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CORPORATE
ACQUISITIONS
AND MERGERS
IN PERU

Corporate Acquisitions and Mergers in Peru

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Corporate Acquisitions and Mergers in Peru

ESTUDIO OLAECHEA

Estudio Olaechea was founded in Lima in October 1878 and today is one of the largest and leading law firms in Peru. The firm enjoys national prominence in the areas of finance, securities, privatizations and concessions, mergers and acquisitions and general international corporate work.

In order to service the specialized needs of our corporate clients and financial institutions in connection with their Peruvian activities, Estudio Olaechea has organized a Practice Group, comprised of partners and associates who are highly experienced in mergers and acquisitions. The firm has a policy of encouraging the strategy of combining legal and business skills. Our professionals have worked, studied and/or lived abroad, and are familiar with international business customs and legal working schemes. Moreover, the firm has longstanding and valued professional relationships with other leading law firms around the world as well as with banks, industries, financial institutions and public sector authorities within Peru.

The firm assists companies and individuals interested in mergers and acquisitions, including due diligences and legal auditing procedures, corporate structuring, acquisition contracts, divestitures, proxy fights, joint ventures and leveraged buyouts, among other things. The firm's attorneys represent buyers, sellers, investors, shareholders' groups and financial advisers in structuring, negotiating and consummating complex domestic and international business combinations and other commercial transactions. Many of the transactions advised by the firm are international in scope.

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LOCAL ECONOMIC, POLITICAL AND CULTURAL ASPECTS

Country Profile

[01] Peru is located in South America and is the third largest country after Brazil and Argentina, with a land area of 1.28 m square kilometres. It is situated in the north-west of the continent and is bordered by Ecuador and Colombia to the north; Chile to the south, Brazil and Bolivia to the east and the Pacific Ocean to the west. The coastline is 2 500 kilometres long.

[02] The country is divided into three distinct regions: the coastal region, which is a strip of land 60 to 100 kilometres wide. The Andes region separates the coastal desert to the west from the jungle or Amazon basin to the east. The jungle or Amazon basin is the largest region in Peru.

[03] Peru is a strategic country for countries that do not have access to the Pacific Ocean such as Brazil and Bolivia. Several highway and railroad projects are under discussion to transport merchandise from and to Brazil and to interconnect both countries with the Pacific Ocean and with the Atlantic Ocean. Peru has a strategic position for international commerce as it is located in the middle of the continent.

[04] The population of Peru is about 30.4 m. More than 70% of the population lives in urban areas and the rest in rural areas. The population growth rate is 1.2% per year. Almost one-third of the nation's population lives in Lima, the capital of Peru. Other populated and economically important cities of Peru are Arequipa, Trujillo, Piura and Cuzco.

[05] Politically, Peru is divided into twenty-four regions. The most important port of the country is located in Callao, which is very close to Lima.

[06] The principal economic activities in the coastal region are farming, agriculture, fishing, industry and tourism. In the Andes, the main economic activities are mining, tourism, agriculture and electricity. In the jungle, the main economic activities are agriculture, oil drilling, tourism and timber.

[07] Spanish is the most widely used language in the country, spoken by more than 84% of the population, followed by indigenous languages such as quechua and aimara, among others.

[08] As at 1 September 2016, the exchange rate is S/ 3.36 Soles per each US Dollar.

Government and Political System

[09] Peru has a government that is democratic, social, independent and sovereign. The State is not divisible and its government is unitary, representative and decentralized. Some functions have been delegated to the regions in order to make the regions' decisions more efficient.

[10] The government of Peru is organized according to the principle of separation of powers.

[11] The Peruvian government is divided into three separate and independent branches: the Executive, the Legislative and the Judiciary. The Constitution defines the jurisdiction of each branch, their members, and the criteria for the selection of such members.

[12] The country has been politically stable since the 1980s when the military government called for democratic elections. Since 1980, Peru has had democratic Presidents elected by the popular vote of its citizens.

