Mergers and Acquisitions in Kenya are regulated under the Competition Act. Apart from regulating mergers and acquisitions, the Competition Act also contains provisions regulating restrictive trade practices, unwarranted concentration of economic power, abuse of dominance and consumer protection. All mergers that fall within the definition set out in the Competition Act require prior authorisation from the Competition Authority.
- **Sector specific regulators.** Mergers or acquisitions involving banks and financial institutions must be notified to the CBK for vetting and approval under the Banking Act. In the insurance sector, approval is required under the Insurance Act from the Insurance Regulatory Authority (IRA). In the telecommunications sector, companies' approvals are required from the Competition Authority of Kenya (CAK).

6. What is the best strategy for acquiring interests in real estate or other tangible property in Kenya? Is this more difficult for foreign investors?

Foreigners may only hold land on the basis of leasehold tenure for 99 years, or they may establish a company in which they are not the sole directors and buy the land through the company. It is imperative to note that a company with foreign shareholders is regarded as a foreign company for purposes of land tenure and cannot own freehold land. The best strategy in acquisition is always to instruct local lawyers to assist in the process of due diligence, acquisition and transfer.

The legal framework for land ownership and control is primarily governed by the Constitution of Kenya, 2010, and the Land Act, 2012. The Constitution of Kenya, 2010, Article 65 (1), states that "a person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.". This provision was introduced in the 2010 Constitution as a way of addressing the historical injustices that had been committed against Kenyan citizens, particularly those of indigenous communities, who had been dispossessed of their land by colonial settlers and later by Kenyan citizens of non-indigenous origin.

The Land Act, 2012, further provides that the registration of leases to foreigners must not exceed 99 years. The intention behind this provision is to ensure that the land remains primarily in the hands of Kenyan citizens, and that foreigners who wish to use the land for business or other purposes do so on a leasehold basis.

7. What laws or regulations exist in Kenya to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The Constitution of Kenya, 2010, Article 31 guarantees the right to privacy as a fundamental right. The Data Protection Bill, 2013 which had been subject to

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discussion for several years was enacted on 8th November 2019 as the Data Protection Act No. 24 of 2019 (the DPA). The DPA gives effect to Article 31 (c) and (d) of the Constitution which outlines the right of every person not to have "information relating to their family or private affairs unnecessarily required or revealed" and Article 31(d), the right not to have "the privacy of their communications infringed".

With a view to operationalize the DPA, the Data Protection (General) Regulations, 2021 and the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 came into effect in 2021 and subsequently the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 in 2022.

The Data Protection (General) Regulations, 2021 ("General Regulations") set out the procedures for enforcement of the rights of data subjects as well as elaborating on the duties and obligations of data controllers and data processors. Some of the salient provisions of the General Regulations include the restriction on the commercial use of personal data, elements required to implement data protection by design or by default, notification of personal data breaches and transfer of personal data outside Kenya. The General Regulations set out the instances under which Data Protection Impact Assessments shall be mandatory and these include: automated decision making with legal effect, such as profiling or use of sensitive data; processing of biometric or genetic data; processing of sensitive data or data relating to children or vulnerable groups; and systemic monitoring, among others.

The Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 highlight the procedure for lodging, admission and response to complaints.

The Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021, which came into effect in July 2022, requires the registration of data controllers and data processors with the Office of the Data Protection Commissioner. The registration process requires that data processors and data controllers outline the data processing activities being undertaken and the corresponding safety measures to ensure data privacy.

Kenya also has sectoral laws that provide for data protection including: Access to Information Act 2016; Banking (Credit Reference Bureau) Regulations 2020; Consumer Protection Act 2012; Health Act 2017; Health Records and Information Managers Act 2016; and Kenya Information and Communications Act 1998.

Kenya has a robust legal and institutional framework for Intellectual Property Rights (IPR) containing various Statutes and Regulations and is a member of various regional and World Organizations by virtue of which resident and foreign investors receive recognition for, and protection, of their IP rights. It is not challenging for aggrieved investors to enforce any infringed rights in Kenya.

8. Describe the most common legal structures used by foreign investors when doing business in Kenya.

The most common forms of business vehicles used by foreign investors in Kenya are Private Limited Liability Companies as they are relatively easy and inexpensive to establish. There are no minimum or maximum share capital requirements except for those operating in regulated industries such as banking

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and insurance. However, common practice is to have a minimum share capital of KES 100,000 (divided into 1,000 shares of KES 100 each). This type of company is legally required to have one director but will usually have at least 2 directors for practical purposes. In the event the said director is a corporate entity, the company must appoint a natural person as a director in addition to the corporate director. It is required to have at least 1 shareholder in a single-member company. There is no requirement to have local shareholders save where the entity is intended to operate in a regulated field. Some legal advantages of private limited liability companies in Kenya include:

- Limited Liability: Shareholders are liable to the extent of capital owed to the company.
- Separation of Ownership and Management: Shareholders elect a board of directors to manage the company, which allows for professional management.
- Perpetual Existence: The company continues to exist even if shareholders die or transfer their shares.
- Easier to Raise Capital: Private limited companies can raise capital through debt or equity.
- Tax Planning: Kenyan private limited companies are eligible for certain tax benefits through efficient tax planning.
- Legal Recognition: A private limited company is a separate legal entity and can enter into contracts, sue and be sued in its own name.

It is also relatively common for foreign enterprises to establish themselves in Kenya as branches of foreign companies. The only downside to this is that branches of foreign companies are liable to be charged corporate tax at 37.5% (as compared to Kenyan Companies which pay corporate tax at a rate of 30%). Investors may also register Limited Liability Partnerships (LLPs) which enjoy unique benefits and are tax efficient. Corporate income tax is not imposed at the level of the LLP, which is considered transparent for tax purposes. Instead, gains or losses are allocated to and taxed at the level of each partner.

9. What are the most attractive opportunities for foreign investors in Kenya at this time?

According to a market survey report by the American Chamber of Commerce, the agriculture sector (comprising crops, livestock, fisheries, and agroforestry), remains the backbone of Kenya's economy, as it contributes the largest share of the country's GDP, at 35% in 2020, and providing livelihood to approximately 75% of the population.

In recent years, the country has seen a growing interest from private equity and venture capital firms looking to invest in banking and financial services, technology media and telecommunications, energy, fast-moving consumer goods and real estate, among other sectors. According to a report by the advisory firm I&M Burbidge Capital on Kenyan deal statistics in 2022, the most active sectors in the East African market are ICT, followed by Financial Services, Logistics, Healthcare, Energy, Manufacturing and Agribusiness. Kenya also remains a regional leader in the digital economy.

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10. Do specific laws or mechanisms exist in Kenya to protect foreign direct investors?

In order to attract and keep foreign investors, Kenya has embedded, in its legal framework, mechanisms to ensure that foreign investors are adequately protected. The Foreign Investments Protection Act (Cap 418) came into force in 1964 with the aim to give protection to certain approved foreign investments. The Act has since undergone several amendments in view of the ever-changing economic environment. Kenya is also a member of the World Bank's Multilateral Investment Guarantee (MIGA) which insures investments against non-commercial risks and helps investors obtain access to funding for cross-border private sector investors and lenders. MIGA is currently supporting off-grid solar technologies in Kenya which help to increase access to electricity in rural areas.

Kenya is a member of the International Centre for Settlement of Investment Disputes (ICSID) Convention, and the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. Multinational companies may opt to seek international well-established dispute resolution at the ICSID. With respect to arbitration of property issues, the Foreign Investments Protection Act (2014) refers to the provisions concerning compulsory acquisition under the Constitution of Kenya, 2010, which allows persons having an interest or right in or over compulsorily acquired property a right of access to a court of law.

AUTHOR BIOGRAPHIES

Jinaro Kipkemoi Kibet, SC

Jinaro Kipkemoi Kibet, SC, is the Senior Partner in the Corporate and Commercial Law team. For over 30 years, Jinaro has handled matters involving securities advisory, corporate restructuring, banking and insurance law advisory for local and international corporates, private equity and investment advisory, public-private partnerships and other financial services. Due to his significant advisory experience and cutting-edge solutions to the legal needs of diverse clientele, Jinaro has been internationally recognized for his work by Legal 500, Chambers Global and Best Lawyers. He has been ranked in The Legal 500 Europe, Middle East & Africa as a Recommended Lawyer in the Commercial, Corporate and M&A practice as well as in the Real Estate and Construction practice. He has also previously won the International Law Office (ILO) Client Choice Awards for Kenya in the category of Litigation. In August 2022, Jinaro celebrated reaching the pinnacle of his career when he was conferred the rank of Senior Counsel by the President of the Republic of Kenya.

Lorraine Igoki

Lorraine Igoki is an associate in the Corporate and Commercial Department whose practice focuses on Mergers & Acquisitions, Private Equity, Restructuring and Insolvency, Capital Markets, Competition Law and Tax. She also advises on corporate matters including regulatory compliance cutting across different sectors, transaction

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agreements, corporate governance as well as carrying out transaction due diligence for mergers and acquisition transactions. Prior to joining the Corporate and Commercial department Lorraine was exposed to high level Technology Media and Telecommunications work touching on fintech, payments and data protection. Prior to joining TripleOKLaw LLP, Lorraine worked at a Tier 1 International Bank and further also honed her skills at top tier international and regional law firms.

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MEXICO

Hugo Cuesta Leaño & Alejandro Martínez Galindo
Cuesta Campos y Asociados, S.C.

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THE NEW WORLD OF FOREIGN DIRECT INVESTMENT
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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

There are certainly signs of change in world trade and the patterns we see evolving are clearly in one direction — a number of countries who have been firm believers in globalization and liberalization of tariffs and trade barriers, are now shifting to a more nationalistic and close economy approach. Fortunately, in the case of Mexico there has not been significant change on trade policies, since Mexico has entered into 14 trade agreements with 50 countries, 30 agreements for the promotion and reciprocal protection of investment, and other commercial and cooperation agreements that provide Mexican exporters and foreign investors in Mexico free trade access to more than 81 countries. A clear example of this is the United States–Mexico–Canada Agreement (USMCA), which represents the largest free trade zone of the world, representing 16% of world trade, with access to a population of approximately 500 million people in the 3 member countries, producing goods and services of approximately USD 27,810 billion per year and representing approximately 16.8% of the annual GDP worldwide.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Mexico's government adopted an aggressive posture in regulating foreign investors?

Foreign direct investment still represents a solid pillar for the Mexican economy. Mexico receives approximately USD 30 billion of foreign direct investment per year (see *https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=MX*).

The Foreign Investment Law which regulates foreign investment, was enacted on December 27, 1993 and has not suffered substantial modifications since then. The only area where the Mexican government has taken an aggressive posture, is an attempt to modify certain regulations regarding energy and automotive production which are questionable under the USMCA, as well as the Mexican constitution. However, the position of the current administration is to continue relying heavily on foreign investment to solidify the Mexican economy, to remain attractive to foreign investment and profit from certain geopolitical circumstances (such as the potential US-China trade conflict), which represent opportunities for Mexico to promote "nearshoring" for US and Canadian manufacturers to establish or solidify their presence in Mexico.

3. Are there specific sectors of Mexico's economy or industries where foreign direct investment is barred or highly regulated?

In general terms, Mexico is a country widely open for foreign investment. There are some activities that are reserved to the Mexican government and Mexican investors, as well as some others where foreign investment is limited to percentages ranging from 10% to 49%, or where the prior approval of the Commission of Foreign Investments is required.

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The following are a few examples of limitations or restrictions for foreign investment in Mexico:

- **Restricted to Mexican investment:** ground freight transportation (except for parcel service), ground passenger and tourism transportation.
- **Highly regulated:** 10% Co-ops (Cooperative societies), 49% in companies manufacturing arms, explosives, munition and cartridges, press and publication of newspapers for national distribution, etc.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Mexico and what steps has the government taken to respond?

The global supply chain collapse has taken its toll on many aspects of manufacturing activities and in the Mexican economy (as a prime manufacturing location).

The most tangible impact was the shipping costs of the raw materials used in manufacturing industries. With the COVID-19 pandemic many international ports were shut down or reduced their operational hours, hence limiting the shipping of products to Mexico. This produced a higher operational cost, shortage of raw materials and ultimately a higher demand of goods negatively impacting the final price of the goods.

Although some Mexican industries could absorb the increased costs, others passed that higher expense on to the final consumers and others closed down operations (it is considered that approximately 1,010,857 Mexican business shut down operations in 2020, see *https://inegi.org.mx/contenidos/saladeprensa/boletines/2020/OtrTemEcon/ECOVID-IE_DEMOGNEG.pdf*).

This supply chain disruption also impacted retail companies. Even when the Mexican industry boasted of manufacturing plants of different industries, some of the products manufactured in Mexico are exportation only products (as of August 30, 2022, there were 6,033 maquiladora companies, which are somehow prevented from selling their products within the domestic market), thus reducing the volume of goods available for the domestic market.

Unfortunately, the Mexican Federal government did little to respond to the supply chain collapse, at least not during the peak of the pandemic and ultimately not until 2022.

On May 4, 2022, the Ministry of Finance and Public Credit published a series of government actions to try to control and prevent inflation and the shortage of products (known in Spanish as "PACIC") (see *www.gob.mx/presidencia/documentos/paquete-contra-la-inflacion-y-la-carestia-pacic*).

Through PACIC the government implemented certain actions focused on:

- the agricultural sector (i.e., fixing fuel prices, waiving payment of antidumping duties upon importation of fertilizers, etc.);
- local transportation of products (i.e., maintaining toll fees and railroad interconnection costs at current prices);
- customs and customs clearance (i.e., expedite the customs clearance of goods imported/exported through maritime ports, borders and inland customs, increase the number of customs officials and create automated lanes);

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- reduction of import duties for food products and raw materials used in the food industry (i.e., 6 months exemption of import duties upon importation of 21 basic goods for consumption and 5 strategic raw materials for that same industry).

The above measures were not sufficient to reduce inflation in Mexico. Based on information from the OECD, Mexico´s total inflation less food and energy is 6.3%; total inflation is 8.7%, and food inflation is 14.2% (see *https://data.oecd.org/price/inflation-cpi.htm*).

On July 20, 2022, the Ministry of Economy published a Joint Declaration on Cooperation of Global Supply Chain on its official website (see *www.gob.mx/se/prensa/declaracion-conjunta-sobre-cooperacion-en-cadenas-de-suministro-globales?idiom=es*). Through this declaration the Mexican government recognizes the importance of the supply chain, acknowledges the challenges faced globally and agreed to follow some principles to strengthen future global supply chain. Nonetheless, the government did set up immediate actions.

5. In M&A transactions as well as joint ventures in Mexico, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Aside from business, market strategy and financial considerations, the most critical issues foreign investors must assess from the legal point of view, with respect to the potential target or joint venture partner, are:

- **Foreign investment restrictions.** As mentioned in Question 3 above, Mexico is a country widely open for foreign investment, but there are some activities reserved to the Mexican government and Mexican investors. The Mexican Foreign Investment Law contemplates alternatives of "neutral investment" vehicles where foreign investors may participate in restricted economic areas, provided that non-voting and non-controlling rights are given to those investors, and subject to prior approval from the Ministry of Economy.
- **Pre-merger/antitrust clearance requirements.** Based on certain thresholds focused on the value of the transaction, the assets, the stock and/or the sales of the parties involved, a transaction could require approval from the Federal Economic Competition Commission and/or the Federal Telecommunications Institute (depending on the markets involved). In case that the relevant transaction exceeds any of the thresholds contemplated by the Economic Competition Federal Law, the transaction may not be closed until the relevant antitrust clearance has been issued; otherwise, the parties could be subject to important economic sanctions (gun-jumping).
- **Tax considerations.** Depending on the type of transaction (stock *vis-a-vis* asset acquisition, or joint venture), tax residency of the parties involved, type of industry and assets, business plan for the intended transaction, prior legal and tax contingencies involving the target, among other considerations, an appropriate tax assessment must be made to implement the most efficient and appropriate structure for the intended transaction. Also, the evaluation of potential tax liabilities of the target is one of the most sensitive topics to be addressed during the due diligence process.

