

National and international context of the neutral investment

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The objective of this article is to analyze the causes that gave origin to the use of the neutral investment, as well as to present/display, the instruments of neutral investment that the foreign investors can use to participate in exclusive activities of Mexican or in which participation limits exist, as well as to review some of the initiatives that recently have occurred in the Congress of the Union and which they must like aim be transparent the concept of neutral investment.

Neutral Investment, Foreign Investment, CNIE

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Antecedents

The intervention of the State in the economy establish in the Constitution of the United Mexican States published in the "Diario Oficial de la Federacion" (DOF) in February 5th of 1927. In particular in the article 25 where the State is the maximum rector in the complete develops that the country needs about the sovereignty and broadens the democratic regime (Guillen, 112: 1997). Later in the same article is added the State will raise, drive, coordinate and orient the national economic activity that the common interest demand to it. (Constitution, 21:2007).

Since the publication of the Constitution until the mid of eighties the economic motor of the country was the State. With the entry of Mexico to the General Agreement on Tariffs and Trade (GATT), the fall of the Berlin wall and especially with North American Integration Treaty, the State reduce its participation in the economic to liberalize the commerce and allow the free passage of goods and services between Mexico, Unit States and Canada, eliminating the permissions, the fees, licenses and particularly the rates and tariffs, as well the liberalization of the financial sector.

In the context of the negotiation of 1992 of the North American Integration Treaty between Mexico, Unit States and Canada, was elaborated a new Law of Foreign Investment (LIE) that was published in the DOF in December 27th of 1993 ²⁷.

The LIE of 1993 was modified by decrees published in the DOF in May 12th of 1995, June 7th of 1995, December 24th of 1996, January 23th of 1998, January 19th of 1999, June 4th of 2001 and July 18th of 2006. (Gomez, 2005: 676). The last actualization is of August 20th of 2008.

This law has with eight titles, thirty nine articles and eleven transient for the better operation of the law it count with the Regulation of Foreign Investment published in the DOF September 8th of 1998. The regulation has forty nine articles and six transients (Gomez, 2005: 676). The only reform is the one of May 4th of 2009.

In the frame of the commerce liberalization, the LIE adapts to the new necessities of the economy with the finality to obtain more foreign investments. In 1999, the direct foreign investment amounted to 12,858.6 millions of dollars; while in 2008 achieve the number of 22,481.2 millions of dollars, which represent an annual average growth of 5.52%.

The total accumulation of foreign direct investment from 1999 to June of 2009 is of 227,017.6 million of dollars, which is placed in many economy sectors, although with the predomination in the manufacture industry and the financial services, with a participation of the 43.0% and 25.6% respectively.

²⁷The antecedent of this Law, is the Lay to Promote the Mexican Investment and Norm the Foreign Investment that had as objective promote the Mexican investment and norm the foreign investment to stimulate the fear and balance development of the country". Diario Oficial de la Federación, March 9th of 1973, p. 5-9.

With the objective of diversify and expand its markets, Mexico have continued establishing free trade agreements and other preferential agreements. Some of the last agreements are with Uruguay, which came into effect in July 15th of 2004, and with Japan, April 1th of 2005. Mexico also maintains bilateral and regional free trade agreements with: Bolivia, Canada, Unit States, Costa Rica, Colombia, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Israel, European Union and the European Free Trade Association. In total, Mexico has 12 agreements of free trade with 44 countries. Also in the frame of the Latin American Integration Association (ALADI), Mexico maintains Agreements of Economic Complementation (ACE) with Argentine, Brazil, Peru and Cuba and with the MERCOSUR.

With almost all the free trade agreements that Mexico has with different countries, like the Agreements for the Promotion and Reciprocal Protection of Investments (APPRIs), incorporate disciplines in the investment field. In general, the chapters of investment incorporate in the free trade agreements talk about the sectorial liberalization, national trade, trade Mexican Official Norm, minimum level of trade, prescriptions of results, capital movement, expropriation and mechanism of differences solution, including the relation between the investors and the State. Only the agreement with Israel (in effect since July 1th of 2000), does not incorporate a chapter relative to the investment.

The neutral inversion

The neutral inversion is which allows the participation of foreign investment²⁸ in the social capital of Mexican societies, which do not have foreign investors for dedicate to some of the reserved activities for Mexicans or in those that are attached to the maximum limits of foreign participation, coinciding with that, their participation in these activities and the possibility to contribute in a bigger percentage to the allowed by the LIE, because this kind of inversion is not take on account to determinate the foreign investment percentage in the Mexican societies.