[13] All economic activities are open to foreign investment with no restriction on the participation of foreign investors. There are, however, some restrictions on foreign investment in certain areas of the economy, such as the media and airlines.

[14] Foreign investors have the same rights as nationals and enjoy equal legal status with these and with the State. An exception is Article 71 of the Constitution, which states that foreign investors have to obtain prior government authorization to acquire minerals, soils, water, forests, fuels or energy sources within 50 kilometres of the national border.

[15] The country integrated into the global financial system in the 1990s after paying standing interests to Multilateral Agencies, Bilateral Creditors and Commercial Banks, becoming fully eligible for lending and disbursement.

[16] Peru's foreign trade presence has diversified and commercial relations have been established with the Asian Pacific Economic Cooperation Association (APEC), the North American Free Trade Commerce Treaty (NAFTA), the Latin American Integration Association (ALADI), the European Union, The Andean Group and Mercosur, among others. Likewise, Peru has signed free trade agreements with several countries.

Legal System

[16a] Peru has a codified civil law system.

Current Economic Aspects

[17] The Peruvian economy grew by 3.3% in 2015, which was higher than the 2.4% growth rate of GDP achieved in 2014. The higher growth rate largely reflected the start-up of production of new mega mining projects. For 2016, predictions are that GDP will grow by about 4%. The increase in comparison with 2014 is due to the recovery of the activity in the primary sectors.

[18] The value of M&A transactions in Peru reached USD1.5 bn in 2015. At first glance, this amount is much lower than the 12 bn closed in 2014. Regardless of the number, there has been interesting investments in Peru of foreign companies,

revealing the interest of investors to continue betting for Peru despite the slowdown. This slowdown is basically a result of the comparison base because in 2014 only the operations of Las Bambas (sold to Glencore Minmetals) and Maestro (sold by Enfoca to Sodimac) represented half of the value of the M&A transactions in 2014. National and regional economic slowdown, the fall in the prices of commodities (mining and petroleum) and the effects of delays in major infrastructure projects are some of the causes why less M&A transactions occurred last year.

[19] Among the operations that can be highlighted is the acquisition of Arca Continental of 47.52% of the shares of Corporación Lindley, representing the entry of the biggest bottler of Coca Cola in Latin America, valued at USD750 mn. Graña y Montero acquired a participation in the Gasoducto Sur Peruano, one of the biggest infrastructure projects of the last years, whose compromised investment has been valued at USD215 mn for 20% of the property, as well as a participation in the company that will participate in the construction. Enagás acquired a participation in Transportadora de Gas del Perú for an amount of USD97 mn. Carlyle acquired Hermes (security company) and consolidated the two most important companies of tourism: Nuevo Mundo and Cóndor Travel. Scotiabank purchased the loan portfolio of retail banking from Citibank.

Main Industries

[20] The Central Reserve Bank of Peru reported an inflow of USD24.6 bn by way of foreign direct investment in 2015. As at 21 December 2014, foreign direct investment by way of capital contributions amounted to USD23.3 bn.

[21] Spain, the United Kingdom and the United States are the three main sources of capital contributions to Peru. Together they accounted for 50% of the aggregate stock in June 2016, while the top ten countries accounted for 85% of the aggregate stock.

[22] Investment from Spain and the United Kingdom each represent 18% of the recorded stock. The United States holds third place, with 13% of the total. Fourth to tenth places on the list are held by Chile (10%), Netherlands (6%), Brazil (5%), Colombia (5%), Panama (4%), Canada (4%) and others (17%).

[23] Foreign direct investment by economic sector was distributed as follows as of June 2016: Mining (23%), Finance (17%), Communications (19%), Industry (13%), Energy (13%), Trade (3%), Services (3%) and Oil (3%).