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- **Labor matters.** Employment and labor laws in Mexico are protective of employee's rights, which are considered of public order and may not be waived. Therefore, it is critical to consider the status of the labor relationships of the target, and carry out a thorough due diligence on employment, labor union and social security matters. It is also critical to design and prepare a plan for a soft transfer of labor relationships or change of control depending on the type of transaction to be implemented.
- **Other critical issues.** There is no "one-size fits-all" for M&A and joint venture transactions. Depending on the industry involved, background of the parties, type of transaction and corporate structure to be implemented, assets and business to be acquired, in addition to those topics listed above, there are other topics that may be critical, such as: legal title and absence of liens or third party rights, intellectual property and information technology matters, location of the business, real estate and environmental topics, availability of infrastructure for the project, financial liabilities, anti-money laundering and anticorruption compliance, foreign trade and customs matters, ESG compliance, regulatory requirements, existing litigations, relationships with customers, suppliers, distributors, government and other parties, among other matters. Therefore, a custom-made due diligence process must be carried out to identify material contingencies, pre-closing conditions and closing logistics for the transaction, as well as other important provisions of the M&A or joint venture agreement, such as representations and warranties, covenants, indemnification provisions, applicable jurisdiction and dispute resolution provisions.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Mexico? Is this more difficult for foreign investors?

The best strategy for acquiring interest in real estate is through the direct purchase of the property. Nonetheless, the use of other legal vehicles may result in certain tax benefits for the purchasing individuals or entities.

Pursuant to the Foreign Investment Law in Mexico, except for properties located within the "restricted zone", the general rule is that **there are no limitations to foreign investment** of foreign individuals, foreign entities, or Mexican entities with foreign investment for the acquisition of real estate interest.

The restricted zone is 100km from the Mexican northern and southern border line, and 50km from the coastline of the country.

When an individual or entity foreign investor desires to acquire a property within the restricted zone for residential purposes, it may only do so through the incorporation of a special purpose trust which will have a maximum duration of 50 years term.

On the other hand, a Mexican company with foreign investment may directly acquire (without the trust structure) a property within the restricted zone, as long as:

- the corporate purpose of the entity requires the acquisition of a property;
- the property will not be used for residential purposes; and
- secures a permit from the Mexican Foreign Affairs Ministry.

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If real estate is not located within the restricted zone, then foreign investors can acquire it directly prior to receiving authorization of the Mexican Foreign Affairs office, in the understanding that foreigners shall abide to the constitutional provisions and accept to be treated as Mexican nationals, therefore, renouncing to the protection of foreign government in case of a dispute over the property.

7. What laws or regulations exist in Mexico to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

The protection of personal data is a fundamental right recognized by the Mexican Constitution since 2009. Following this recognition, several laws, regulations and guidelines have been enacted to regulate data exchange and privacy within both, the public and private sectors.

Private Sector

Private entities and Individuals processing personal data from individuals are subject to the Federal Law for the Protection of Personal Data Held by Private Parties (2010), its Regulations (2011), and the Guidelines on Privacy Notices issued by the National Institute for Access to Information and Protection of Personal Data (INAI) (2013). These regulations comprise the main legal framework for the private sector.

Public Sector

Federal, State, and local authorities processing personal data from individuals are subject to the Federal Law for the Protection of Personal Data Held by Obliged Subjects (2017), the General Guidelines for the Protection of Personal Data for the Public Sector (2018), as well as local laws and regulations addressing authorities of each state of Mexico.

The protection of Intellectual Property in Mexico is not challenging at all for foreign entities or individuals. In fact, it is common practice within Mexican or foreign entities doing business in Mexico to protect trademarks, patents, copyrights, and plant varieties.

Furthermore, Mexico has solid institutions protecting intellectual property rights, such as the Mexican Institute of Industrial Property (patents and trademarks); National Copyright Institute (copyrights); and the National Service of Seed Inspection and Certification that are in charge of the registration and enforcement of IP rights over plan varieties.

In addition, Mexico has specialized laws for IP matters, and is also part of the most relevant International Treaties related to Intellectual Property, therefore, not only is the registration fairly regulated, but also there are important aspects to enforcing IP rights in Mexico.

The Intellectual Property system in Mexico follows international standards, regarding the prosecution for obtaining registrations, thus foreign investors will find that the requirements and timelines are similar to countries as the US or the European Community.

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8. Describe the most common legal structures used by foreign investors when doing business in Mexico.

The most common structures implemented by foreign investors doing business in Mexico are the following:

- Mexican companies (with full participation of foreign shareholders);
- branch offices of the foreign company; and, depending on the type of business,
- Mexican trust with full benefits to foreign investors.

The most common type of corporate vehicles in Mexico are:

- **S.A. de C.V. or its modality, S.A.P.I. de C.V.** This entity shares similarities with a Corp. in the USA and is the type of company chosen when the entity needs to implement corporate governance rules, directors and managers structure, shareholders agreements and obligations (e.g., for a Joint Venture project) and attract investment from third parties. This entity is a limited liability company, and except for certain matters, the shareholders are not liable for the obligations and risks of the company. Unless there is an exception because of the industry or sector, the tax regime of the S.A. de C.V. and the S.A.P.I. de C.V. is exactly the same as the one of the S. de R.L. de C.V.
- **S. de R.L. de C.V.** This Mexican entity is similar to an LLC. It offers protection to the partners regarding liabilities of the company, but it does not require a complex corporate structure. This structure is not recommended when the intention of the business is to attract investors or implement shareholding rules and agreements. When the holding company is an LLC, and such company has elected to "Check the box" for tax purposes, the income deriving from the S. de R.L. de C.V. can be taxable for the individual owners of the LLC.
- **S.C.** This entity shares some similarities to an LLP, although it is not a limited liability company. Nevertheless, from the tax perspective, there are some advantages regarding the calculation of income and payment of taxes each period.
- **Branch offices of the foreign company.** This structure is not a very sought-after vehicle for doing business in Mexico. The main reason for this unpopular choice is the tax effects this structure triggers to the foreign company, which requires that entity to be registered as a Mexican taxpayer and comply with all obligations for taxpayers in Mexico, which compared to some other jurisdictions, may be burdensome and highly regulated.
- **Mexican trust.** This is a special purpose vehicle that can be incorporated for whichever legal business and/or personal purpose. There are no restrictions as to the activities, purposes and operations the trust can execute, as long as the purpose is legal and does not break another law provision. A complex structure can include multiple purposes and corporate governance rules (directors, managers, supervisors). The parties in a trust are:
  - The trustee ("fiduciario") which always has to be a Mexican bank. The trustee´s purpose is to receive the assets or funds giving in trust, to safeguard them and make sure that the purpose of the trust vehicle is accomplished.
  - The trustor ("fideicomitente") is any individual or entity (except for the

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trustee, who cannot be trustor and trustee at the same time). The trustor provides and entrusts the assets for the trust purpose. Unless certain rules are provided in the trust, the assets contributed will no longer legally belong to the trustor.

- The beneficiary ("fideicomisario") is any individual or entity (except also for the trustee, who cannot be trustee and beneficiary at the same time). This party ultimately receives the benefits of the trust.

Given the flexibility of this vehicle, it is possible to have the participation of multiple trustors and beneficiaries, or even, the trustors could be the beneficiaries at the same time. It will really depend on the purpose of the trust.

For tax purposes, the trust can be either transparent, or a taxable vehicle with business activities (in which case, the trust shall have a tax registration and file tax returns periodically).

9. What are the most attractive opportunities for foreign investors in Mexico at this time?

Mexico has been recognized as a prime manufacturing location worldwide. This recognition is the result of mature legal vehicles implemented throughout decades of foreign investment. The manufacturing nature of the country has been diversified to more technological services, including software design, as well as agricultural business and innovation.

Mexico´s domestic market represents an important commercial share for retail industries and due to its geographical location is a great place to serve as the front door for selling goods to the USA (still one of the largest markets in the world).

With "nearshoring" Mexico´s potential for the incorporation of companies serving to the manufacturing industry has increased. With the supply chain collapse many companies have turned their eyes to Mexico as a new location point for setting up plants. Considering Mexico´s large network of free trade and commercial agreements worldwide (14 trade agreements with 50 countries, 30 agreements for the promotion and reciprocal protection of investment, and other commercial and cooperation agreements) it is a very attractive country for doing business.

10. Do specific laws or mechanisms exist in Mexico to protect foreign direct investors?

The laws that regulate foreign investment in Mexico are the Foreign Investment Law and its regulations, as well as in the regulations set forth in the foreign investment chapter of the international treaties ratified by Mexico, which according to Mexican law, have constitutional level. This means that the international treaties and provisions therein have the same ranking as the Mexican constitution in terms of potential conflict of laws. The above is the general rule unless specific industry is regulated (thus protected) by secondary laws and regulations governing that industry.

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AUTHOR BIOGRAPHIES

Hugo Cuesta Leaño

Partner and CEO of Cuesta Campos Abogados, Hugo Cuesta focuses his practice on international transactions, including corporate, M&A, business law and corporate governance. He has represented foreign entities doing business in Mexico and Mexican entities doing business abroad for over 25 years. Hugo Cuesta is Mexican counsel on international projects and business transactions, advising multinationals on their legal needs in Mexico.

He has advised leading companies in their industries such as Flex, Jabil, Nike, BBVA, Gencom, Rappi, ZF Zachs, Electrifil, Corteva, Wizeline, Bright Machines, and Daimler, Lixil, Creditea, among others, which provides him with an impressive expertise in the field.

Hugo Cuesta is former vice chair of Meritas Law Firms Worldwide and Vice Chair of the American Chamber of Commerce (AMCHAM). He plays an important role on the negotiation of international treaties where Mexico is a party. Currently, he coordinates the Investment Chapter of the Next-Door Room. Likewise, he is advisor of the FTA EU-MEX, the FTA Ecuador-Mexico and of the United Kingdom.

Hugo Cuesta continuously provides his perspective and insights on the Mexican economy and trends in legal services and is frequently invited by business publications such as Forbes (Mexico, U.S., and Japan), Foreign Policy, Mexico Business Publishing and other important national and international newspapers and magazines. He is also a regular speaker in several international forums including American Chamber of Commerce, Meritas Law Firms Worldwide, Mexican Department of Economic Development, among others.

Additionally, he is listed in the rankings of Mexican lawyers recommended by the prestigious English publications Legal 500, Chambers & Partners and Latin Lawyer 250.

Alejandro Martínez Galindo

Alejandro acts as Chief Legal Officer (CLO) in Cuesta Campos. He also heads the Foreign Trade practice of the Firm.

As CLO, Alejandro coordinates all our lawyers and manages the Firm´s special projects. He also participates in the staffing of projects and in the development of our different practice areas. Additionally, he is an active member of our Executive Committee.

Alejandro has more than 20 years of experience in foreign trade and customs matters. In addition to customs and foreign trade matters, his practice focuses on commercial law, administrative law, trade, and regulatory compliance, as well as customs valuation, and compliance with non-tariff regulations and restrictions. Moreover, Alejandro has complemented his practice with customs litigation, standing out as a national reference by obtaining favorable verdicts in matters of major importance.

In 2017 and 2019, he was recognized as the "Next generation lawyer" by The Legal500 as a result of his professional career and recognition in the areas of his specialization.

Alejandro was partner of the global legal services firm Baker McKenzie for over 15 years, developing a successful professional career and positioning international trade practice in both the Chambers and Partners and the Legal500 rankings.

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NORWAY

Christoph Morck
Brækhus

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

While not being a member of the European Union, Norway is a member of the European Economic Area (EEA) with access to the European Union single market's basic principles of free movement of goods, services, persons, and capital. The EEA free trade rules came into effect for Norway in 1995 and have resulted in the EU single market being an even more relevant trade partner for Norway. While Norway historically has also had strong international trade relationships outside the EU/EEA area (for instance with Russia, China and Japan, to these countries mainly as a consequence of Norway's oil & gas production and its strong position within the global shipping and fishing industries), we believe that – in light of the sanctions against Russia and an enhanced international insecurity – the relevance of Norway's interdependence and trade relation with the EU will increase even further.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Norway's government adopted an aggressive posture in regulating foreign investors?

The EEA free trade rules came into effect for Norway in 1995, and Norway has since liberalised its foreign investment legislation to conform with the EU free movement principles and that of national treatment to EU members and the other EEA members Liechtenstein and Iceland. Beyond the EEA, Norway's foreign investment legislation towards third countries is governed by principles of reciprocity and by bilateral and international trade agreements. While Norway follows the relevant EU or US sanctions regime at all times, it has not shown any aggressive postures in regulating foreign investors. However, within certain sectors, we have seen indications of Norway being more aware of protecting natural resources and critical infrastructure, for instance through declining investment in or supplies to the Norwegian oil and gas sector and/or critical infrastructure from state-owned or state-near companies in Russia as well as China (for instance 5G).

Due to the economic crisis triggered by the COVID-19 pandemic, foreign direct investment (FDI) in Norway dropped sharply to almost USD -2.4 billion in 2020, down from USD 16 billion in 2019. Sweden, the U.S. and the Netherlands almost consistently rank as top investors in Norway, accounting for more than 40% of inflows, whereas **mining and quarrying, manufacturing and financial services are the main sectors in terms of FDI stock**. The Norwegian economy is largely based on **the petroleum and gas sector**. Consequently, the decline in the price of hydrocarbons led to a drop in investment in Norwegian oil companies in recent years. Most recently, the Norwegian government pension fund has enhanced its efforts to move towards sustainable investments, for example by announcing the divestment of carbon-related assets from its portfolios.

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3. Are there specific sectors of Norway's economy or industries where foreign direct investment is barred or highly regulated?

While there are no general restrictions on foreign direct investment in Norway, there are certain general restrictions or concession requirements within specific industries, applying irrespective of nationality. Further, there are restrictions due to national security interests and competition law rules. None of these rules are specifically targeted towards foreign direct investors.

As regards foreign direct investment screening, with the entry into force of the EU FDI Screening Regulation on 11 October 2020, all 27 EU Member States are required to implement national FDI screening mechanisms. Norway is not a part of this cooperation but has chosen to introduce its own national rules in the National Security Act (NSA). According to this Act, Norwegian authorities are, on an exceptional basis, entitled to intervene in the acquisition of shares and interests in Norwegian companies or business company assets, if the investment qualifies as being relevant to **Norwegian national security**. The NSA is intended to help prevent, detect and counter activities that present a threat to national security, and ensure that security measures are implemented in accordance with the fundamental legal principles and values of a democratic society. Typically, undertakings in the **defence, telecommunications, transport and energy sectors, food and water supply and health services** are covered by the provisions of the Act. However, there is no public list or record of which companies have been made subject to the national security regime. If the investment is related to the acquisition of a qualified majority stake in the target company, the investment is subject to a mandatory notification requirement, irrespective of the amount of turnover of the target company in Norway. In addition, and irrespective of the notification requirement, the Norwegian authorities can at any time, and at their sole discretion, decide upon any target in Norway qualifying as being relevant to the national security of Norway.

Within the **agriculture sector**, a concession is required for the purchase of farmland above 3.5 hectares if the purchase occurs outside the family of the current owner. Typically, local municipalities also impose a requirement for a buyer to register their permanent residence at the farmland. This concession requirement is irrespective of the nationality of the purchaser.