In this kind of inversion, the control of the company decisions are know the Mexican investors because the voting right is eliminated or new foreign rights are established, which, only get a yield for their inversion, but do to have an important role in the operation and decision making of the company.

²⁸ According with the article 2 of the current LIE for foreign investment is understand: a) the participation of foreign investors, in any proportion, in the capital of Mexican societies, b) the one made by Mexican societies with majority of foreign capital and c) the participation of foreign investors in the activities and events contemplated by the LIE. In the article 1 fraction V of the Lie normative is defined the participation of the foreign investment in the social capital as “the percentage of foreign investment in the social capital of a society, calculated in relation to the total actions or social parts which do not have the character of neutral inversion, including the action of social parts affected in trust”.

Because the lack of national capital for the development of specific activities and with the desire to promote the participation of foreign investment in these activities, is established for first time the concept of neutral inversion in the General Resolution Number 2 issued by the National Commission of Foreign Investment, published in DOF, June 21 of 1989.

The concept of neutral inversion was very criticize because was consider a type of inversion that was not predicted in the Law to Promote the Mexican Investment and Regulate the Foreign Investment of 1973 and because did not accomplish with the principles of novelty of the law and law reserve. Despite these critics, this concept was regulated more widely in the Law to Promote the Mexican Investment and Regulate the Foreign Investment of 1989²⁹ and then in the LIE of 1993.

This Regulation established two forms participation of the neutral inversion

- a) For International Financial Societies for the Development in the capital of Mexican societies (article 8 and 9).
- b) For Certificate of Ordinary Participation emitted by fiduciary institutions (article 12 to 15).

These certificates should be acquired by foreign investors and accomplish to conditions:

²⁹ This regulation set up the bases of the new dispositions to promote the foreign participation in projects of investment in Mexico. Some of the most important modification are the regimen of automatic authorization, which allows, that an established company have any percentage of stocks by foreign investors or to increase the capital in existent companies, without the necessity of the authorization of the National Commission of Foreign Investment.

That the in trust patrimony would be constituted by representative actions of the social capital of societies with actions that will be quoted in the Mexican stock exchange.

The actions in trust integrate neutral series or "N" which only could be acquired by credit institutions as fiduciaries, in the trusts that for this effect could be constituted,

Of the first condition is derived that only could opt for this type of financing the companies that quoted in the stock, not having access, the rest of the companies, limiting their participation; After the concept of neutral inversion is established in LIE of 1993.

In this regulation like in its posteriors modification the neutral inversion is considered as the one that is made in Mexican societies or in authorized trusts and that is no computed to determinate the percentage of foreign investment in the social capital of the Mexican societies (article 18).

The current LIE, establish that the forms in which the neutral inversion could participate are:

Tool of neutral inversion emitted by trusts, with the authorization of the Economy Secretary, that give only respect societies, pecuniary rights³⁰

The new tools of neutral inversion now are commercial paper³¹, that can be positioned through the stock houses and have special regulation in the Law of Titles and Credit Operations.

³⁰ The pecuniary rights relate to the economic participation that the investors have in the utilities of the Mexican societies for concept of the inversion that they made.

³¹ Antes eran Certificados de Participación Ordinaria.

These new tools are not attached to the conditions that should accomplish the Certifies of Ordinary Participation, the LIE and its regulation; do not say anything about it.

From the exposition of motives that Carlos Salinas de Gortari in the "Document of Presentation of the Foreign Investment Law to the Chamber of Deputies of the Union Congress" keep clear that can participate through these new tools, the mercantile companies by stocks, quoted or not in the Mexican Stock exchange, which constitute an advance in relation with the Certifies of Ordinary Participation. Salinas points: "The neutral inversion is a mechanism, that have proved be an scheme highly benefic in order that the societies which quoted in the stock market could cleave extern resources and financing of the investors".

Special series of stocks in Mexican societies, without voting rights or with limited corporative rights, previous authorization of the Economy Secretary and to be applicable of the National Banker Commission of Values (article 20). This new form of neutral inversion participation allows that not only the companies which quoted in the stock have access to this type of inversion, but all the companies, quoted or not in the stock.

It constitutes an advance in relation with the Certifies of Ordinary Participation that established only the participation of the companies that quoted in the stock. Eliminating the voting right or establishing limited corporative rights, the LIE, does not allow that the foreign investors take control of the company neither intervene in the decision making, not even in the those which correspond in the ordinary assembly and only will have pecuniary rights or limited corporative rights.