[24] The main investors responsible for capital movements in the 2010-2016 period, whether through capital contributions or share purchases, were as follows: Empresa Nacional de Telecomunicaciones S.A. from Chile in Communications; Minas Peñoles S.A. de C.V. from Mexico in mining; Telefónica Latinoamerica Holding, S.L., from Spain in communications; Votorantim Metais LTDA. from Brazil in mining; Cyprus Climax Metals Company from the United States in mining; The Bank of Nova Scotia from Canada in finance; Peru Copper Syndicate Ltd. from the United Kingdom in mining; Oderbrecht Latin Finance S.A.R.L. from Luxembourg in energy; SN Power

Holding Peru PTE LTD from Singapore in energy; IC Power Holdings (Kallpa) Limited from Bermuda Islands in energy; Hudbay Peru Inc. from Canada in mining; Anglo Quellaveco SARL from Luxembourg in mining.

During the first semester of 2016, although only USD1.9 bn was transacted in M&A, seventy-nine operations were registered on the transactional market, a 68% higher than during 2015. The notorious fall in the amount transacted was due to presidential elections that were held on April and June 2016. The infrastructure sector will count with the highest leadership for M&A in 2016 given that it is expected that many Brazilian companies would be selling their assets in Peru after the *Lava Jato* scandal.

[25] This firm's experience in the M&A world includes, amongst other transactions, representation of brewery SABMiller's acquisition of Bavaria's holdings in Peru (worth USD7.8 bn on a global basis); representation of SABMiller on their purchase through the Lima Stock Exchange of voting stock of Peru's largest brewery for approximately USD478 m; representation of SABMiller in six separate tender offers for the voting rights of Peru's largest brewer Union de Cervecerías Peruanas Backus y Johnston and its five listed Peruvian subsidiaries (now edging closer to 100% ownership); advisory of Maersk AS on the bid for the concession of the new terminal for containers at the Port of Callao; advisory and representation of HSBC Bank USA as security agent in the credit facility to Volcan Compañía Minera SAA for USD120 m; advisory of the shareholders of Peruvian company Derivados del Maíz (DEMSA) in its sale of 100% of the outstanding common shares and 67.47% of the investment shares, and the listing of common shares on the Lima Stock Exchange; advisory of a private fund on the purchase of an important minority stake in Volcan Compañía Minera SAA; advisory on the sale of Alcoa's packaging and consumer business to New Zealand's Rank group in twenty-six jurisdictions, worth 2.7 bn on a global basis; advisory of Central Parking Corporation on the sale of 100% of the shares held on its Peruvian subsidiary Central Parking System Peru SA; assisted all of the shareholders of Peruvian company Abrasivos SA in the sale of 100% of their shares in 3M Peru SA.; advisory and representation of ACS Solutions France in various areas in regards to the concession for the Collection Unit of the Metropolitan Bus Project (Lima's main public transport service); advisory of Compañía Sudamericana de Vapores (CSAV) on its acquisition through off-shore merger of a holding in Hapag-Lloyd's container business; due diligence on Maple Gas Corporation del Perú and Maple Etanol on behalf of Alcogroup.

Cultural Aspects

[26] Peru is a friendly place for foreign investors. Not in vain has the country achieved USD22.7 bn of foreign direct investment by way of capital contributions in the course of 2012.

[27] Good handling of the country's image has become an efficient way to promote Peru's goods and services in an increasingly competitive world market.

[28] Peru is generally regarded as a country with both an impressive geography and an impressive history. It is considered a mega-diverse country because it has 84 of the 117 existing 'life zones'.

[29] Great cultures have inhabited Peru: The Incas, Paracas, Nasca, Wari, Moche, Chimu, Tiahuanaco, among others. There are citadels like Caral, built before the Great Pyramid, where the inhabitants would gather in a circular plaza to listen to music.

[30] Peruvians are polite and always willing to assist foreigners travelling through the country.

[31] Spanish is the main language throughout Peru, although most highland Indians are bilingual, with Quechua being their preferred language and Spanish their second tongue. Several small lowland groups speak their own languages. English is understood in the best hotels, in airline offices and travel agencies.

[Next page is Peru 5.]