Within the **hydropower sector**, one of Norway's key energy resources, the legal framework is based on the premise that Norway's hydropower resources belong to, and shall be managed in the best interest of, the general public. This is reflected in a requirement for two thirds public ownership of major hydropower plants, i.e. plants with a capacity above 10 megawatts. Minor hydropower plants (i.e. with less than 10 megawatts) are only subject to a licence.

Within the **oil and gas sector**, considered in income Norway's most important sector, the acquisition of participating interest in Norwegian petroleum licences is subject to the approval of Norwegian authorities, however this requirement is not specifically targeted towards foreign direct investment.

Finally, **Norwegian merger control and competition rules**, which are mainly based on the EU merger control and competition rules, may set acquisition restrictions.

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4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Norway and what steps has the government taken to respond?

Norway's pandemic-led economic downturn remained limited compared to most European countries: after losing only 0.8% in the aftermath of the pandemic, the country's GDP was estimated at +3% in 2021, thanks to a strong rebound in private consumption and an increase in employment, which offset declining investments. Benefitting from higher oil and gas prices (Norway's main exports), the 2022 economic output is projected to be running slightly around the pre-pandemic path. The economy is forecast to grow by 3.8% in 2022, before slowing to 2.9% in 2023 (IMF), although uncertainty remains due to new waves of the pandemic, the weak or reduced global economic trends and the historically high household debt level.

The Norwegian government's response to the economic downturn relied mainly on the implementation of employment support measures as well as economic stimulus measures. On the employment side, the Norwegian government implemented a 20-day furlough scheme in March 2020. Usually when an employee is made redundant, the employer is responsible for paying the first 15 days of unemployment and then the employee, following a three-day stop in pay, can receive unemployment benefits from the Norwegian state. The new furlough scheme reduced the period the employer was responsible to pay to two days, followed by an 18-day period where the Norwegian state provided the payment; beyond the 20-day period an individual could apply for unemployment benefits. A further flexibility for employers was that employees could be furloughed part-time (up to 50%) and therefore could continue to be in contact with and contributing to their workplace. The intention was to support companies to rotate staff on furlough within a business to try to limit unemployment.

In addition to the furlough scheme, the Norwegian government heavily increased its support to local business through loan guarantees to the private sector. Government loan guarantees for small and medium enterprises were announced in March 2020, and the scheme was extended to all private firms including those with more than 250 employees in April 2020. Further to this, a NOK 6 billion loan guarantee package for the aviation industry was agreed including specific protection for particular domestic routes and the abolition of the air-and airport passenger taxes. In addition to these support schemes, the government also followed a reluctant approach in terms of the collection of outstanding taxes, duties and social contributions.

In May 2020, the Norwegian government initiated a new scheme, where movement control measures were scaled back, and economic measures were revised to increase economic activity and help the unemployed return to work. These included a temporary subsidy scheme for companies to take back temporarily laid off workers, measures to underpin activity in the construction sector and a green transition package.

From 2023, Norwegian economic activity looks set to rise further going forward. Recent data from a survey by the Norwegian Central Bank show that Norwegian businesses are planning to expand capacity in the period ahead. For many,

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capacity constraints and labour shortages have become an increasing problem. The war in Ukraine from February 2022 has led to increased uncertainty about the future economic performance of Europe and many of Norway's main trading partners.

The Norwegian economy is relatively shielded from the direct consequences of the war and sanctions as Ukraine and Russia only account for a small share of Norwegian foreign trade. However, Russia's invasion has underscored the need for alternatives to Russian oil and gas. Many European countries now see Norwegian oil and gas as a key element in their efforts to reduce Europe's dependence on Russian energy over time. Coupled with high oil and gas prices, this will underpin growth in Norwegian oil investment, which even before the war was set to rise significantly ahead. Higher oil investment will be a key driver of growth in both the Norwegian manufacturing industry and the economy in the coming years.

In the ongoing energy crisis in Europe, Norway's renewable energy recourses hydropower and wind power are of enhanced interest in a European context and will play a vital role to Europe's green energy transition.

5. In M&A transactions as well as joint ventures in Norway, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

M&A transactions involving assets located in Norway, or shares in Norwegian target companies, are customarily and predominantly governed by Norwegian law. Parties may occasionally agree that foreign law shall apply to share purchase agreements, however this is not common unless both seller and buyer are based outside Norway. Norwegian law is based on the principle of freedom of contract, subject only to limited restrictions. Despite this, mandatory rules of Norwegian law typically apply on M&A transactions involving a Norwegian target and are relevant in terms of a foreign buyer's due diligence and risk assessment of the Norwegian target. Consequently, foreign parties involved in a transaction in the Norwegian market will normally have to obtain Norwegian legal advice to determine their contractual rights and obligations, and to be able to perform their due diligence and risk assessment properly.

Further to this, environmental, social and governance (ESG) issues continue to grow in influence. The Norwegian Transparency Act came into force 1 July 2022., the Act is based on the principles laid down in the OECD Guidelines for Multinational Businesses as well as the OECD Guiding Principles on Business and Human Rights, both of which implementing the United Nations "Protect, Respect and Remedy" Framework. The Act imposes significant requirements on approximately 9,000 Norwegian and foreign companies offering goods and services in Norway. However, foreign enterprises offering goods and services are only subject to the Act, if they are liable to pay taxes pursuant to Norwegian tax legislation. The Transparency Act establishes duties with the aim of promoting respect for human rights, decent working conditions and ensuring access to information. We believe this increased focus on human rights will be significant in many M&A due diligence processes. It will be increasingly important for the

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buyer to assess whether the Norwegian target company has sufficient processes in place to be able to comply with the Transparency Act.

In addition, national security considerations are becoming more and more important in transactions. The authorities are to a greater extent assessing potential threats to national security interests and may require suspension, blockage or impose measures to mitigate the risk of threats to such interests. The authorities are currently discussing which sectors are particularly important from a national security perspective and may subject additional areas, such as data centres, to regulations.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Norway? Is this more difficult for foreign investors?

Investing in real estate in Norway may be carried out either directly or indirectly.

For **indirect investments**, the most common Norwegian vehicle used is the Norwegian private limited liability company (AS), with the Norwegian limited/unlimited partnerships as additional options. That particularly applies to foreign investments in Norwegian commercial real estate. The choice of the investment vehicle is mainly due to avoidance of capital gains tax of 22% at a share sale under the participation exemption method for corporate shareholders, as well as to avoid stamp duty of 2.5% on the fair market value upon registration of title. Further, dividend withholding tax (WHT) is not imposed on repayment of paid-in capital or on liquidation dividends.

The framework for taxation of ownership of shares is not significantly complex, with some exceptions for cross-border investments. A Norwegian multi-tier structure is often simple to establish and to administer during the investment period. Norwegian corporate shareholders are 100% exempted from taxation of capital gains on the disposal of shares in a Norwegian limited liability company, irrespective of the ownership percentage or the holding period. Dividends are 100% tax exempted as well, provided that a Norwegian or EEA resident company has more than 90% ownership. However, 3% of received dividends are subject to 22% taxation, i.e., effectively, 0.66 % tax on dividends if the ownership is not more than 90%. When foreign investors expect annual distributions from the real estate, a Norwegian partnership between the foreign investor and the Norwegian real estate company may be established to reduce the exposure for WHT.

For **direct investments**, registration of title to a property triggers, with few exceptions, 2.5% stamp duty calculated on the gross fair market value of the property. Previously, it was common to let an empty holding company hold the title to a commercial real estate. By purchasing the real estate and the shares in the title holding company, it is possible to avoid triggering stamp duty on a transfer. However, acquiring a property with such a structure should be subject to thorough due diligence of both the history of the real estate and the title company.

A foreign company making a direct investment in Norwegian real estate must register in Norway and file a corporate income tax (CIT) return. Net income from the real estate business carried out in Norway is subject to ordinary taxation at a rate of 22%. In calculating taxable income, book income shown in the annual

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financial statements is used as a starting point. However, the timing of CIT is based on the realisation principle. The basic principle is that an income is taxable in the year in which the recipient obtains an unconditional right to receive the income, and an expense is deductible in the year in which the payer incurs an unconditional obligation to pay the expense. In general, all expenses, except gifts and entertainment expenses, are deductible.

Investments in fixed assets are to be capitalised and depreciated according to a declining balance method at any rate up to a given maximum. Commercial buildings, industrial buildings and installations, hotels, boarding houses, restaurants and certain other structures can be depreciated by different depreciation rates. Land and ordinary residential buildings are not tax depreciable. If such assets are sold with a capital gain, the taxation can be deferred, and a loss must be deferred.

7. What laws or regulations exist in Norway to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

Although not a member of the EU, Norway is a member of the European Economic Area (EEA). The EU General Data Protection Regulation (GDPR) entered into effect on 25 May 2018. The GDPR was incorporated into the EEA agreement and became effective in Norway on 20 July 2018. Norway is thus bound by the GDPR in the same manner as all other EU Member States. The GDPR was incorporated into national law by means of the new Norwegian Personal Data Act which has been in effect since 20 July 2020.

As regards protection of intellectual property rights, Norway is part of all major international property treaties such as the Paris Convention on the Protection of Industrial Property (relevant for foreign patents and trademarks), the Madrid System Concerning the International Registration of Marks (relevant for trademarks), the Berne Convention for the Protection of Literary and Artistic Works (relevant for copyrights) and the Hague System for the International Registration of Industrial Designs (relevant for foreign design rights). Furthermore, the Norwegian Marketing Control Act and the Norwegian Trade Secrets Act protect against the unreasonable exploitation of a company’s goodwill and confidential information. At the same time, there are requirements for the company’s own marketing and secrecy.

8. What are the most common legal structures used by foreign investors when doing business in Norway.

Norway has a predictable business climate and the set-up of companies and legal structures is comparably easy and straight-forward.

The most common legal entity chosen by foreign investors is the legal form of the private limited liability company (AS). From a tax perspective, it is often beneficial to also establish a holding structure, especially in cases where the foreign investor resides and is incorporated within the EU/EEA area.

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For less permanent activities, foreign investors often chose to establish a Norwegian branch of its foreign company (NUF). However, the threshold for a foreign entity becoming subject to Norwegian taxation is rather low if the entity "conducts business activities" in Norway. When being subject to Norwegian taxation, the tax reporting and filing obligations on the Norwegian branch are almost the same as for a Norwegian limited liability company, which might explain why Norwegian limited liability companies are preferred by foreign investors. If a double taxation treaty is in place between Norway and the home state of the foreign investor, Norwegian taxation is only applicable if the business activities of the foreign investor's branch office from a tax perspective constitutes a permanent establishment.

The corporate tax is based on extract of accounts which reflects the business operations carried out in Norway. The corporate tax rate of a NUF equals the tax rate of a limited liability company. Norway does not levy withholding tax on distributions of branch profits to the foreign head office.

9. What are the most attractive opportunities for foreign investors in Norway at this time?

According to a 2022 analysis made by McKinsey Norway ("Norway tomorrow"), business attractions arise particularly along the following three opportunities:

- The energy transformation in Europe, where Norwegian energy recourses and industries in areas such as hydrogen, offshore wind, batteries, carbon capture, and storage and green maritime industry provide promising opportunities. Hydrogen in particular will be one of the world's most important solutions to the climate and energy crisis. Norwegian gas, water, and wind resources for energy production enable Norway to produce green and blue hydrogen less expensively than its competitors, Norway will play a leading role in, and set standards for, the world's green transformation.
- The digital transformation, where Norway, although not historically but recently, has asserted itself on the global stage, in both consumer platforms and software for major industry, Norway has built a number of global winners, and the accelerating digital transformation has provided Norway with several opportunities. Deals with the IT and tech sector lead the way in Norwegian M&A activities.
- The sustainability transformation (in addition to the energy industries), where Norway has leverage due to its traditions, natural resources, and a strong focus on sustainability in all industries, including those not pertaining to the energy sector. Tourism, aquaculture, and circularity in general are opportunities here. Environmental, social and governance (ESG) issues continued to grow in influence in 2022. The Norwegian Transparency Act entered into force on 1 July 2022. The Act imposes significant requirements on approximately 9,000 Norwegian and foreign companies offering goods and services in Norway (foreign enterprises offering goods and services are only subject to the Act, if these are liable

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to pay taxes pursuant to Norwegian legislation). The Transparency Act establishes duties aiming to promote respect for human rights and decent working conditions and ensure access to information. An increased focus on human rights will be significant in many transaction due diligence processes. It will be increasingly important for the buyer to assess whether the target company has sufficient processes in place to be able to comply with the Transparency Act.

10. Do specific laws or mechanisms exist in Norway to protect foreign direct investors?

As Norway has no specific foreign direct investment legislation, there are also no specific laws or mechanisms on the protection of foreign direct investors.

AUTHOR BIOGRAPHY

Christoph Morck

Christoph Morck is a corporate/M&A partner with mid-sized Norwegian business law firm Brækhus. He heads the firm's team for corporate law and finance, and he is in charge of our company's International Desk. Christoph assists international and foreign companies in connection with the establishment and development of their operations in Norway. His primary focus is on transactions (M&A), corporate law, commercial agreements and construction law. He has extensive experience with foreign companies' investments in Norway, whether this entails the establishment of branches or subsidiaries or typical acquisitions (M&A), cooperative joint venture agreements, project investments, or other types of cross-border business activities.

Christoph is recommended by Legal 500 in the area of Commercial, Corporate and M&A. "Christoph Morck heads the department at Brækhus Advokatfirma, which is notably active in TMT, real estate and construction sectors and regularly handles cross-border transactions – enhanced by the firm's involvement in several international networks."

Christoph is licensed to practise law in both Norway and Germany and is a recommended lawyer in the area of German-Norwegian commerce.

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REPUBLIC OF KOREA

Jihn U. Rhi & Jong Jae Lee
K1 Chamber LLP

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for the Republic of Korea and your clients?

Liberalization in recent years has led to some drastic changes in world trade. Reasons for such change include China's economic rise and the resulting escalation of conflict between the US and China as well as the collapse of the international industrial order due to the outbreak of COVID-19. As a result, the global supply chain has been greatly damaged due to the restriction of cross-border movement of goods and personnel. In the past, companies have decided to move production bases to the most economically viable countries or regions without fear of restrictions on the movement of goods and personnel, assuming that their products would move freely anywhere in the world. But, such assumptions do not seem to work any longer.

Korea is an economy highly dependent on international trade. So far, Korea has enjoyed great benefits from the liberalization of the global economy and the resulting expansion of world trade volume and scale. Thus, Korea is in the position to be greatly affected by changes in international trade. If world trade shrinks for whatever reasons, Korea will be significantly affected. Korea and our clients should endeavour to overcome such situations, but, unfortunately, the external environmental change is not something we can control and change easily. Thus, our efforts will proceed in the direction of strengthening internal capabilities through industrial and corporate restructuring and investment.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has the Republic of Korea's government adopted an aggressive posture in regulating foreign investors?

In the past, the Korean government took a traditional position, regulating foreign direct investment to protect and strengthen domestic economies. Liberalization has changed this position, particularly since the so-called IMF crisis in the late 1990s. Now, unless a prospective foreign investment falls into a category of barred sectors or restricted sectors under the Foreign Investment Promotion Act (FIPA), the government's role as a regulator is limited to requiring certain reports and registration procedures in order to keep track of foreign investment.

Under the FIPA, a foreign investor that intends to make an investment in Korea is required only to file a report of such investment to the Ministry of Trade, Industry, and Energy (MOTIE). For the convenience of the investors, the Enforcement Decree of the FIPA provides that the reporting can be made to either one of the foreign exchange banks designated by the MOTIE or the Korea Trade Investment Promotion Agency (KOTRA). In practice, such foreign investment reports are normally processed within one day, if all required documents are ready and in order.