For International Financial Societies for the Development in the society's capital of Mexican societies (article 22). Consider International Financial Societies for the Development the foreign moral people who have as objective promote the economic development, through the contribution of the temporary risk capital, grant of preferential financings or technic support of different types, according with the article 24 of the Regulation of the Foreign Investment Law.

According with the article 25 of the same regulation, named Societies will be forced to previously obtain the recognition of the National Commission of Foreign Investment and in the case that they desire to participate in reserved activities or with specific regulation, should obtain favorable resolution of the Commission and accomplish with the article 29 of the Regulation. With the objective to norm and control the inversion from other countries, the LIE of 1993, on its article six points the economic activities exclusive for Mexicans or Mexican societies with inclusion of foreign. The current Law, in the same article, points that these activities are:

- National land transport of passenger, tourism and charge, without include the services of mailing and package.
- Retail trade of oil and distribution of liquefied petroleum gas
- Radio broadcasting service and other of radio and television, different of the cable television

Institution of development banks, in terms of the subject law;

The benefit of the professional and technic services that expressly point the applicable legal dispositions.

The foreign investment will not participate in the mention activities and societies in the present article, directly or through trusts, social pacts or statutory, pyramid schemes or another mechanism that give control or some participation, except for the disposition in the Fifth title of the law. In the article seven of the LIE established the maximum amount and the areas in which could participate the foreign investment (see chart num. 1).

Limits to the foreign participation in economic activities and societies attached to the specific regulation, 2009

Up to 10%	Up to 25%	Up to 49%
Production Cooperatives	National air transport	Insurance institutions
	Transportation by air taxi	Bonding companies
	Specialized air transport	Exchange house
		General Deposit Warehouses
		Companies referred to in Article 12 bis of the Securities Market Law
		Administrators retirement funds
		Manufacture and sale of explosives, firearms, cartridges, ammunition and fireworks excluding the acquisition and use of explosives for industrial and extractive activities, or the development of explosive mixtures for use in such activities.
		Printing and publishing of newspapers for circulation in the country.
		Series "T" of companies owning agricultural land, livestock and forestry
		Freshwater fishing, coastal waters and the exclusive economic zone, excluding aquaculture
	Integral Port Administration	

Port pilotage services to vessels for inland operations, in terms of the law of matter.

Chart 1

Source: Foreign Investment Law of December 27th of 1993, the last reform of August 20th of 2008.

The limits for the foreign investment participation pointed un this article, could not be directly overload, neither through trusts, convenes, social pacts, pyramid schemes or any other mechanism that give control or a bigger participation to the one is establish, except by the disposition of the Fifth Title of this Law.

In the article 8 is established the economic activities and societies in which is required favorable resolution of the National Commission of Foreign Investment in order that the foreign investment make part in the percentage major than 49% which are: port services to vessels to make operation of interior browsing, such as towing, mooring and lighterage, shipping companies engaged in the operation of ships only in high traffic, concessionary societies or aerodrome licensees service for public, private service of preschooler education, primary, school, high school, higher and mixture, legal services, credit information services, value qualifiers institutions, insurances agents, cellphone telephony construction of pipelines to transport oil and its derivatives oil and gas drilling and the construction, operation and exploitation of railroads which are general communication ways, and provision of public service of rail transport.

It required favorable resolution of the Commission when the total values of actives of the societies which is about, in the moment to submit the acquisition solicitude, overloading the amount that annually determinate the Commission (article 9).

From the above, came out that the foreign capital could not participate in the activities and societies mentioned before, being a necessary condition but not enough, because the fifth Title of the LIE establish that the foreign capital can participate in the activities exclusive for Mexicans or Mexican societies through neutral inversion. Until February of 2006 there are around 201 resolutions of the Economy Secretary about neutral foreign inversion, that have been authorized, working the same number of companies through the neutral inversion. (Mares: 2006).

The Senate sent to the Chamber of Deputies a letter about neutral inversion with the only finality to make the inversion transparent. The letter sent April 4th of 2006, contains:

- The application of the term that the Ministries of Foreign Relations and Economy have to authorize the entry of foreign neutral investment, and in the case of resolution operate the operates the ficta affirmative:
- The neutral inversion is redefined, as well, the flows that could be computed under the same, therefore is consider as such, only to the investment belonging to:
 - a) Trust
 - b) Investment societies
 - c) Funds of foreign investment

- The attributions of the National Commission of Foreign Investments are applied, with the finality to establish more controls in front the possible utilization of the neutral inversion figure as way of simulation.
- Specific penalties are set to the simulation through the use of any scheme that allows the foreign investors overload the established limits in the Law of Foreign Investment.

