Some Considerations on International Arbitration in the Field of Foreign Investment by the ICSID: the case of Trucking in Mexico

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Abstract

This article will analyze the legal frame of the international proceedings of arbitration for foreign investment (FI) stated by the International Centre of Settlement of Investment Disputes (ICSID). In such regard, it will demonstrate the actual scope of the international proceedings of arbitration as a security implement for NAFTA´s foreign investors versus the legal provisions established in the Foreign Investment Law of the Mexican State.

1. Introduction

Foreign Investment has been a relevant topic in Mexican economic history for many years. The growth of the Mexican economy, in some cases, is subsumed to financial indicators that define how much and how FI is being invested in Mexico. It is known that FI is a trigger factor in the creation of direct and indirect jobs in Mexico. In addition, FI presupposes an atmosphere of reliability in the investment, which in the best of cases, helps other investors consider investing their capital in Mexico. To this we must add the strategic geographical position that Mexico has with the United States of America; the second most sustainable global economy behind China. It should be noted that the United States ranked first in income GDP with the sum of $16,660.83 million dollars.

If we consider these statistics, Mexico has a privileged geographical relationship with the United States and should take advantage of it. For Mexico this geographical positioning is the sustainable basis, by which, American Foreign Investment in our country should exceed expectations compared to other countries. This geographical factor combined with the North American Free Trade Agreement (NAFTA) are powerful advantages that should generate American interest in Mexico.

According to reports from the Mexican Ministry of Economy (ME), during the years 2009-2014, direct investments in Mexico have fluctuated between 2 billion dollars and 6 billion dollars. In addition, the re-investments of capital have fluctuated between one billion dollars and 5 billion dollars, respectively[1].

It should be noted that in 2013, Mexico realized 35,188 billion dollars in foreign direct investment (FDI). A breakdown shows that Belgium contributed 78%, United States 32%, Netherlands 8%, Germany 4%, and Japan 4%, among others. 50% of these investments were categorized as new investments. These statistics herald the importance of FDI in Mexico[2].

At this point, we must pause and ask the following questions: Considering our geographical position, NAFTA, and the presented statistical data, is Mexico attracting the maximum amount of available resources? And are Mexico or United States taking full advantage of the invested resources? Later in this paper I will try to respond to these questions but for now my principal goal is to develop a strategy that will illustrate how the United States can invest even more FI in Mexico, taking full advantage of the benefits stipulated under NAFTA.

Specifically, I would like to address the example of the auto-transport sector. In other articles, I developed a thesis regarding conflict between legal provisions in the field of IE by NAFTA versus the Mexican law of foreign investment (LIE). In this article, I will use that research as a basis to provide an effective strategy for developing increased FDI in Mexico.

2. An approach to the scope of NAFTA relating to Foreign Investment

What needs to be said of NAFTA? Concerning the scope of NAFTA we are entering one of the most controversial topics in international law. By way of preamble, we must remember that the NAFTA was signed at the end of 1993 by the Salinas administration[3]. In principle, it seemed that signing the NAFTA agreement would open the most desirable commercial avenues for Mexico, and this

[1] Ibíd.

[2] Ibíd.

[3] Ministry of Trade and Industry . (1998) . Free Trade Agreement . Mexico D.F. : Graphical factories of the Nation.

act certainly initiated other optimistic projections. But, after 20 years of its implementation, we must presume that what was initially expected as a result of the entry into NAFTA has been, so to speak, lacking. This can be mainly attributed to legal barriers in our Mexican regulatory system as well as some factors of a political nature.

However, considering the above, it should also be noted that entry into the NAFTA agreement has not only increased IE in Mexico but also repositioned Mexico as the leading exporting country in Latin America because NAFTA created a portal of investment into the North American market there.

I am, of course, referring to the scheme of investment in the productive sectors, which by entering into the NAFTA agreement, were areas reserved for the three participating countries; Mexico, the United States and Canada. These three entities, through the NAFTA agreement, have exclusivity to exploit trading practices in certain strategic areas. Put another way, some goods and services are reserved to direct or indirect foreign participation by the Contracting States. For example, the investment in the field of auto-transport.