Depending on the type of business, however, a prospective foreign investor seeking to make an investment in Korea can be subject to additional registration and/or approvals by relevant authorities, including the Ministry of Economy and Finance (MEF) and the Financial Services Commission (FSC). Furthermore, under

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the Monopoly Regulation and Fair Trade Act (MRFTA), a business combination report must be filed with the Korea Fair Trade Commission (KFTC) if the assets or turnover of the entity resulting from foreign investment meets certain reporting thresholds. The purpose of the MRFTA is to prohibit certain types of "business combinations" (mergers and other business combinations as defined under the MRFTA) that may substantially restrict competition in the relevant market. In addition, there are certain industry sectors that are restricted or precluded from investment under the FIPA.

3. Are there specific sectors of the Republic of Korea's economy or industries where foreign direct investment is barred or highly regulated?

Generally speaking, the government's role as a regulator is limited to requiring certain reports and registration procedures in order to keep track of foreign investment, unless a prospective foreign investment:

- threatens national security and public order;
- harms public health, sanitation or environment; or
- is against the morals and customs of the Korean society or violates any laws or subordinate statutes of Korea (in which case the government can restrict or prohibit such foreign investment (FIPA Section 4(2))).

The FIPA provides the list of barred sectors and restricted sectors. To be more specific, the sectors where foreign investment is **barred** include, to name a few:

- post services;
- the central bank;
- mutual aid business for persons and/or businesses, and pension businesses;
- securities and forward exchanges;
- clearing houses for notes and/or cheques;
- educational institutions; and
- industrial organizations, professional organizations and labour union.

The FIPA also provides certain restricted sectors where the foreign investment is not barred but heavily regulated. The restrictions are imposed mainly in the form of the maximum equity holding which can be invested by foreign investors. The **restricted** sectors include, to name a few:

- cultivation of grains and other food crops (permitted except for rice and barley);
- business of raising beef cattle (permitted only less than 50%);
- offshore or coastal fishing (permitted only less than 50%);
- publication of newspaper (permitted only less than 30%);
- publication of magazines and periodicals (permitted only less than 50%);
- nuclear fuel processing (permitted except for manufacture and supply of fuel for nuclear power);
- business of electric power generation, transmission, distribution or sale ((i) permitted only less than 50%; and (ii) the number of shares having voting rights held by the foreign investors shall be less than those held by the largest domestic shareholder); and
- wholesale of meat (permitted only less than 50%).

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In addition, certain electric communication network facility rental business, fixed line telephone or other fixed line communication, wireless telephone, and/ or wireless call or other wireless communication are permitted where less than 50% is held by foreign government, foreigners and other specific foreign-related entities) and broadcasting businesses are permitted only less than 33%.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in the Republic of Korea and what steps has the government taken to respond?

Many Korean companies are dependent on foreign supplies of certain important parts and materials. As the pandemic hit the global economy and manufacturing hubs like China went into lockdown, many Korean companies went into a serious crisis. The shutdown of factories abroad triggered shortages of parts for major manufacturers in Korea and there became an atmosphere that important and essential parts and materials should be produced domestically. Producing essential parts and materials at home was a hot-button political issue even before COVID-19 arrived, after Japan imposed restrictions on exports to Korea of three key materials in 2019. The recent global supply chain collapse further sparked the need and interest in localization of parts and materials.

The Korean government adopted and announced a suite of supportive measures aimed at incentivizing local companies to make materials, parts and equipment in Korea. The government has also advocated reshoring to encourage companies with production sites overseas to bring the facilities back to Korea, providing an initiative that comes with a KRW 1.5 trillion commitment through 2025. Well-performing small-and medium-sized enterprises (SMEs) that have a proven track record of localizing parts and materials will enjoy the benefit of incentives.

In the midst of the supply chain collapse, semiconductor products have emerged as one of the most important products. A shortage of semiconductor chips during the COVID-19 pandemic disrupted the production of multiple products and initiated a debate in the US on its dependence on chip imports. The US government proposed forming the so-called Chip 4 alliance comprising the USA, Japan, South Korea, and Taiwan to secure the global semiconductor supply chain, coordinate policies, subsidies, and joint research and development (R&D). It is said that Japan and Taiwan have agreed to join the alliance and Korea is also considering positively.

5. In M&A transactions as well as joint ventures in the Republic of Korea, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

The recent pandemic caused many practical limitations to foreign investors over how M&A deals were conducted worldwide. Foreign investors should understand this changed environment. Among others, due to travel restrictions, quarantine measures, social distancing rules and occasional office shutdowns, certain essential procedures such as on-site due diligence, management presentations and negotiation sessions were substituted with virtual solutions instead of in-person meetings. The pandemic situation is abating to some extent recently but

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these restrictions still remain. But it is expected that the way of conducting M&A deals will be normalized as the pandemic situation comes to an end.

Besides the usual ways of M&A deals, foreign investors should pay special attention to potential anti-competition issues. If a foreign investor intends to acquire the shares of, merge with or acquire a business of a Korean company, such merger or acquisition could have an anti-competitive effect within the Korean market, so such merger or acquisition may be subject to regulations by the Korea Fair Trade Commission as a restricted anti-competitive business combination as provided in the MRFTA. In addition, the foreign investors in the digital economy platform business, need to pay special attention to unfair trade competition issues and abuse of market power. The Korean Fair Trade Commission, as main regulator of antitrust law in Korea, has been active in law enforcement in that area.

6. What is the best strategy for acquiring interests in real estate or other tangible property in the Republic of Korea? Is this more difficult for foreign investors?

Regarding the acquisition of land by foreign investors, Korea adopts the principle of reciprocity. That is, Korea does not impose any restrictions upon any foreigners, except for nationals, corporations or organizations of a country which restricts the acquisition or transfer of land by Korean nationals, corporations or organizations. Thus, acquisition or transfer of land in Korea by foreigners of a country which does not restrict acquisition or transfer of land by Koreans is no more difficult than a similar transaction by Koreans. The only difference is that a foreigner has certain obligations to report on its acquisition, holding or transfer of real estate under the relevant laws such as the Act on Report on Real Estate Transactions, Foreign Exchange Transactions Act and Foreign Investment Promotion Act.

The best strategy for acquiring interests in real estate or other tangible property would differ, depending on the situation and needs of the foreigner acquiring the interests. But, regarding taxes related to real estate acquisition, holding and transfer, it is necessary to consider acquiring real estate through a corporation rather than directly acquiring real estate by an individual, because, in case of corporations, it is not only easier to undertake tax planning but applicable tax rates may be lower. In particular, the maximum capital gain tax for real estate transfer is 50% for individuals, while corporations are to add-up the capital gain in its corporate income and pay only the corporate income tax, the maximum rate of which is 22%, provided that, in case of capital gains of a corporation from the transfer of house and non-business land will be separately taxed, but only at 10%.

Generally speaking, Korea has no special restriction to be imposed only upon foreigners on other tangible property.

7. What laws or regulations exist in the Republic of Korea to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

Korea has a number of data privacy laws and regulations, namely, the Personal Information Protection Act (PIPA), Act on Promotion of Information and

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Communications Network Utilization and Information Protection (Network Act), and Credit Information Use and Protection Act (CIUPA).

The PIPA is Korea's comprehensive general law on personal information protection that applies to all public institutions, corporations, and individuals that process personal information for business purposes. The Network Act regulates an online service provider's processing of personal information of its users, while the CIUPA governs the processing of personal credit information for commercial transactions (e.g., financial transactions).

Each of the above three laws include provisions on the collection/use, third-party transfer, outsourcing, and destruction of personal (credit) information. The three laws also require that, in principle, the data subject's prior consent be obtained in order to process their personal (credit) information, unless in certain exceptional cases. Under the PIPA, Network Act, and CIUPA, data handlers must also implement certain technical and managerial safeguards to ensure the secure processing of personal (credit) information.

Failure to comply with the above data privacy laws may result in administrative sanctions (e.g., penalty surcharges and administrative fines), civil liability, and/or criminal sanctions (e.g., imprisonment), so it is important for those handling personal (credit) information as part of their business to familiarize themselves with the applicable provisions of each of the laws and comply with them. Korean regulators are of the view that Korea's data privacy laws and regulations can be applied to foreign companies who process personal (credit) information of Koreans, even if a foreign company processes a Korean customer's personal (credit) information outside of Korea. Comprehensive intellectual property laws exist in Korea, and they provide the same levels of protection for foreign investors as local companies. The local courts and tribunals enforce the relevant laws uniformly, regardless of the nationality of the parties. The intellectual property laws of Korea range from the laws that protect patent (Patent Act), utility model (Utility Model Act), design (Design Act) and copyright (Copyright Act), to laws that protect more particular intellectual property rights such as variety of seeds (Seed Industry Act) and semiconductor layout (Semiconductor Layout Design Act). Korea is a member country to the Patent Cooperation Treaty, Paris Convention for the Protection of Industrial Property and Berne Convention for the Protection of Literary and Artistic Works, and protects the relevant intellectual properties of the nationals of the other member countries based on the principle of reciprocity.

8. Describe the most common legal structures used by foreign investors when doing business in the Republic of Korea.

When establishing operations in Korea, a foreign investor should first choose:

- incorporating a subsidiary; or
- establishing a branch office or liaison office.

Some of the major considerations in choosing between a subsidiary and a branch or liaison office include tax implications, corporate liability issues and the intended activities in Korea. It should be noted that a liaison office is not permitted to engage in any profit generating activities.

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When a foreign investor decides to incorporate a subsidiary they may choose from a number of forms of incorporation as set forth in the Korean Commercial Code (KCC).

They include:

- stock company (*chusik hoesa*);
- limited company (*yuhan hoesa*);
- partnership company (*hapmyong hoesa*);
- limited partnership company (*hapja hoesa*); or
- limited liability company (*yuhan chaekim hoesa*).

The stock company (*chusik hoesa*) or limited company (*yuhan hoesa*) is the most commonly used form of corporate structure by foreign investors in Korea. The key factors in choosing the type of corporate entity usually include corporate liability, management and operation of the entity and tax implications. In stock company, shareholders who have invested in a company hold limited liability of their investment amount, transfer of stocks is easier, corporate bonds can be issued, and stocks can be listed. In limited company, members who have invested in a company hold limited liability of their investment amount, transfer of stocks may be restricted under the Articles of Association, corporate bonds may not be issued and the units of a limited company will not be listed. Generally speaking, the stock company is suitable for large companies as it is easy to invite shareholders, while limited company is more suitable for small or medium size enterprises composed of limited number of members.

9. What are the most attractive opportunities for foreign investors in the Republic of Korea at this time?

In the midst of COVID-19, overall foreign investment in Korea declined. Despite the overall decline, however, FDI inflows continued to be robust in several sectors.

Currently, the following sectors provide attractive opportunities for foreign investors:

- semiconductor and 5G telecommunication related areas (machinery, chemical materials, patent licensing, etc.);
- bio-pharmaceutical, healthcare and medical devices (especially, bio-similar, drug substance, diagnostic devices and clinical test area);
- electric cars and batteries;
- content businesses (music, drama and movies, online & mobile games, web toons); and
- cosmetic products (so-called K-beauty).

These are the sectors in which Korean companies enjoy a competitive advantage in terms of technology and innovations.

10. Do specific laws or mechanisms exist in the Republic of Korea to protect foreign direct investors?

In Korea, foreign investors are generally protected by the following three principles:

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- guarantee of overseas remittance;
- national treatment; and
- exclusion from the discriminatory application in tax reduction and exemption regulations.

First, it is guaranteed that a foreign investor remit proceeds accruing from the stocks, etc. acquired by it, proceeds from the sale of stocks, etc., and the principal, interests, and service charges paid under the loan agreement referred to in the FIPA to a foreign country in accordance with the details of the report or permission of the foreign investment at the time of such remittance. (Article 3 (1) of the FIPA).

Next, foreign investors and foreign-invested companies shall be treated in the same manner as Korean nationals or Korean corporations or enterprises are treated in respect of their business operations, except as otherwise provided in other statutes (Article 3(2) of the FIPA).

Lastly, the provisions of tax statutes concerning tax exemptions and reductions applicable to Korean nationals or Korean corporations or enterprises shall also apply to foreign investors, foreign-invested companies, and the lenders of the loans provided under the FIPA, except as otherwise provided in other statutes (Article 3(2) of the FIPA).

In addition, to further protect foreign investors and to resolve complaints from foreign investors and foreign-invested companies, the Korean government introduced the Foreign Investment Ombudsman ("Ombudsman"). The Ombudsman was commissioned by the President of Korea on the recommendation of the Minister of Trade, Industry and Energy following deliberation by the Foreign Investment Committee. The Ombudsman investigates and handles complaints from foreign investors and foreign-invested companies, devises improvement measures for the foreign investment system, and delivers proposals to related administrative or public organizations. The Ombudsman may also request cooperation of related administrative organizations or competent authorities to handle complaints from foreign investors and foreign-invested companies.

AUTHOR BIOGRAPHIES

Jihn U. Rhi

Jihn U. Rhi is a managing partner at K1 Chamber LLP. He practices in IP & Entertainment, Antitrust, Digital Economy, Bankruptcy, Commercial Litigation and Arbitration, and Bio Pharmaceutical. Mr. Rhi received an LL.B. from the Seoul National University College of Law and LL.M from Cornell University. He is admitted to the Korea bar.

Jong Jae Lee

Jong Jae Lee is a partner at K1 Chamber LLP. He practices in Commercial and Corporate Law, Cross-Border Transactions, Real Estate, Commercial Litigation and Arbitration, and IP Law. Mr. Lee received an BA in Economics from the Seoul National University and JD from New York Law School. He is admitted to the New York bar.

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TUNISIA

Ismaël M'rad
Dentons Zaanouni Law Firm & Associates

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

Tunisia has been fully integrated in the trade globalization process since the 1980s and took a policy to encourage the sectors of tourism and outsourcing activities, mainly in textile and automotive.

While preserving strength within the above key sectors, Tunisia has, since 2000 been encouraging investment in the following key sectors with high growth potentials:

- **Renewable energies.** The green energy sector emerged in Tunisia in the 1950s through STEG's investment in hydroelectric power. Aware of the challenge of its energy security, Tunisia has embraced a policy of gradually integrating renewable energies into the energy mix as a priority axis of development. The objective is to reach 30% of electricity production from renewable energies by 2030. The country has significant development potential, particularly in wind and solar power, and has adopted a framework law, promulgated in 2015, defining a legal base for the implementation of private renewable energy projects.
- **Aerospace and aeronautic industry.** The aeronautics sector has seen a significant development in Tunisia between 2000 and 2017, owing mainly to the successive set-up of foreign leaders who managed to structure the sector around six main branches covering all the value chain links. The aeronautics sector is characterized by a mature value chain on all links with high added value.
- **Agro-food industry.** The food-processing sector is one of the most developed sectors in Tunisia and is considered to be at the core of the Tunisian economy. The sector is structured mainly around the production of inputs for the food processing industry, upstream and downstream logistics and marketing services around 3 sectors constituting the main links of the food-processing value chain, the production of inputs, processing industry and marketing services.
- **Pharmaceutics.** The pharmaceutical industry value chain encompasses research & development activities, manufacturing inputs for the pharmaceutical industry and distribution channels.
- **IT.** With competitive salaries, an undeniable quality of human resources, a technological infrastructure meeting international standards and generally a favourable legislation through the Start-Up Act, Tunisia can be an ideal platform to access neighboring markets, such as those of Algeria or Libya, as well as other African or Middle Eastern markets.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has Tunisia's government adopted an aggressive posture in regulating foreign investors?

