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The Foreign Investment Law of Mexico and its conflict with the North America Free Trade Agreement

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Abstract

Considering the commercial opening in the 80s Mexico has been signed twelve foreign trade agreements ("FTA's"). However, the FTA that is to the World Trade Organization ("WTO") databases, the commercial exchanges between NAFTA's parties raise up to $1103 billion dollars annually. Also, the exportations between members represented the 48.3% of the 100% of commercial exchanges in 2013.Each party of NAFTA had an important volume of commercial exchange with other countries. In 2011, the United States of America ("US") report a total amount of $1480 billion dollars in exportations, occupying the second place in worldwide exportations and a total amount of $2266 billions of dollars in importations, taking with this numbers the first place around the world.

Introduction

The aforementioned statistics represent the relevance of NAFTA despite other foreign trades around the world. Specifically in the case of Mexico exportations, a total amount of $350 billion dollars and $361 billion dollars in importations from NAFTA were taking in 2013.Those numbers are sufficient evidence to represent the volume of foreign trade operations between NAFTA's parties and their importance around the world. How this statistics may be affected? In most cases, exist a conflict between internal laws and international dispositions. In this regard, we will analyze the structure of NAFTA concerning foreign investment and the legal dispositions of the Mexican foreign investment law ("Mexico Investment Law") in order to observe the possible conflicts between NAFTA and Mexico Investment Law.

Main Thesis

Inside NAFTA's theoretical framework we find a great diversity of legal provisions that are related foreign investment between parties, as well, we find a variety of fundamental ideas that regulate the commercial relationsbetween parties.Those provisions are mandatory for the US, Canada and Mexico and its accomplishment are regulated by the Vienna Convention on the Law of Treaties. Specially, we will center our analysis in annex 602.3 of the Mexican exceptions of NAFTA.It is important to define the conception of national exception. Following the legal lore the "*national exception*", has an exclusively power of the country inherent sovereignty, in other words, there are activities, goods or services that are in exclusive dominion of a State "*reserved activities*". Commonly in a modern State it is noticed which activities, goods or services are considered as inalienable to the administration and control of the State, its enforcement declines in their national legislation.Ergo, each Country may decree by their national legislation and sovereignty their activities, goods and services as private, so they can be regulated and administrated by a public power. So in the legislative content of NAFTA, the annex 602.3 described the strategic activities as reserved for the Mexican State:

most relevant by the volume of his commercial exchanges is the North America Free Trade Agreement ("NAFTA"). According

a) Exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feed-stocks and pipelines;

b) Foreign trade; transportation, storage and distribution, up to and including the first hand sales of the following goods:
i) Crude oil,
ii) Natural and artificial gas,
iii) Goods covered by this Chapter obtained from the refining or processing of crude oil and natural gas, and
iv) Basic petrochemicals;

c) The supply of electricity as a public service in Mexico, including, except as provided in paragraph 5, the generation, transmission, transformation, distribution and sale of electricity; andExploration, exploitation and processing of radioactive minerals, the nuclear fuel cycle, the generation of nuclear energy, the transportation and storage of nuclear waste, the use of reprocessing of nuclear fuel and the regulation of their applications for other purposes and the production of heavy water.Moreover and pursuant to Article 1101(2), there are other activities and/or services reserved for the Mexican State "*Investment-Scope and Coverage*", private investment is not permitted in the activities listed in paragraph i. Chapter Twelve "Cross-Border Trade in Services", shall only apply to activities involving the provision of services covered in paragraph 1 when Mexico permits a contract to be granted in respect of such activities and only to the extent of that contract. At this point we can detect that the foreign investment its forbidden under reserved activities.

Also, concerning to the subsections a) and b), the Mexican State has excluded the commercial intervention or foreign investment in hydrocarbon or any activity related to exploration, exploitation, refining, processing, production, trade, transportation, storage, distribution and sale.Otherwise in the subsection c) the supply of electricity isreserved as a public service, including the generation, transmission, transformation and distribution and sale of electricity.As well in nuclear areas, there are exceptions related to the exploration, exploitation and processing of radioactive minerals, including the nuclear fuel cycle, generation, transportation and storage of nuclear waste, the use and reprocessing of nuclear fuel and the regulation of their applications for other purposes.

The aforementioned provisions represent the activities restricted under NAFTA for foreign investors. Therefore, if we interpret those provisions in"*contrary sense*", the subsections a), b) and c), we can determine and conclude that the activities, goods and services not included in said articles are areas that can be used for investment between NAFTA parties.

Furthermore, article 1101(2), paragraph I from NAFTA, emphasizes that the parties will consider as reserved activities, the "Cross-Border Trade Services"as follows:

a) All the Transportation Service Agreements, including:
i) Land transportation services.
ii) Nautical transportation services.
iii) Aerial transportation services.
iv) Support and auxiliary transportation services.
v) Telecommunication and postal services.
vi)Restore services related to transportation machinery related to a fee…

However, if the Mexican State allows a contract between NAFTA's parties and related to these activities, thereforeit's permittedtheforeign investment in the Cross-Border Trade Services.

According to both analysiswe can inferred that NAFTA allows to invest in those activities that are not reserved in the trade according to annex 602.3. Also for the Cross-Border Trade Services if partiescomplywithin the contractstated by Mexican State.