After entering the NAFTA agreement a timetable of foreign participation in certain sectors was established. Foreign Investors in the auto-transport sector could invest up to 30%, 4 years after the Treaty was signed. Next, a stake of up to 70% was scheduled for 7 years after the Treaty was signed and finally, 100% participation was scheduled for 10 years[4] after the Treaty was signed.
In summary, from January 1, 2004 Canadian and American entities could invest in the automotive transport sector with 100% participation.

20 years later, the question could be asked therefore, why are Canadian and American auto-transport companies not participating through foreign investment in this economic sector? Let's pause and consider the statistical data from the Mexican Ministry of Economy regarding new foreign investment in Mexico. We can argue that Canadians and Americans have not expressed interest in this particular field because by investing, they would not be in compliance with the legal provisions set out in the EI terms specified in the NAFTA Agreement. This is a problem of law enforcement.

3. The Legal problems related to foreign investment in terms of a 'carrier' in Mexico.

[4] Ibíd

Historically, Mexicans have been recognized for having cloned their laws, codes and practices, etc., from that of other States. In short, our commercial code is a copy of the French Code of Commerce of 1800 and today the Mexican code of Commerce is one of the regulatory bodies that has undergone little change. Therefore, we are currently using very dated and 'borrowed' business practices. However, this is an issue that I will not further expound on here.

On the other hand, I will state contextually, that part of our legislation is not adjusted to suit the present economic needs of this industry. Likewise, continuing legislative failures have not enabled us to make sufficient structural and substantive reforms to adapt our economy with the current challenges of globalization.

In the case that concerns us, we need to tackle the problem in the field of auto transport. Therefore, it is necessary to quote the provisions of article 6 of the Act that expresses the following:

Article 6- Economic activities and the entities mentioned below, are **reserved exclusively to Mexican** nationals or to Mexican entities with a foreigners' exclusion clause:
I.-National land transportation of passengers, tourism and cargo, excluding courier and parcel services...
Provisions in article 6 of the Act prohibit foreigners participating in economic activities related to the national land transport of passengers, tourism and cargo. This specifies that the creation of companies earmarked for the auto-transport industry are restricted to Mexican companies.

It should also be noted that the provisions contained in the FIL are of public order and this means that their observance and obligation are not subject to the will of anyone. Next, we will point out that the Act is applicable throughout the national territory. To conclude this point, any foreign person or entity may not invest in Mexico in terms of auto-transport.

Contrarily, NAFTA establishes the legal basis that allows foreign investment by its parties in the Mexican auto-transport domain. Therefore, we are facing the ensuing conflict which is created when legal provision of one act is hierarchically superior to the other, i.e. in the case of FIL vs. NAFTA.

Within its own system, Mexico asserts legal hierarchy in the application of Mexican law. This legal position is established in article 133 of the political Constitution of the Mexican United States which establishes:

.. .this Constitution, the laws of the Congress of the Union that emanate from it and all the treaties that are in accordance with it... shall be the Supreme Law of the whole Union...

In this sense, the Supreme Court of Justice of the nation ruled concerning developing a jurisprudential

thesis that determines that **International Treaties that are according to the political Constitution of the Mexican United States rule above legal provisions of federal nature, regardless if they are or not of public order.**

This was the basis for the legal interpretation that resulted in the Supreme Court establishing that international treaties (e.g.: NAFTA) are hierarchically superior to the laws promulgated by the Mexican Congress (e.g.: Foreign Investment Law)[5]. Therefore, the prohibition established in article 6 of the LIE about the IE in terms of auto transport, makes it impossible for foreigners to invest in this area, which is otherwise permitted for those foreigners who are authorized to do so by virtue of the NAFTA international treaty!

Therefore, we must ask what should a foreign investor do to enforce their scheme of participation in the transport sector of the Mexican economy?

4. A solution: The international process of foreign investment on ICSID

ICSID was created in 1965, by the Convention to determine the settlement of investment disputes between States and nationals of other States in order to resolve disputes between a Member State and a national investor from another State[6]. Resolutions are meant to promote an atmosphere of mutual trust and encourage the free flow of international private capital towards countries wishing to attract it. To this day, the ICSID is signed by more than 120 countries, including the distinguished participation of the United States of America.