Attracting foreign direct investment (FDI) has been always a key priority for the Government of Tunisia (GoT) since the liberalization of its economy which began in the late 1980s.

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From that time, Tunisia became fully integrated in the globalization of trade and developed into a major hub for outsourcing for industry, especially in textile and automotive components, and adopted a complete set of initiatives to encourage wholly exporting activities such as the promulgation of the Code of Incentives to Investments in 1993.

Facing new challenges following the financial crisis of 2008, the opening of new markets with the EU extension, the rise of the digital economy, the entry of China into the WTO and the elated increase of competition between developing countries, along with the context of the Arab Spring (which put Tunisia in face of social pressure to create jobs and economic opportunities for its young population), the country undertook an ambitious program of regulatory reforms to make the economic environment more competitive and to reinforce the attractiveness of its investment climate, including:

- adoption of a new investment law and its decrees in 2016 and 2017 respectively, enshrining key investor guarantees and removing barriers on FDI in numerous economic activities;
- adoption of a specific legal framework governing Private Public Partnerships (PPP) in 2015;
- reform of the Competition Law in 2015 with the support of EU and OECD, in order to meet international standards and best practices of competition policies;
- reform of the insolvency regulations in 2016 with an improvement of anticipated alert tools of economic difficulties;
- adoption of Startup Act in 2018; and
- adoption of Law of Improvement of the Investment Climate in 2019.

3. Are there specific sectors of Tunisia's economy or industries where foreign direct investment is barred or highly regulated?

The exercise of a commercial activity in Tunisia is not permitted to foreigners according to the provisions of the Decree-law No.61-14 of August 30, 1961, relating to the conditions of exercise of certain commercial activities. Such prohibition encompasses the following activities:

- real estate agent;
- commissioner, broker and commercial agent;
- general or special agent of insurances;
- dealer, consignee, general representative, sales agent; and
- travelling salesmen;

Pursuant to the same Decree-law, any non-Tunisian person or entity who wants to perform any of the above activities must apply for a foreign trade card, with the following exemptions:

- activity of extraction of raw materials (mining, oil & gas);
- banking, exchange and stock exchange activities subject to applicable regulations; and
- trade and distribution of hydrocarbons;

Notwithstanding the above restrictions, foreign investments in industry and services are permitted, except for activities subject to authorizations and/or

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compliance with specifications. Tunisia decided in 2018 to adopt a policy of a negative list of activities for certain strategic sectors, such as transport, banking and finance, hospitality, hazardous industries, health, education, telecommunication, and other commercial and service activities.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in Tunisia and what steps has the government taken to respond?

With the acceleration of price increases, the consequences of the post-COVID-19 crisis and the war in Ukraine, repeated interruptions of supply chains have disrupted not only worldwide companies and industry tycoons but also small and medium companies around the world.

The automotive industry is an example of such phenomenon. The disturbance of the production of semiconductors in Taiwan in 2021 strongly impacted the automotive market. More recently, German automotive manufacturers saw their situation worsened with the stopping of work on their cabling plants located in Ukraine further to the outbreak of the Russian-Ukrainian war. Contrary to their German competitors, French automotive manufacturers were less affected by such crisis since they are used to locating their contractors in North Africa.

All the above crises constitute a challenge for globalization under its current form and force the restructuring of global supply chains into a new configuration based on relocation in nearby countries, which experts of OECD, IMF and US Treasury call "friend-shoring".

According to OECD officials, Tunisia has many key assets ready to take advantage of such reshaping of global supply chains. The Tunisian Minister of Industry, Energy and Mines, Mrs. Neila Nouira El Gongi, recently declared that the Russian-Ukrainian crisis, despite its impact on the national budget, may offer great potential for growing the industrial sector. A task force works in close collaboration with Tunisian Ministry of Economy, Tunisian Investment Agency (TIA) and Foreign Investment Promotion Agency (FIPA) to identify opportunities resulting from this new configuration of global supply chains. In the same way, Mrs. Gongi announced that discussions are ongoing with foreign investors about advanced projects of relocation in the sectors of electronics, automotive industries as well as new projects related to mobility – "We are actually repositioning our country on the international chessboard of investment with a special focus on Africa" she declared in the same context.

5. In M&A transactions as well as joint ventures in Tunisia, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Before considering an M&A or joint venture transaction, a foreign investor will need to be in compliance with the provisions of the following regulations:

- Law No. 2016-71 of September 30, 2016 on the Investment Law;
- Law No. 2015-36 of September 15, 2015 relating to the reorganization of competition and prices;

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- the Decree-Law No. 61-14 of August 30, 1961 relating to the conditions of exercise of certain commercial activities; and
- the foreign exchange regulations.

The main concerns for a foreign investor regarding Law No.2016-71 will be in respect of the conditions of eligibility to the premiums and incentives granted to the foreign investors (e.g., allowance of increase of added value and competitiveness, allowance of regional development, allowance of development of the capacity of employability, allowance of sustainable development etc.). To do this, they will have to make effective their investment project and to comply with regulations relating to the right of work, transparency, health, social security, environmental protection, protection of natural resources, taxation, territorial planning and urbanism.

Regarding the law on competition and prices, a foreign investor, for an M&A transaction, will have to obtain the approval of the minister in charge of trade, provided that some thresholds are met (market share of 30% and/or global turnover of TND 100 million). This agreement is necessary for any economic concentration project. It is understood that an economic concentration is any act involving the transfer of ownership or use of all or part of the assets, rights or obligations of an enterprise, the effect of which is to enable an enterprise or a group of enterprises to exercise, directly or indirectly, a decisive influence over one or more other enterprises.

Decree-Law No. 61-14 requires foreign investors to obtain a trade card from the Ministry of Trade in order to engage in certain commercial activities (examples include, but are not limited to, commercial agents, brokers and dealers).

Foreign exchange regulations provide for freedom of transfers related to "current operations", i.e., without prior authorization of the Central bank of Tunisia (CBT), as well as for net real proceeds and value added from sale or liquidation of capital invested previously through foreign currency import, while other operations, such as clearing debts with foreign countries, are subject to prior CBT authorization.

6. What is the best strategy for acquiring interests in real estate or other tangible property in Tunisia? Is this more difficult for foreign investors?

Tunisian law imposes some restrictions regarding the ownership of real estate by foreign citizens, which can be summarized as follows:

- Foreign ownership of agricultural land is forbidden (Law No.69-56 of 22 September 1969 related to reform of agricultural structures, as amended by Law No.97-33 of 26 May 1997). The ownership of agricultural land is permitted for Tunisian persons, cooperatives, public entities, civil and limited liability companies fully owned by Tunisians and public limited companies dedicated to agricultural activities and created in compliance with Law No.89-43 of 8 March 1989. Companies whose capital is owned totally or partially by foreigners can operate agricultural activities through lease of land only and the land cannot constitute a contribution in kind to such companies.
- Foreign investors benefit from a freedom to acquire lands and buildings located in industrial and tourist zones for the purpose of their economic project.

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- For lands and buildings which are not located within industrial or tourist zones, their acquisition by foreign investors is subject to the prior authorization of the Governor, in accordance with the provisions of the Decree of 4 June 1957 related to real estate transactions. Such authorization is mandatory, failing which the sale contract is void. In practice, the acquisition will follow the following process, regardless of the quality of the foreign applicant (private or investor):
  - Signature of a promise of sale, on which performance will be conditioned by the obtaining of the Governor authorization. Parties can agree upon an advance payment (generally between 10% and 20% of the sale price).
  - Obtaining of the Governor authorization (applicable to foreigners either for the sale and the purchase of a real estate). If refused, the promise of sale is terminated and the advance payment is reimbursed to the purchaser (parties can agree on a non-reimbursable portion of the advance as indemnity for the seller).
  - Signature of the sale contract (which shall make reference to the Governor authorization) / registration at the tax office / registration at the Land Registry.
  - Obtaining authorization of the Central Bank of Tunisia when the purchase is made by any foreigner who is not resident in Tunisia, in accordance with the provisions of article 20 of the Decree No.77-608 of 27 July 1977 related to exchange control regulations.

7. What laws or regulations exist in Tunisia to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

Article 30 of the new Tunisian Constitution of 25 July 2022 provides that "The State protects privacy, inviolability of the home and the secrecy of correspondences, communications and personal data (…)", while article 29 provides that the protection of intellectual property is guaranteed.

Protection of personal data

Based on such principle, the protection of personal data is governed by the provisions of Organic Law No. 2004-63 of 27 July 2004 on the protection of personal data, which has been adopted further to the adhesion of Tunisia to the Convention No.108 of the European Council.

The collection (automated or manual) of personal data is subject to prior declaration to the Tunisian authority of protection of personal data (INPDP). The legal representative of the legal entity wishing to collect personal data must be of Tunisian nationality, be resident in Tunisia and have no criminal record. The data concerned by the collection are those of natural persons present (resident or not) in Tunisia.

The transfer of personal data abroad, is subject to the prior authorization of the INPDP.

Criminal sanctions include:

- in case of non-compliance with the obligation of prior declaration and obtaining authorization for the transfer abroad: one year imprisonment and a fine of TND 5000;
- in case of not obtaining the consent of the person concerned by the collection of his personal data: one year of imprisonment and a fine of TND 5000;

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- in case of collection of personal data that are subject to a ban on collection: two years imprisonment and a fine of TND 10,000.

Civil sanctions must be evaluated from the point of view of compensating for the damage suffered by the person concerned by the collection of their personal data.

Protection of intellectual property

Tunisia is a member of the World Intellectual Property Organization (WIPO), and adheres to most related international treaties and conventions. The National Institute for Standardization and Industrial Property (INNORPI) (see *www.innorpi.tn*) is the agency responsible for patents and trademarks; the Tunisian Copyright Protection Organization (OTDAV) is the agency responsible for copyrights; and the Tunisian Internet Authority (ATI) is the agency responsible for administering the .TN country domain name.

Tunisia intellectual property laws enshrine the equal treatment of foreign registrants and Tunisian nationals. Registration and maintenance requirements for Tunisian patents, trademarks, and copyrights are straightforward and relatively inexpensive. The creation of a specialized intellectual property court in 2014 employing judges and court clerks with specific training and expertise in handling intellectual property cases has also significantly increased the speed and quality of legal enforcement decisions clients, with numerous advantages for companies claiming trademark infringement in connection with counterfeit goods.

In 2016, Tunisia signed an agreement with the EU that allowed automatic patent protection in Tunisia for European patent applications through the European Patent Organization. The agreement went into effect in December 2017.

8. Describe the most common legal structures used by foreign investors when doing business in Tunisia.

Tunisian legal framework distinguishes between:

Individual companies and partnerships companies	Limited Liability company	Joint stock companies
• Sole proprietorship. • General partnership. • Limited partnership. • Joint venture.	• Limited liability company (Société à responsabilité limitée - SARL). • Single-owned limited liability company (Société Unipersonelle à responsabilité limitée).	• Public limited company (Société anonyme - SA). • Limited company by shares (société en commandite par actions).

In Tunisia, the most widespread and frequent forms of companies are the limited liability company (SARL) and the public limited company (SA). Each legal form (SARL or SA) has its own particularities.

The table below details the different aspects related to SARL and SA, including those related to incorporation, management, rights and obligations of shareholders, and transfers of securities:

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	Limited liability company (SARL)	Public limited company (SA)
Number of shareholders	1 (Single-owned limited liability company) up to 50.	7 to unlimited.
Shareholders	Persons (adults, and minors through their legal administrator) and/or entities.	Persons (adults, and minors through their legal administrator) and/or entities.
Responsibility	Limited to capital contributions.	Limited to capital contributions.
Share Capital	Undefined (in practice no less than TND 1,000).	At least TND 5000 and TND 50,000 in case of a publicly-traded SA.
Composition of the share capital	Contributions in cash and/or in kind.	Contributions in cash and/or in kind.
Release of cash contributions	In full at incorporation.	The company is only incorporated after the subscription of the entire share capital. Each shareholder must release at least a sum corresponding to the quarter of its subscribed shares. The full payment of the cash shares must take place within a maximum period of 5 years from the day of the incorporation.
Contributions in industry	Possible, but does not integrate the company capital.	Impossible.
Decision-making	Powers divided between the manager and the shareholders' assembly.	Powers divided between the management and control bodies (board of directors and CEO, or supervisory board and management board) and the shareholders' assembly.
Accounting obligations	Keeping of regular accounts, mandatory accounting books and preparation of annual accounts.	Keeping of regular accounts, mandatory accounting books and preparation of annual accounts.
Deposit and publication of the accounts at the National Register of Companies	Mandatory.	Mandatory.
Statutory Auditor	Mandatory as of the second fiscal year and only if the company meets two of the above thresholds: • TND 100,000 for the balance sheet total; • TND 300,000 for the total income; • 10 employees.	Mandatory.

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9. What are the most attractive opportunities for foreign investors in Tunisia at this time?

Excellent opportunities exist for potential investors, especially in sectors of high-added value technology, such as hydrocarbons, power generation, renewable energy (including green hydrogen), aeronautics, transportation, healthcare, safety and security, and IT. Other opportunities may be identified in more labor-intensive, offshore manufacturing industries such as textiles, agribusiness, aerospace, and mechanical and electrical equipment. In recent years, multinational companies have established call-centers primarily for European markets.

Tourism has always constituted a key economic advantage for Tunisia. The crisis in the 10 last years (Revolution of 2011, terrorist attacks, pandemic) deeply impacted local operators who were oriented on the business model of popular mass tourism. The sector is trying to take a second wind and new opportunities are emerging for some businesses such as guesthouse hospitality, cultural and historical tours, golf packages, desert excursions, and medical tourism.

10. Do specific laws or mechanisms exist in Tunisia to protect foreign direct investors?

Tunisia has bilateral investment treaties in force with Argentina, Austria, Belgium-Luxembourg Economic Union, Bulgaria, Burkina Faso, China, Czech Republic, Denmark, Egypt, Ethiopia, Finland, France, Germany, Greece, Indonesia, Iran, Italy, Jordan, Republic of Korea, Kuwait, Lebanon, Libya, Malta, Morocco, the Netherlands, Oman, Poland, Portugal, Romania, Senegal, Spain, Sweden, Switzerland, Syria, Togo, Turkey, the United Arab Emirates, the United Kingdom and the United States.

Tunisia is also member of the WTO as well the regional trade organizations AfCFTA, COMESA, ECOWAS and Arab Maghreb Union, and was the first country of the south Mediterranean coast to have entered into association agreement with the EU in 1995.

In addition to its above international commitments, soon after its adhesion to WTO, Tunisia adopted a specific legal framework dedicated to attracting foreign investment through the Code of Incentives of Investments in 1993, granting specific advantages to wholly-exporting companies. The investment legal framework has been reshaped with the Law of Investment of 17 September 2016 which reaffirms certain benefits granted to foreign investors:

- The investor is free to own, rent and exploit non-agriculture properties for the purpose of achieving direct investment operations or their extension.

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- A foreign investor must not be treated less favorably than a Tunisian investor in like circumstances with regard to his rights and obligations.
- An investor's funds, possessions and intellectual rights are guaranteed in conformity with the legislation in force.
- Investors' properties shall not be expropriated, except for public interest without any discrimination regarding nationality and upon fair and equitable compensation in accordance with due process of Law.
- Foreign investors can freely transfer abroad funds in foreign currency in accordance with applicable exchange regulations.
- Where a dispute arises between the Tunisian State and the investor, parties are freely allowed to agree on the mediation's procedures and rules, Otherwise, Conciliation Rules of the United Nations Commission on International Trade Law shall apply. If a dispute between the Tunisian State and a foreign investor is not settled through conciliation, it may be submitted to arbitration under an agreement between the parties. In such case, the arbitration procedures are subject to the Arbitration Code provisions. Otherwise, the Tunisian courts are exclusively entitled to examine the dispute.