THE REGULATORY FRAMEWORK

Business Vehicles

[32] There are several different structures that foreign investors may use, depending on their specific needs, as investment vehicles in Peru. Peruvian Companies' Law (hereinafter, 'Corporate Law') provides for several forms of corporate organization. The most widely adopted forms are: the Corporation (Sociedad Anónima) and the Limited Liability Company (Sociedad Comercial de Responsabilidad Limitada). Besides these two, the Corporate Law recognizes the existence of the General Partnership (Sociedad Colectiva), the Simple Limited Partnership (Sociedad en Comandita Simple), and the Limited Partnership with Shares (Sociedad en Comandita por Acciones), among others.

Corporations

[33] Corporations are the most common type of business vehicle used in Peru. Their main characteristic is the limited liability of their stockholders, who are liable only to the extent of their contributions to the corporation.

[34] The capital stock is represented by shares and there is no minimum or maximum capital requirement laid down by the law, except for certain specific types of corporation (e.g., banks, insurance companies, stockbrokers, etc.).

[35] The corporation must comprise at least two shareholders, which can be natural and/or legal entities. The duration can be for a fixed or indefinite term.

[36] The incorporation process may be carried out through simultaneous or successive subscriptions for shares. Simultaneous subscription occurs when the incorporators subscribe for all the shares themselves. Successive subscription occurs when the promoters offer the shares to the public. The shares of stock must be fully subscribed and at least 25% of each share must be effectively paid-in.

[37] The board of directors and one or more managers are in charge of the administration and management of the corporation. The board of directors is composed of at least three members, and their term of office is at least one year with a three-year cap. Re-election of directors is permitted.

[38] The Corporate Law grants to the board of directors and managers certain powers to act on behalf of the corporation. However, it is conventional for the board of directors or the shareholders meeting to grant additional powers to them in connection with the performance of their duties in the corporation.

[39] The shareholders' meeting is the primary corporate body, and comprises all the corporation's stockholders; they must hold a meeting at least once a year. This mandatory annual meeting must be held within the first three months of each year in order to decide the financial results of the previous year, amongst other issues.

[40] Different types/ classes of shares may be created, including non-voting shares. Shares of stock may be freely transferred; however restrictions on their transferability may be laid down in the bylaws (e.g., rights of first refusal).

[41] Peruvian Corporate Law distinguishes three specific types of corporations, the standard corporation, the closely held corporation and the publicly (or openly) held corporation. A corporation will be a standard corporation if it does not comply with any of the requirements established for the closely or openly held corporation.

Standard Corporation

[42] Corporations that do not comply with the requirements for publicly held or privately held corporations are considered to be standard corporations, regulated by the general clauses established for all type of corporations in the Corporate Law.

Capital Structure

[43] The corporation may issue different types or classes of shares. The difference between them could be constituted by: (1) the rights granted to their holders; (2) the obligations assumed by their shareholders; or (3) by both the rights and obligations. All stocks of the same class will have the same rights and obligations.

[44] A corporation may issue non-voting stocks whether it is a standard, closely held or openly held corporation. Non-voting stocks are not counted in determining the quorum necessary to hold shareholders' general meetings. Non-voting stock confers the following rights upon the holder:

- The right to participate in the distribution of profits and net assets resulting from liquidation in priority to any common stockholder;
- The right to be informed at least every semester about the corporation's activities and management;
- The right to oppose agreements which damage their rights; and,
- The right to withdraw from the corporation in cases established by the Corporate Law or the bylaws.

Moreover, in the case of a capital increase, shareholders can:

- subscribe for voting stocks on a pro rata basis when the shareholders' general meeting agrees to increase the capital only through the creation of stocks with voting rights;
- subscribe on a pro rata basis for stocks with voting rights and in a sufficient number to maintain his participation in the capital, in cases where the shareholders' general meeting agrees that the increase is to include the creation of non-voting stocks, (but in an insufficient number for the holders of these stocks to maintain their participation in the capital);
- subscribe on a pro rata basis for non-voting stocks in cases of capital increase where the shareholders' general meeting is not limited to the creation of stocks with voting rights or in cases where the general meeting agrees to increase the capital only through the creation of non-voting stocks; and