We have pointed out that the ICSID is composed of more than 120 countries. Mexico, for its part, is not within those 120 countries. What impact does this have? In principle, it could be interpreted that Mexico may not enjoy the rights enshrined in the ICSID by virtue of the fact that it is unsubscribed to the same. In the first instance this is correct. However, article 1120 of the XI chapter of NAFTA states that "disputes regarding investment which arise between nationals of a Member State and the Government of another Member country of the Treaty may be resolved by ICSID arbitration". In addition to the text of the ICSID Convention, in 1967 it adopted an administrative regulation regarding financial and the following legal instruments: procedural rules applicable to conciliation and arbitration; to arbitration procedures; conciliation procedures; "Model clauses" concerning fees, jurisdiction, applicable law, nationality, etc.

Article 1 of the ICSID establishes that it is intended "to facilitate the submission of the investment disputes between Contracting and national States of other Contracting States to a Conciliation Commission or an Arbitral Tribunal, as the case may be". The jurisdiction of ICSID covers legal disputes arising directly from an investment between a Contracting State (or any political subdivision or public body of a Contracting State accredited to the Centre by that State) and a national (legal persons) of another Contracting State, when the parties have consented in writing to submit to ICSID the resolution of the dispute on such investment. It is clear from the foregoing that its jurisdiction is conditioned to the following requirements: consent, subject and object[7].

The consent of the Government of Mexico is manifested in the acceptance and signing of NAFTA. To be an international treaty signed by the Federal Executive and ratified by the Senate of the Republic. [i]NAFTA is held as an international instrument which obligates the Government of Mexico and their respective Secretaries of State to subject the conflicts arising from the investment to the arbitrary authority of the ICSID. The subject referred to in the aforementioned article 1 ICSID is manifested to the Mexican State as a fictitious legal person, i.e., represented by the obligations assumed towards other States under its sovereignty. In this sense, the Mexican Government on behalf of the authorities is obligated in relation to international disputes established by the ICSID. Finally the subject matter which is the enforcement of ICSID is the same legal nature of investment between the Contracting States. Specifically, those States that conform NAFTA. Ergo FI dispute resolution policy investment between Mexico, United States and Canada.

5. Conclusions

In conclusion, we have addressed the prospect of EI in Mexico. We have considered current statistical data showing that the IE in our country is one of the most important topics in the national economic agenda. In this respect, we can respond to the question we set to ourselves at the beginning of this article, which we will summarize in the following way. Is Mexico taking advantage of the positive circumstances that holds territorially and commercially to the United States of America in the field of IE? According to what we have discussed, the answer is that Mexico, in the field of IE has not

[5] Interpretation of Article 133 of the Constitution , P. IX- 2007 (Supreme Court of the Nation February 13, 2007)

[6] International Centre for Settlement of Investment Disputes (1965).

[7] Saldaña Pérez , Juan . (2010) . Legal Regime of International Trade. D.F. Mexico : Editorial Porrúa.

suitably adapted its national law with international law. Specifically, we are referring the NAFTA Agreement which is undoubtedly, the most important international treaty signed by Mexico in recent times.

Our object of study was clearly singularized in the case of auto transport. In this sense, the growth of trucking in Mexico has declined in competition against other markets and competitors because mistakenly, the LIE has diminished the foreign intervention of capital and declared it not to be subsumed to the international provisions, i.e. of NAFTA. Now, as a result of what we have argued in our case, foreign investors have the real possibility to enforce the rights enshrined in NAFTA through arbitration or conciliation procedure established by the ICSID, with the purpose that those rights in the field of investment are invoked and recognized internationally, through international recommendations.

Finally, the task of legislators in the field of IE is a topic of urgent treatment and discussion. Recall that present competitiveness is determinant for the attraction of new markets and is a determinant for our domestic economic growth. EI in terms of motor transport is just one case which demonstrates the lack of legislative work in Mexico within these themes. However, this problem is not unresolvable and the conclusion of this article is that it has provided an effective tool that allows potential investors to participate in the auto transport industry in Mexico.