AUTHOR BIOGRAPHY

Ismaël M'rad

Ismaël M'rad is Senior Associate at Zaanouni Law Firm & Associates, in charge of commercial and corporate matters, general compliance in IT, banking and foreign exchange regulations, and development of renewable energy projects.

Ismaël's focus is on international construction contracts of industrial plants, particularly those related to mining production and power plants in Tunisia. He has advised in relation with contractor's disputes with public project owners, either on amicable level or by international arbitration (ad hoc, ICC, LCIA).

He is also experienced in cross-border transactions of oil & gas assets and helped secured listing and delisting of a major Tunisian bank from the London Stock Exchange, while being fully involved in new market trends by securing foreign investments in electronic trade platforms, digital currencies and renewable energies, with specific focus on Power-to-X projects.

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UNITED KINGDOM

Sally Jones, Carolyn Thurston Smith, Mark Hough, Jen Lee, Russell Gardner & Nicola Tong
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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

UK trade patterns have been affected by a combination of recent events: the UK's withdrawal from the EU, the COVID-19 pandemic and the war in Ukraine. UK trade policy has evolved in response, and we outline the most significant considerations for traders and investors below.

The UK's withdrawal from the EU (Brexit) has resulted in major changes to its trading relationship with the EU Member States and other members of the European Economic Area. The Trade and Continuity Agreement sets out the terms of trade between Great Britain and the EU going forward. Agreement on the Windsor Framework, which replaces the Northern Ireland Protocol from March 2023, has generated greater certainty in relation to the special position of Northern Ireland.

As a result of Brexit, UK businesses no longer have unfettered access to the internal market and regulatory divergence is set to increase over time. For both traders and investors, the UK therefore no longer necessarily offers an attractive 'gateway' to the European market.

One of the biggest changes in trade dynamics comes from the reintroduction of customs processes and other border measures, which have caused significant logistical difficulties for those seeking to move goods between the UK and the EU. Although the EU remains the UK's biggest trading partner for both goods and services, figures on UK-EU trade show a considerable decline in trading activity. According to the latest ONS figures, between 2017 and 2021 the UK's total exports to the EU fell from GBP 281.43 billion to GBP 267.40 billion (a 4.99% reduction). During the same period, the UK's imports from the EU fell from GBP 353.10 billion in 2017 to GBP 292.21 billion in 2021 (a 17.25% reduction).

In the wake of EU withdrawal, the UK has increased its efforts to negotiate new trade partnerships and refresh existing free trade agreements (FTAs). The UK has negotiated FTAs with Australia and New Zealand and a cutting-edge Digital Economy Agreement with Singapore. In March 2023, it was announced that the UK's application to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has been formally approved. These new agreements demonstrate an ambitious approach to negotiating agreements and reflect the UK Government's commitment to expanding the country's international trade network.

The loosening of trade ties in Europe, combined with the UK Government's tilt towards the Indo-Pacific as a region of specific focus for strengthening and deepening trade relations, could mark the beginning of a turn away from the regional bias that remains prevalent in international trade trends. While practical considerations such as transportation and logistics along with cultural factors such as long-standing business relationships mean this will not change overnight, we could see new patterns emerging over time. The dynamism and strong growth in the Indo-Pacific region have attracted UK

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business interest and recent and future UK trade agreements may serve to crystallise this focus.

COVID-19 imposed numerous stresses on the global trading system and although the impact of the pandemic has eased considerably, this has been replaced by pressures from the war in Ukraine. The global nature of supply chains means that constraints in any one part of the globe are likely to prompt effects around the world and UK businesses have been impacted accordingly. The impact of war in Ukraine is particularly significant as the country provides a large proportion of the world's sunflower oil, cereals such as corn and wheat, and iron and iron ore as well as rare earths, including lithium and rare earth metals such as platinum and gallium.

In the short term, an uncertain trade landscape is likely to prevail. Within this uncertainty, strategic opportunities can nevertheless be found as companies seek to spread their risk and diversify their supply chains to minimise the impact of future shocks. Although businesses now face higher trade barriers with the EU internal market, the extent to which these present a challenge to export may lessen over time as they become accustomed to the new trade regime. Possible new trade avenues, including those in Asia-Pacific, may also become more attractive to businesses already exporting to the EU, as many of the export requirements will already be familiar.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has the United Kingdom's government adopted an aggressive posture in regulating foreign investors?

The UK is generally recognised as an open market for investment, with successive governments having sought to emphasise the UK as an attractive investment destination. As a general rule, foreign individuals and businesses have the same rights and obligations and the same ability to invest and conduct business, as those resident in the UK.

The National Security and Investment Act 2021 (NSIA) has introduced a more extensive national security regime for the UK which expands the types of transactions that are covered by national security reviews to include not just mergers and acquisitions but also minority investments and acquisitions of assets. This regime applies to both UK and foreign investors and also applies in the context of intragroup reorganisations.

Under the terms of the NSIA, qualifying acquisitions in one of the 17 qualifying sectors (see Question 3) must be notified to the UK Government and receive approval before they can take place. Broadly speaking, a qualifying acquisition occurs when an investor acquires a level of control above a certain threshold over a qualifying UK entity or asset (which can include land and both tangible and intangible movable property, including source code algorithms, software and trade secrets), and that entity or asset is in a qualifying sector. Constraints or conditions could be imposed on ownership of some entities and assets and, in extreme circumstances, the transaction could be barred from taking place. Even outside these 17 sectors, a transaction may be called in for review by the Secretary of State if there are potential national security concerns. This power can be used

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even after a transaction has taken place, meaning investors may be advised to file a voluntary notification as a precautionary measure.

It is anticipated that the screening process may be more stringent for overseas investors, although formally it applies to internal investors too. If an overseas investor is looking to invest in a qualifying sector, the ability to do so may be more limited than was previously the case.

It is too early to provide an in-depth assessment of the NSIA's impact on foreign investment. Overall, the UK system is broadly in line with similar approaches which are being, or have recently been, introduced or updated elsewhere. However, the Act operates on a case-by-case basis and it is not clear what decision might be issued by the Secretary of State in any given scenario. As a result there remains some uncertainty about the extent and scope of its application and conversations around implementation are ongoing as investors and advisers familiarise themselves with the system. While the Act does not necessarily indicate that the UK Government is taking an "aggressive posture", it nevertheless introduces potential barriers to or constraints upon investment.

More generally, the UK Government announced a review of its approach to attracting FDI to run from April to September 2023 (see *www.gov.uk/government/publications/terms-of-reference-for-the-review-of-foreign-direct-investment*).

3. Are there specific sectors of the United Kingdom's economy or industries where foreign direct investment is barred or highly regulated?

Although the UK Government and UK law generally permits and encourages foreign investment, the NSIA has introduced a more extensive national security regime for the UK (see Question 2 above).

This Act identifies 17 qualifying sectors of economic activity, which are seen as critically important to national security:

- Advanced materials.
- Advanced robotics.
- Artificial intelligence.
- Civil nuclear.
- Communications.
- Computing hardware.
- Critical suppliers to government.
- Cryptographic authentication.
- Data infrastructure.
- Defence.
- Energy.
- Military and dual-use.
- Quantum technologies.
- Satellite and space technologies.
- Suppliers to the emergency services.
- Synthetic biology.
- Transport.

Many of the above-mentioned sectors were already highly regulated in their own right (for example Defence, Civil Nuclear and the Military) and restrictions

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on investment in these sectors would not be a new consideration for foreign investors. However, the new Act has both expanded regulation in respect of these areas, and introduced new regulation that applies to other sectors which would not previously have been subject to stringent conditions or restrictions.

As such, it is more important than ever for investors to obtain professional advice before entering into investment activity in the UK.

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in the United Kingdom and what steps has the government taken to respond?

Global supply chain pressures have forced price increases throughout global supply chains, affecting business in the UK. In order to spread risk, many businesses are looking to diversify their supply chain sourcing.

The UK Government has recognised these pressures. In October 2021, the UK used its Presidency of the G7 to agree to work together to support "resilient and sustainable supply chains" (see the G7 trade ministers' statement at *www.gov.uk/government/news/g7-trade-ministers-communique-october-2021*).

The UK is already taking action on supply chains at a national level. The National Cyber Security Centre has published guidance to support the cybersecurity of supply chains (see *www.ncsc.gov.uk/files/Assess-supply-chain-cyber-security.pdf*). Meanwhile the Ministry of Defence (MoD) has also been running Project Defend, mapping and producing in-depth analysis of 65 critical global supply chains to develop mechanisms to guard against risks and boost supply chain resilience.

In the recently negotiated UK-Australia FTA, both parties agreed to "enhance cooperation, including the exchange of information… with a view to further developing trade facilitation, while ensuring compliance with their respective customs laws, regulations, and procedural requirements, and improving supply chain security" in a number of specific areas including "cooperation on improvement of their risk management techniques, including sharing best practices and, if appropriate, risk information and control results…". The deal also introduced a Strategic Innovation Dialogue, through which the two countries have promised to enhance cooperation to promote and facilitate innovation in areas such as "value chain matters, including supply chain resilience".

5. In M&A transactions as well as joint ventures in the United Kingdom, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

Prior to completing a transaction, foreign investors need to ensure that the proposed merger or acquisition complies with UK competition law and that it does not fall within the scope of the 17 sensitive economic sectors covered by the National Security and Investment Act 2021 as doing so will trigger the compulsory notification procedure under that Act (see Questions 2 and 3 above).

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In addition to ensuring that they are aware of the rules and requirements to undertake this initial investment, investors should familiarise themselves with:

- ongoing regulatory obligations such as permits, licences or authorisations specific to their business or industry;
- the tax position both for the entity they are investing in, and themselves; and
- their general ongoing requirements once the investment has completed (such as corporate filing requirements and accounting obligations, including production and publication of annual accounts), to ensure they are compliant with such obligations.

All investors, including EU investors, will also need to take account of the changing post-Brexit legislative landscape. Areas where legislation is currently aligned may increasingly diverge over time and this will need to be monitored, particularly given the UK Government's stated intention to repeal a number of EU-origin regulations over the coming years.

6. What is the best strategy for acquiring interests in real estate or other tangible property in the United Kingdom? Is this more difficult for foreign investors?

The UK real estate market is one of the biggest and most liquid in Europe. The market is well developed and seen as an easy market for both new and existing foreign investors to engage with. One of the key advantages is transparency: information on available assets in both residential and commercial property categories is readily available. This combination of liquidity and transparency also provides accessible entry points at all levels of the market.

Property law is clear and well-established and the UK offers a landlord-friendly environment. This gives investors confidence in their rights.

The best strategic approach for acquiring property interests will vary from investor to investor. Property investors are well supported by a community of advisers including lawyers, accountants and the banking industry who can provide industry insights as well as the technical professional expertise required to facilitate acquisitions.

Investors should be aware of the new Register of Overseas Entities, held by Companies House. Overseas entities are required to provide details of beneficial owners and managing officers. The new rules came into force in August of 2022 and are intended to further public trust in the market by enhancing the transparency around ownership of land by overseas entities.

7. What laws or regulations exist in the United Kingdom to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

At present, the UK's personal data protection regime is governed by the UK General Data Protection Regulation and is closely aligned to the original EU General Data Protection Regulation. Following Brexit, it is anticipated that the UK's personal data protection framework is likely to change. In March 2023 the Data Protection and Digital Information (No. 2) Bill was laid before Parliament.

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The explanatory notes identify one of the purposes of the Bill as "providing more certainty and stability for cross-border flows of personal data". The Bill also includes provisions covering smart data schemes to facilitate sharing of customer data with authorised third providers in response to a consumer request and other provisions around sharing, aimed at supporting business growth.

The UK is recognised as a global leader with regards to protection of intellectual property (IP) rights, and offers a clearly articulated system of protection for both registered IP rights such as patents and trademarks and non-registered IP protections such as copyright, unregistered designs and trade secrets. The UK has numerous highly qualified IP practitioners, including trademark and patent attorneys, who can advise clients on the best way to protect their intellectual capital. Rights holders have the ability to ensure practical enforcement of those rights through the civil courts or alternative methods of dispute resolution.

8. Describe the most common legal structures used by foreign investors when doing business in the United Kingdom.

Foreign investors can utilise the full range of legal structures. It is most common for global companies to create private companies limited by shares (often referred to simply as 'limited companies'), although it is also possible (although far less common) to create a private company limited by guarantee. This is because a limited company is recognised as a standalone legal entity and the liability of its shareholders is therefore more limited than it may be under other structures such as a UK branch, which would not have any legal personality of its own.

Other structures – namely public limited companies (PLCs), partnerships, limited liability partnerships, limited partnerships – are also available.

9. What are the most attractive opportunities for foreign investors in the United Kingdom at this time?

The UK has always been an attractive destination for FDI. There are some key fundamentals driving the UK's attractiveness that remain constant: use of English, which has become the international language of business; a time zone that makes it easy to interact with the rest of the world; and a strong legal and regulatory framework – although Brexit will mean aspects of the regulatory framework will evolve.

There have been dips in FDI activity into the UK recently. According to EY's UK Attractiveness Survey (see *www.ey.com/en_uk/attractiveness/21/how-uk-resilience-in-winning-fdi-creates-opportunity*), the number of FDI projects landing in the UK is down from recent peaks but the value of investments remains high. The latest survey saw the UK recover some ground from 2020's pandemic-driven decline, while the UK was second in Europe for total FDI project numbers; London remains Europe's most attractive city for FDI.

Some of the biggest future opportunities may well be found in the eight Freeports in England announced in March 2021 (see *www.gov.uk/guidance/*

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freeports). Similar to Special Economic Zones (SEZs) in other parts of the world, these would have different economic regulations and benefit from tax and customs incentives to drive innovation, job creation and accelerated development. These include tax reliefs, zero stamp duty, direct access to regulators to drive innovation, several years of zero business rates, lower tariffs and customs obligations, as well as streamlined planning processes. Two additional Green Freeports have been announced in Scotland in Cromarty and Forth (*www.gov.scot/policies/cities-regions/green-ports*).

Another area that is creating opportunities for investment is the transition to clean growth. The UK was the first G7 country to embrace a legal obligation to achieve net zero emissions by 2050 (78% by 2035) and wants to become a leading destination for innovation, testing and adoption (see *www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035* and *www.instituteforgovernment.org.uk/explainers/net-zero-target* for more information). The UK's 'Carbon Budget' approach has become the standard global mechanism for reducing greenhouse gases following the UN Paris Agreement (see *https://climate.ec.europa.eu/eu-action/international-action-climate-change/climate-negotiations/paris-agreement_en*).

Strategic policy initiatives are reinforced by GBP 26 billion in funding opportunities for business, designed to incentivise up to GBP 100 billion of private investment by 2030. This has been offered across a range of green initiatives, from support of electric vehicles and infrastructure to alternative energy sources such as hydrogen, offshore wind and advanced nuclear fuels.

These opportunities are likely to be bolstered by the recent changes in the visa system, for example the new Scale-Up Worker and High Potential Individual (HPI) visa routes, which demonstrate to businesses the appetite of the UK government to act in a targeted way, enabling investment opportunities to be exploited.