In addition, Annex I related to the foreign investment in Cross-Border Trade Services, Mexico's list referred as follows:

A) Its required a permission from theSecretary of Communications and Transportation to establish and operate a truck station. Only the natural people with Mexican nationality as well Mexican industrywith a termination clause will be able to obtain a permit.
B) The investors from elsewhere or their investments will not be able to participate, directly or indirectly, in the industry founded or established in Mexican territory, dedicated or related to truck stations.

Successively, it refers to a gradual outline of foreign investment participation in Cross-Border Servicesarea, and applied to a "*Reduction Schedule*", which points:

…associated to founded or established companies in Mexican territory, dedicated to the operation or activity of truck stations and bus terminals, the foreign investors would only be able to acquire, directly or indirectly:

a) Three years after the signing Treaty date, till a 49 percent in the participation of the companies.

b) Seven years after the entry into force of the Treaty, till up to a 51 percent in the company participation: and
c) Ten years after the entry into force of the Treaty, till a 100 percent in the participation company.

Afterward, in urban trucking matter, touristic transportation and loading it decrees that Member Countries will be able to invest in the previously mentioned services, following the reduction schedule.

a)Three years after the signing Treaty date, till a 49 percent in the participation of the companies.
b) Seven years after the entry into force of the Treaty, till up to a 51 percent in the company participation: and
c) Ten years after the entry into force of the Treaty, till a 100 percent in the participation company.

Pursuantwithin both legal dispositionsadvertised in NAFTAat 2014ForeignInvestors will be able to invest in the auto-transportation till a 100 percent as a foreign entity.

Carrier in Mexico is a principal conveyance for transporting goods into national territory. The loading motor carrier moves around 83% that equals to 470 million tons that at the time is the 56% of national load. A featured question appears, if the carrier sector is the most important issue for goods trading, then why the companies do not invest in their transportation infrastructure? Based in databases of Secretary Telecommunication there are 114,541 companies dedicated to carrier in Mexico, which 82% have less than 5 units and only the 0.5% had the more than 100 truck fleet. It is important to point out the difference between the Mexican carrier companies that operate under a scheme of man-truck, and the North American and Canadian carrier companies that operate in a massive level under more than 1000 transportation units.

The lack of Mexican entrepreneurs investors in the carrier sector, itson a critical point where the government must put his eye on. The creation of programs to develop this sector is a clue to become one of the most competitive carrier companies. Even so if the government does not create this programs to support carrier sector, there are other alternatives such as the foreign investment.

Following the topic of reduction schedule in the previous analysis, related to foreign investment under NAFTA, it is illegally the legal provisions associated to the Foreign Investment Law stated in Article 6, fraction I:

"Mexican activities and societies that are mentioned are restricted in an exclusive way to Mexican people or Mexican societies with an exclusion clause of alien: National terrestrial passenger transportation, tourism and loading, not including courier and parcel service".

As we can observed under Article 6 the conflict between lawsappeared and is related to an exclusion to Mexican Societies with foreign participation in auto-transportation sectors and the analogous scheme which allows the foreign investment ofcompanies in the auto-transportation sector.

In this context the Mexican Supreme Court on February 13th 2007, stated "THE INTERNATIONAL TREATIES CONSTITUTE PART OF THE SUPREME UNION LAW AND ARE POSITIONED OVER THE GENERAL FEDERAL AND LOCAL LAWS" (Interpretation of the Constitutional Article 133, 2007). It shall respect the schedule established to permit the participation of foreign investment in carrierregarding Mexican companies. To accomplish this purpose it has to be proposed a reform to article 6 of the Foreign Investment Law, so the conflictbetweenNAFTA and the Foreign Investment Law may bedisregarded.

Also, one of the main problems concerning the Mexican legal frames is the lack of capacity to accomplish with the main objectives of NAFTA. However, this issue seems to be a secondary priority for the legislators in all parties, as well,in this regard exist a un-accomplishment by the US. In recent days Mexican transporters are pressing the Government of Mexico in order to open the carrier investment, as an example of this matter we can observe the recent law suit presented by 4,500 enterprises affiliated to the Mexican National Chamber of Carriers considering the breach of NAFTA for impeding the transit of transporters and investment between NAFTA's parties. We consider necessary to create international panels in order to discuss different

alternatives and homologate criteria respecting security and services measures to be accomplished by the transporters before reforming of the Foreign Investment Law.

Conclusions

Finally, we conclude that there is a real issue between the legal dispositions established in NAFTA regarding foreign investment, specifically in carrier matters versus the Mexican regulations for the foreign investment related to carrier companies. In other words, there is a conflict between the application of NAFTA or the Mexican Foreign Investment Law. In this scenario the legal solution to this problem in a short term is to utilize the international legal proceedings created for these issues. Is the case of the international proceeding of arbitration established by the International Center for the Arraignment of Differences Related to Investments ("CIADI"). This international proceeding serves to establish through an international recommendation, NAFTA's hierarchy before the Mexican Foreign Investment Law. This instrument will help the foreign investor to exploit the benefits of NAFTA regarding foreign investment in carrier matters. In other words the foreign investor could use the legal interpretations stated herein to demonstrate the permission stated by NAFTA to invest in Mexico's auto-transportation sector. Notwithstanding, we have to consider that the legal sustention and the results of the arbitration by CIADI to solve the conflict between laws are topics to other analysis. Of course as we said the investor could consider the legal aspects detected and demonstrated in this research in order to invest in Mexico.

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