10. Do specific laws or mechanisms exist in the United Kingdom to protect foreign direct investors?

The UK is a strong proponent of the rule of law and, as a general rule, it does not discriminate between foreign and domestic companies. Investors into UK companies can expect to benefit from the same rights and remedies as fully domestic companies. UK courts are trusted to be fair and impartial. In addition, investors can make use of alternative forms of dispute resolution, such as arbitration and mediation.

The UK has negotiated an extensive network of Bilateral Investment Treaties (BITs) and FTAs with its trade and investment partners. Many of these agreements contain dedicated provisions for protection of overseas investors from the partner country, including a number which incorporate the possibility for investors to bring dispute settlement proceedings against the UK directly, if they believe their rights have been infringed. UNCTAD's Investment Dispute Settlement Navigator records only one instance of a claim having been brought against the UK, further reinforcing the UK's reputation

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as a safe environment for foreign investors. It is also worth noting that some of the investment protections found in these agreements overlap with certain protections recognised under international law more broadly, which are available to all foreign investors.

The UK Government generally (subject to the terms of the National Security and Investment Act 2021 and competition law) encourages foreign investment. It publishes useful guidance to assist foreign investors in understanding what requirements will be placed on them and how to comply. It also has taken steps to make foreign investment easier, for example by avoiding any requirement for a UK company to have UK resident directors – instead directors can all be domiciled internationally if that is preferred. The Department for International Trade (DIT) offers an investor support service and the Office for Investment is also designed to provide assistance to those looking to invest in the UK.

AUTHOR BIOGRAPHIES

Drawing on in-depth knowledge of the international trade and investment landscape, EY's Trade Strategy practice helps organisations – governments, investors and corporates – to identify trade inefficiencies, and then take steps to mitigate them.

Sally Jones
Sally Jones is a Partner in EY's Trade Strategy team helping companies and governments enhance trade. She is a leading specialist in trade policy from both a global and UK/EU perspective. She advises organizations across multiple industries including FTSE 100, Fortune 500, privately owned companies and trade associations. She also has frequent contact with the UK Government and the EU Commission.

Carolyn Thurston Smith
Carolyn Thurston Smith is a Senior Manager in the Trade Strategy team. She originally trained as a solicitor and worked for a number of years in policy and law reform in Brussels, London and Edinburgh, specialising in commercial law and trade in both an EU and wider international context. Carolyn has a particular focus on, and interest in, data and digital trade, regulation and standards, and ways in which legal frameworks can be used to support trade and investment.

Mark Hough
Mark Hough is a Partner in the Law practice at EY. He has extensive experience advising on a range of transactions, including mergers and acquisitions, disposals, joint ventures and equity fundraisings, as well as reorganisations and general corporate matters. His clients range from UK and international public and private companies through to owner-managed businesses and their shareholders. During his career he has spent time within the legal departments of two FTSE 100 companies.

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Jen Lee

Jen Lee is a corporate lawyer who has worked for both international law firm DLA Piper and PWC, before joining EY in January 2018 where she is now a Director in the Transactions Law team. Jen has more than 12 years' experience in advising a range of clients, with particular focus on large corporates and privately owned businesses, and specialises in national and international mergers and acquisitions as well as joint ventures, corporate reorganisations and all other aspects of corporate law.

Nicola Tong

Nicola Tong is a Director at EY with 20 years of consulting experience across the private and public sectors. She is adept at taking strategy and implementing it for her clients to deliver results. For over 10 years she has been working in FDI including leading the UK government's outsourced 120-strong FDI contract team. She is part of EY's network of FDI professionals regularly called upon to advise teams globally on effective strategies to delivering IPAs' desired investment outcomes.

Russell Gardner

Russell Gardner joined EY in 2000. He is the lead partner for the London real estate tax team and overall London real estate business. Russell specialises in providing tax advice on significant real estate and leisure transaction and UK and International tax structuring of real estate businesses and investments. He has considerable public market experience including many IPOs.

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UNITED STATES

Dennis Unkovic
Meyer, Unkovic & Scott LLP

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1. After more than a half century of increasingly liberalized world trade, there are signs of change. Do you see world trade patterns evolving in new and different directions? What does this mean for your country and your clients?

World trade patterns are experiencing historic disruptions that promise to permanently alter the course of global trade in the future. There is a marked movement away from the international trade model which has dominated global governmental policies since the end of World War II. The trend suggests that governments are increasingly embracing bilateral trade agreements among nations as well as placing a greater reliance on the role played by regionalized trading blocs. Many nations are already adopting policies that transparently favor national economic priorities and self-interests. This movement away from a global trading system is changing how and where United States companies will make investment decisions outside of the U.S. and will also promote increased inbound investment opportunities for the U.S.

2. Historically, foreign direct investment was embraced by governments as a way to strengthen domestic economies. Has the United States government adopted an aggressive posture in regulating foreign investors?

For half a century, the United States was a priority target for foreign investors because of the size of its large consumer-driven economy. This open-door policy is transforming because the U.S. government has begun to recognize the vulnerabilities of its domestic economy as many leading U.S.-developed technologies (such as advanced semiconductor chips) have been the target of competing countries and industries. This concern is reflected in recent initiatives by the Biden Administration to shield high value U.S. technologies from being acquired by foreign companies or countries that are perceived as a strategic threat to the U.S. economy.

Just as this book is going to press, a related trend is emerging which was sparked by the passage of the Consolidated Appropriations Act 2023, signed into law by President Biden on December 29, 2022. It focuses on identifying possible national security threats to the U.S. economy posed by outbound investments which impact strategic sectors of the U.S. economy. This new law will initially direct the U.S. Treasury Department, Department of Commerce and other agencies to examine outbound investments that involve China and Russia and could affect U.S. national security in areas such as artificial intelligence, quantum computing and, semiconductors and related equipment. I anticipate this will eventually lead to the implementation of a program responsible for also screening outbound investments in the future.

3. Are there specific sectors of the United States economy or industries where foreign direct investment is barred or highly regulated?

For political and national security reasons, the United States Congress has historically shielded key industrial sectors within the U.S. economy so as to restrict, or in some cases block, foreign direct investment (FDI) from non-U.S. investors and governments.

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Examples are:

- **Airlines.** The U.S. Department of Transportation has established limits on foreign ownership in U.S.-based air carriers [49 U.S.C. §40102(a)(15)].
- **Transportation.** Title 46 of the United States Code outlines certain barriers to FDI in the U.S. maritime industry.
- **Mining.** The Mineral Leasing Act of 1920 (as amended) governs the disposition of certain U.S. natural resources and defines what opportunities are open to foreign investors.
- **Ports.** The Deep Water Ports Act of 1974 restricts FDI to certain defined levels in deep water oil and liquid natural gas ports.
- **Defense.** Executive Order No. 12829, the National Industrial Security Program, defines which contractors may access U.S. government classified information and which companies are barred under "foreign ownership, control or influence" (FOCI).
- **Communications & Media.** The Communications Act of 1934 (as amended) restricts the percentage of ownership which is permitted for a foreign corporation or investor seeking U.S. communications licenses, including broadcast, wireless personal computer systems, cellular and aeronautical.
- **Nuclear Energy.** This is a highly complex and regulated area, and FDI in the nuclear energy field is significantly limited. See the Atomic Energy Act of 1994, 68 Stat. 919.
- **Agriculture.** The Agricultural Foreign Investment Disclosure Act of 1978 outlines the reporting requirements when a "foreign person" desires to acquire an interest in 10 or more acres of agricultural land in the United States.
- **Banking.** The banking sector of the U.S. economy is highly regulated with respect to foreign financial institutions. See the International Banking Act as amended by the Foreign Bank Supervision Enhancement Act of 1991.
- **Real Estate.** In December 2015, former President Obama signed into law provisions easing the obligations imposed on some foreign investors covered by the 1980 Foreign Investment in Real Properties Tax Act (FIRPTA).

4. The global supply chain has been collapsing worldwide since 2020. How has this impacted businesses in the United States and what steps has the government taken to respond?

The global supply chain is broken. Because COVID-19 brought this issue to the forefront, many mistakenly assume the pandemic was the cause of the supply chain collapse. It was not; COVID-19 merely exposed problems that had been impacting the supply chain for years. Beginning in the 1980s, companies worldwide began to shift their sourcing of materials and components from domestic suppliers to foreign countries where labor costs were much lower. China was the major beneficiary of this trend, and its economy grew twentyfold over three decades. Today, China can no longer offer "cheap labor" as an incentive to locate manufacturing facilities there. Basically, the reason is the once popular management theory of "just in time" manufacturing – that is, maintaining inventories at low levels and only ordering a component or raw material right

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before it is needed – proved to be inherently flawed. This led to supply chain fractures that spiked during the pandemic.

In response to the fractured global supply chain, the United States government adopted a wide variety of incentives to promote more domestic sourcing of components and materials, particularly where an industry or company has a technology or product that is important to U.S. national security interests. An example of such an incentive is requiring products sold to the U.S. government or its agencies to contain increasingly higher percentages of "domestic" (U.S.) content in order to qualify for government funding.

5. In M&A transactions as well as joint ventures in the United States, what are the most critical issues foreign investors must evaluate prior to contemplating a transaction?

The Exon-Florio Act of 1988 (Exon-Florio)

Exon-Florio was enacted by the U.S. Congress in 1988 in reaction to growing concerns surrounding increasing acquisitions of key U.S. businesses by Japanese and other foreign companies. It is intended to regulate foreign investment based on "national security issues." Exon-Florio permits the President of the United States to monitor potential FDI as well as projects and joint ventures with U.S. companies doing business worldwide where national security is involved. The President has the power to halt a proposed project, or even reverse a completed transaction between a U.S. company and a foreign entity or government if:

- credible evidence exists that the transaction would negatively affect U.S. national security; and
- there are no steps the President could take to minimize those effects.

As a result of Exon-Florio, foreign investors for more than three decades have had to carefully analyze the potential national security implications of any proposed project in the U.S. before making any public announcement.

The Foreign Investment and National Security Act (FINSA)

Exon-Florio was strengthened by the enactment of FINSA following the September 11, 2001 terrorist attacks on New York City and Washington, D.C. FINSA mandates an even more comprehensive scrutiny of FDI in the United States. Under FINSA, proposed FDI transactions involving "critical infrastructure" in the U.S. receive more rigorous reviews. FINSA requires the Executive Branch of the U.S. government to report annually to the U.S. Congress as to when and how national security interests may be affected by FDI. When a transaction involves an entity which is controlled or owned by a foreign government, FINSA mandates a formal examination of the proposed deal. Beginning with Exon-Florio and continuing through the present day, the group within the U.S. government charged with conducting such reviews is called The Committee on Foreign Investment in the United States (CFIUS).

The Committee on Foreign Investment in the United States (CFIUS)

CFIUS is an inter-agency task force which draws on key individuals from throughout the United States government having the authority to oversee

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proposed FDI transactions in the U.S. CFIUS is composed of representatives from the Departments of Homeland Security, Justice, Defense, Treasury, Commerce, State and Energy, along with members of the Office of U.S. Trade Representatives and the Office of Science & Technology Policy. CFIUS monitors FDI transactions, both large and small, that have a potential impact on U.S. national security. CFIUS has the authority to approve or disapprove a proposed transaction or to reverse a completed deal if it is found to be against U.S. policy or critical to national security interests.

The standard CFIUS review applies to proposed transactions involving (1) a foreign entity that (2) desires to acquire control of a U.S. business that (3) possesses products, services or intellectual property that are (4) fundamental to U.S. national security interests or critical to U.S. infrastructure. The definition of a foreign entity is "any foreign national, foreign government, foreign entity, or any other entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity." It is important to note that CFIUS reviews transactions involving existing businesses. It does not apply to "Greenfield" investments where a foreign party is going to actually start a business from the ground-up. However, the definitions of "national security" and "critical infrastructure" are broad and not well defined.

When looking to acquire an existing U.S. business, foreign investors basically have two options:

- **Advance Notice to CFIUS.** The foreign investor can agree to submit to CFIUS the details of its intention in advance of making an investment in the United States. The foreign investor at this time must disclose to CFIUS the nature, purpose, scope and expected closing date of the transaction. The assets to be acquired must be specifically described, and the investor must disclose information about itself, including a description of its business activities and any ties to foreign government agencies.
- **No Advance Notice to CFIUS.** If a foreign government is not directly involved, a foreign investor, unless otherwise mandated, can elect to proceed with an investment without first advising CFIUS. However, the risk of this option is the possibility that CFIUS will later decide to review and reject the deal after it is complete. There is no time limitation on CFIUS' ability to review a finalized transaction.

When CFIUS becomes involved, there is a defined timeframe in which it can act. The majority of transactions in which CFIUS is given advance notice for review are cleared within 30 days. If the proposed transaction clears, it has "safe harbor" protection, meaning that the CFIUS decision is final and cannot be reversed (unless, of course, an investor misrepresented information or otherwise acted fraudulently). If after 30 days it is still unclear whether the transaction should be approved, CFIUS can take an additional 45 days to either:

- unanimously clear the transaction;
- propose a mitigation plan to the parties; or
- submit its recommendation to the President.

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Once a proposed FDI project is sent to the President, the President has 15 days to review the transaction and reach a final decision. Presidential decisions are not subject to judicial review.

If CFIUS determines that a transaction resulting in the foreign ownership or control of a U.S. business will have possible negative national security implications, the foreign investor can work to cooperate with the U.S. government to complete the transaction by making concessions. If successful, CFIUS and the parties will execute a "mitigation agreement" instituting the changes necessary to satisfy national security concerns.

On October 20, 2022, the U.S. Treasury Department (as Chair of the CFIUS members) issued the long-expected Enforcement and Penalty Guidelines. It is clear at this early point that CFIUS authorities going forward will penalize companies which commit CFIUS violations. The underlying motivation of the Guidelines is to encourage "voluntary self-disclosures" of any possible violations, such as material misstatements, failure to make a mandatory disclosure, or non-compliance with a mitigation agreement negotiated with CFIUS authorities. Penalties can be significant (such as USD 250,000 per violation). Also, penalties may in some cases reference the value of a transaction. While it will be some time before the impact of the Guidelines are fully understood, counsel should carefully review them now. Also, if investors have previously acquired a foreign investment which may have been subject to CFIUS purview, they need to investigate whether CFIUS guidelines were violated before they acquired an interest.

When CFIUS determines that a proposed FDI transaction may result in foreign ownership or control of a U.S. business that will have negative national security implications, the foreign investor can request the opportunity to work with the U.S. government to complete the transaction to the mutual satisfaction of both parties. If successful, CFIUS and the parties will execute a "mitigation agreement" which outlines the changes necessary to satisfy any concerns regarding national security. CFIUS frequently requires mitigation agreements in the form of board resolutions, security control agreements, special security agreements, proxy agreements, and/or voting trust agreements. Once a mitigation agreement is approved and the transaction is completed, CFIUS has the authority to continue monitoring ongoing compliance with the agreement.

The Foreign Investment Risk Review Modernization Act (FIRRMA)

On August 13, 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) was signed into law. FIRRMA significantly expands the authority of CFIUS to review future foreign investments in the United States. A primary focus of FIRRMA is to prevent the theft of trade secrets and intellectual property of U.S. companies as well as to keep foreign companies from investing in or purchasing assets near U.S. military bases. FIRRMA also strengthens and expands the CFIUS review process and will likely make it more difficult for foreign companies to successfully invest in the U.S. if national security interests are potentially at risk.

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Parties now face a more challenging and complex analysis when deciding whether they need to file for clearance under the new FIRRMA regulations. The underlying issue being – is a CFIUS filing mandatory? Transactions are no longer limited to those that result in the foreign control of a business. CFIUS can now look at transactions where there is less foreign control by the investor.

There are two new rationales for asserting CFIUS jurisdiction:
- defined real estate transactions; and
- "TID U.S. businesses," which are defined as businesses which are involved in critical technologies, critical infrastructure, and/or sensitive personal data.

CFIUS is now authorized to review certain investments which are viewed as "non-controlling" but are not fully passive in nature. The U.S. government is concerned when a foreign person has:
- membership rights or observer rights on a TID U.S. business board of directors; or
- any involvement in decision making in a TID U.S. business (other than simply voting shares); or
- access to substantive non-public proprietary information of a TID U.S. business.

FIRRMA regulations define what is necessary to be considered a TID U.S. business:
- critical technologies (examples include items on commerce content list [CCL], software, defense materials, emerging technologies);
- critical infrastructure (examples include oil and gas, telecoms, water, finance, defense industries, ports, power);
- companies handling sensitive personal data (examples include individual personal data, genetic information, collections of data companies).

Also because of FIRRMA, some real estate transactions will now be subject to CFIUS review and approval. Examples include real estate located near military bases, missile fields, and/or maritime ports and airports. There are exceptions so that many types of real estate purchases are not subject to CFIUS review and approval.

Next, the U.S. government is concerned when other foreign governments are involved in TID U.S. businesses. This is an area where CFIUS requires a filing at least 30 days prior to a controlled transaction.

Finally, when investment funds are involved, a careful review of FIRRMA regulations is required. There are certain types of investments that are now covered by CFIUS and FIRRMA.

6. What is the best strategy for acquiring interests in real estate or other tangible property in the United States? Is this more difficult for foreign investors?

There are a number of United States laws and regulations which limit and, in some cases, prohibit FDI in certain industries, including real estate. Assuming a foreign investor is permitted to invest in U.S. real estate, a limited liability

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company (LLC) or a limited partnership (LP) are the most common legal vehicles. Either can provide liability protection for the owner(s).

Forming an LLC or an LP gives an investor two advantages. First, an LLC/LP provides the same insulation from liability as does a corporation. Second, an LLC/LP is taxed as a partnership (pass-through of profits and losses directly to owners) and is generally more flexible from an operational standpoint. Owners of an LLC/LP are qualified if they are corporate entities, individuals, or both. Because real estate investments are a complicated undertaking, the unique factors of each specific investment will suggest the best business structure to select.

A foreign investor needs to understand one important aspect of real estate in the United States – the U.S. maintains a comprehensive set of laws designed to protect the environment. Any investor (domestic or foreign) who purchases title to U.S. real estate may be legally obligated to "remediate" or clean-up any existing environmental problems on or within the property, even if those problems were caused by prior owners. For example, "Brownfield Sites" where former industrial plants once operated or older buildings which contain asbestos or other hazardous materials will pose significant and often costly risks of remediation to the purchaser. This is why before foreign investors decide to purchase real estate in the U.S., comprehensive due diligence needs to be conducted in order to confirm whether any environmental problems exist on the targeted property.

7. What laws or regulations exist in the United States to protect data exchange and privacy, and is the protection of intellectual property challenging for foreign investors?

Data exchange and privacy law is a rapidly developing field fueled by the continued advances of technology. Electronic information by its nature transcends national boundaries into places where laws can differ greatly. Foreign investors will find the current state of data exchange and privacy laws in the United States both complex and, at times, confusing. There are no national comprehensive data exchange and privacy laws because the U.S. legal system operates on federal, state, and local levels, and so laws are not uniform. Even at the state level, privacy laws can vary greatly, with California having the most stringent laws in place to protect privacy.

The commercial and health sectors are also heavily regulated. The U.S. Federal Trade Commission and the Department of Health and Human Services administer data exchange and privacy laws for the commercial and health sectors. The Federal Trade Commission Act (FTC Act) and Health Insurance Portability and Accountability Act (HIPAA) are important statutes.

Federal Trade Commission Act (the FTC Act)

The FTC Act is a broad statute that creates a duty of care for companies to protect their data to a reasonable standard. The FTC Act prohibits unfair or deceptive practices that affect commerce in the absence of data exchange and privacy regulation. For example, if a business has a privacy policy, failure to follow it may be considered a deceptive practice and result in legal liability.

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Health Insurance Portability and Accountability Act (HIPAA)

Medical information is highly regulated by HIPAA. The law applies to any entity that deals with medical information, including foreign investors doing business in the United States. The Standards for Privacy of Individually Identifiable Health Information regulates how medical information is collected and used. For example, an employer may not disclose an employee's health-related information with other employees and must maintain employee health records separate from other company records. An employer is required to designate one person from the company to have sole access to health-related information. Foreign investors need to understand that HIPAA creates a duty for companies to take reasonable steps to protect private health information exchanged or stored through electronic mediums.

At the U.S. federal level, specific guidance is difficult to obtain, as the regulations operate on a "reasonableness" standard. Reasonable measures for data privacy can be achieved by following the NIST Cybersecurity Framework.

The strongest data exchange and privacy laws now exist in the European Economic Area (EEA). While data privacy in the United States is generally handled as an aspect of consumer protection, it is viewed as a human right in the European Union (EU). The EU continues to broaden the reach of its data privacy regulations in response to increases in data breaches across the globe from hackers, terrorists, and law enforcement and security agencies. The status of data exchange and privacy regulation between the EU and the U.S. remains unsettled and is subject to change. Foreign investors doing business in the U.S. and within the EEA must accept the reality that when data leaves one country, it must have the same protections as it did in the originating country. The invalidated EU-US Privacy Shield was replaced by the US-EU Trans-Atlantic Date Privacy Framework to safeguard commercial cross-border data flow.

8. Describe the most common legal structures used by foreign investors when doing business in the United States.

There are five basic legal structures for businesses operating in the United States:

- Sole Proprietorship.
- General Partnership.
- Limited Partnership [LP].
- Limited Liability Company [LLC] and Limited Liability Partnership [LLP].
- Corporation.

Foreign investors have access to the same legal business structures as U.S. entities.

The sole proprietorship and the general partnership are rarely selected by foreign investors because these structures do not provide adequate levels of legal protection from liability.

Limited partnerships (LPs) and limited liability partnerships (LLPs) are utilized less often because they are not always appropriate for conducting business except in specific areas (such as real estate).

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The two business structures most often selected by foreign investors in the United States are the **corporation** and the **limited liability company (LLC)**. Both offer significant protections for their owners. It is important to understand there is no federal law in the United States governing the formation of corporations and LLCs. LLCs and corporations instead are formed pursuant to the business organization laws of each of the 50 states. While some differences may exist between states regarding formation requirements, fees and reporting, the basics are often quite similar.

One major difference between an LLC and a corporation is taxation. An LLC is taxed as a partnership for federal income tax purposes. A corporation, because it is considered a separate legal entity (a "legal person"), the income and losses of the business do not pass through personally to the shareholders. The corporation itself is taxed on the income it generates at the federal and state tax rates applicable only to corporations. Shareholders are then personally taxed on any income (via dividends or distributions) that is paid to them by the corporation.

In short, both the immediate and long-term needs and goals of an investment need to be analyzed carefully prior to selecting the most appropriate structure to operate the business.

9. What are the most attractive opportunities for foreign investors in the United States at this time?

The economy of United States is so large that highlighting the most attractive investment opportunities is a challenge. What follows are four areas that currently have significant potential.

- **Energy.** The U.S. is largely self-sufficient in the production of energy from natural gas and petroleum reserves. As a result, industries related to transportation and storage of petroleum and refining natural gas into commodities such as plastics present particularly attractive investment opportunities.
- **Infrastructure.** As this book is going to press, the Infrastructure Investment and Jobs Act of 2022 was signed into law which will update the U.S. public transit infrastructure, highways and bridges, ports, railways, EV investments and transmission grids. While there will be some restrictions on how and when those projects are designed and contracted, it is a significant area of opportunity.
- **Medical.** One positive result of COVID-19 was that it forced the United States and its pharmaceutical and medical supply industries to refocus on where products/drugs are sourced. The significant shortage of needed PPE and medical equipment during the pandemic will serve to incentivize non-U.S. entities to expand or set up new operations in the U.S.
- **Semiconductor Technologies.** The Securing Semiconductor Supply Chains Act of 2022 became law in August 2022. Known as the "CHIPS Act", it encourages, through both government grants and incentives, the manufacturing of semiconductor chips and equipment in the U.S. Expect this to expand greatly over the next decade.

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10. Do specific laws or mechanisms exist in the United States to protect foreign direct investors?

As a general rule, the United States treats foreign investors and U.S. citizens and entities in the same way. No special laws at the federal level grant foreign investors special status over domestic investors. However, as described more fully in the answer to Question 5, if a foreign investor voluntarily seeks CFIUS clearance in advance, then after receiving CFIUS approval, the foreign investor will receive a "safe harbor" for its investment.

AUTHOR BIOGRAPHY

Dennis Unkovic

Dennis Unkovic is a partner with Meyer, Unkovic & Scott LLP in Pittsburgh, Pennsylvania. His practice involves negotiating complex commercial transactions, including international mergers and acquisitions, and advising on inbound and outbound investment projects. He has traveled to over 65 countries throughout his career, with significant involvement in China, India, Japan, Korea, Southeast Asia, and Europe.

A prolific writer, Unkovic has authored, edited or contributed to numerous books and articles for both domestic and international publications. His latest published books are "Asia Ascending" (Ankerwycke Publishing, November 2018), "America in the Mirror" (Amazon Kindle, August 2020), and "Transforming the Global Supply Chain: Cyber Warfare, Technology, and Politics" (Ankerwycke Publishing, October 2021). He frequently briefs business executives, trade associations and government leaders on high-profile issues.

Affiliated with numerous courts and professional organizations, Unkovic has been named for inclusion in every annual edition of The Best Lawyers in America (Woodward/White) since 2003. He served as Chair of the Meritas® global legal referral network from 2015 to 2018.

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CONTACT DETAILS

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EDITOR'S OVERVIEW
Dennis Unkovic
Meyer, Unkovic & Scott LLP
1300 Oliver Building
535 Smithfield Street
Pittsburgh, Pennsylvania 15222
United States
T: +1 412 456-2800
F: +1 412 456-2864
E: du@muslaw.com
W: www.muslaw.com

AUSTRALIA
Angela Harvey, Mary Digiglio & James Skelton
Swaab
Level 4, 20 Hunter Street
Sydney NSW 2000
Australia
T: +61 9233 5544
F: +61 9233 5400
E: MED@Swaab.com.au
AXH@Swaab.com.au
JAS@Swaab.com.au
W: www.swaab.com.au

BRAZIL
Hermano de Villemor Amaral (neto), Eduardo Tranjan, Gabriel Bon de Macedo & Mariana Rossi
Villemor Amaral Advogados
Av. Brigadeiro Faria Lima 4509 – 4° floor - Itaim Bibi, São Paulo – SP – Brazil 04538-133

Rua Farme de Amoedo 56 – 2° to 4° floor – Ipanema, Rio de Janeiro – RJ – Brazil 22420-020

T: +55 21 3806 3400
+55 11 2102 8460
E: hvan@villemor.com.br
eduardotranjan@villemor.com.br
gabrielmacedo@villemor.com.br
marianarossi@villemor.com.br
W: www.villemor.com.br

BULGARIA
Trayan Targov
BOYANOV & Co.
82, Patriarch Evtimii Blvd
1463 Sofia
Bulgaria
T: +359 2 805 5055
F: +359 2 805 5000
E: mail@boyanov.com
t.targov@boyanov.com
W: www.boyanov.com

CHINA
Yao RAO, Sijia ZHANG, Shuaijie LU, Shihao XIAO, Lu DANG & Junzhou JIN
HHP Attorneys-At-Law
Room 2208, 150 Hubin Road, Corporate Avenue 5
Huangpu District
Shanghai 200021 China
T: +86-21-5047 3330
F: +86-21-5047 0264
E: yao.rao@hhp.com.cn
W: www.hhp.com.cn

FINLAND
Peter Jaari
Lexia
Lexia Helsinki
Lönnrotinkatu 11
00120 Helsinki
Finland
T: +358 50 3084125
E: peter.jaari@lexia.fi
W: www.lexia.fi

FRANCE
Neil Robertson
Bignon Lebray
75 rue de Tocqueville
75017 Paris
France
T: +33 (0)1 44 17 17 44
E: nrobertson@bignonlebray.com
W: www.bignonlebray.com

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GERMANY
Dr. Anton M. Ostler
Arnecke Sibeth Dabelstein
Oberanger 36
D-80331 München
Germany
T: +49 89 38 80 80
F: +49 89 38 80 8101
E: a.ostler@asd-law.com
W: asd-law.com

JAPAN
Hiromasa Ogawa, Naoki Takahashi & Darcy Kishida
Kojima Law Offices
Gobancho Kataoka Bldg., 4th Floor
Gobancho 2-7, Chiyoda-ku
Tokyo 102-0076
Japan
T: +81-03-3222-1401
F: +81-03-3222-1405
E: webmaster@kojimalaw.jp
ogawa@kojimalaw.jp
takahashi@kojimalaw.jp
kishida@kojimalaw.jp
W: www.kojimalaw.jp/en

KENYA
Jinaro Kipkemoi Kibet, SC & Lorraine Igoki Njiru
TRIPLEOKLAW LLP
ACK Garden House
1st Ngong' Avenue, off Bishops Road
Nairobi
Kenya
T: +254 722 510 884
+254 709 830 100
E: jkibet@tripleoklaw.com
ligoki@tripleoklaw.com
W: www.tripleoklaw.com

MEXICO
Hugo Cuesta Leaño & Alejandro Martínez Galindo
Cuesta Campos y Asociados, S.C.
Corporativo Antara
Av. Ejército Nacional Mexicano
843-b, piso 12
Colonia Granada, Del. Miguel Hidalgo
Ciudad de México, 11520
México
T +52 (55) 5540-1737
E: hcuesta@cuestacampos.com
amartinez@cuestacampos.com
W: www.cuestacampos.com

NORWAY
Christoph Morck
Brækhus
Roald Amundsens gate 6
Postboks 1369 Vika
0114 Oslo
Norway
T: +47 23 23 90 90
M: +47 45 21 89 04
E: morck@braekhus.no
post@braekhus.no
W: www.braekhus.no

REPUBLIC OF KOREA
Jihn U. Rhi & Jong Jae Lee
K1 Chamber LLP
13th floor, 126 Teheran-ro
Gangnam-gu
Seoul
Republic of Korea
T: +82 2 6956 8420
F: +82 70 4325 8420
E: jihn.rhi@k1chamber.com
jjlee@k1chamber.com
W: www.k1chamber.com

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TUNISIA
Ismaël M'rad
Dentons Zaanouni Law Firm & Associates
6, rue Imam Rassaâ – 1002
Tunis
Tunisia
T: +216 71 909 235
F: +216 71 906 578
E: tunisia.secretariat@dentons.com
ismael.mrad@dentons.com
W: www.dentons.com/en/global-presence/africa/tunisia

UNITED KINGDOM
Sally Jones, Carolyn Thurston Smith, Mark Hough, Jen Lee, Russell Gardner & Nicola Tong
EY
1 More London Place
London, SE1 2AF
United Kingdom
T: 0207 951 2000
E: sally.jones@uk.ey.com
carolyn.thurston.smith@uk.ey.com
mhough@uk.ey.com
jen.lee@uk.ey.com
rgardner1@uk.ey.com
ntong@uk.ey.com
W: www.ey.com

UNITED STATES
Dennis Unkovic
Meyer, Unkovic & Scott LLP
1300 Oliver Building
535 Smithfield Street
Pittsburgh, Pennsylvania 15222
United States
T: +1 412 456-2800
F: +1 412 456-2864
E: du@muslaw.com
W: www.muslaw.com

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