The Chamber of Deputies rejected this initiative for the fundamental principle that the inversion is benefic for the country and because will go against the principal objective of the LIE, which I the attraction of foreign investment to the country, its arguments are:

That the foreign direct investment is fundamental for the countries' development, being in an important source of financial resources to long term and, therefore, exerting a strong impulse to the economic growth through the generation of new employs, the complementation of the national inversion, the strength of the productive sector, through transference of knowledge and technology.

That the Law of Foreign Investment is of public order and the general observation in the entire Republic and its object is the determination of rules to canalize the foreign investment to the country and provide that this contribute to the national development.

According to the article 18 of the Foreign Investment Law, the "neutral inversion is that which is made in Mexican societies or in authorized trusts according to the present title and it will not be computed to determinate the percentage of foreign investment in the social capital of the Mexican societies."

That the stage direction of neutral inversion only to the belonging of trusts, investment societies or fund of foreign investors, is clearly violative of the Free Trade Agreements and of the Reciprocal Agreements if Promotion and Protection of Investments (APPRIS), of which Mexico is part, concretely about that constitute a direct violation of the principle of “National Trade”, through which: “Each one of the parts will give to the investors of the other part a treat not less favorable to than the one is given, in similar conditions, to its own investors referent to the establishment, acquisition, operation, sell or other disposition of the inversions” (example article 1102 of the TLCAN).

That with the redefinition of foreign investment prevents the possibility of investment in the sectors with restrictions for foreign investment, pointed in the article 6 of the Foreign Investment Law, such as land transport, oil commerce, distribution of liquid gas, service of radio broadcasting and other radio and television.

In the same way, this reform will stop the inversion in the sectors with specific regulation, mentioned in the article 7 of the law, like airlines, telecommunications, insurance and financial institutions, financial leasing, port administrators, retirement funds management, etc. in other words, all the foreign companies and corporative groups, will be exclude, if they are not trusts, investment societies or investors funds.

That the own Free trade Agreements and APPRIS, subscribed by Mexico and approved by the Senate, in particular the TLCAN, establish that the part could not modify any existent disposition to the date of the implementation of the Trade, in such way that named modification has as effect reduce the rate of conformity with the principles of the Trade (Article 1108 of TLCAN), like is the principle of “National Trade”, except that mention modifications be correctly excepted or reserved by Mexico (Annex I of TLCAN).

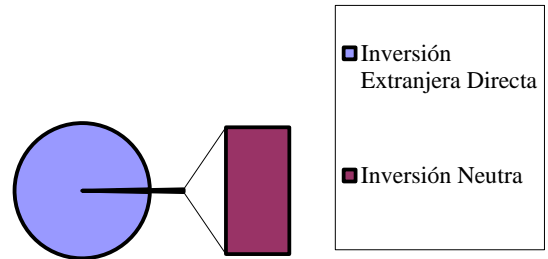
That the expansion of the terms to authorize neutral foreign investment, is contrary to the policy of regulatory improvement, which has as finality to simplify and streamline the procedures to the public administration, also is estimated that the terms establish in the Law of Foreign Investment are enough and suitable, and of conformity with the article 31 of the Federal Law of Administrative Procedure, supplementary of this Law, is possible to expand the legal term to solve the solitudes of neutral inversion.

Extend the power of the National Commission of Foreign Investment to solve about the authorization and the terms and conditions of the neutral inversion participation in any of the activities pointed in the article 8 of the Foreign Investment Law, is contradictory, because the neutral inversion was designed especially in order that the foreign investment participate in the reserved or with especial regulation activities, contemplated in the articles 6 and 7 of the Law.

The proposal of infractions, relative to the neutral inversion, results understandable, however, a reform to the sanctions of the Foreign Investment Law should be integral, because in sanctions subject there are general and specific rules, and should also exist a balance between the different hypotheses. Consequently, the authority should have sufficient scope to solve the events and acts with a proportional strength to the importance of the fact.

The Chamber of Deputies perform according to the tendency that Mexico has been following about foreign investment, because Mexico has trades of investment with different nations of the world, which carry to violate a one of the clauses that the foreign investment required from national trade. This clause is include in almost all the trades that Mexico has signed being like the APPRIIS and the integration trades, like for example the trade of Mexico with the European Union. According to the Economy Secretary would lost between 200 and 500 millions of dollars in the period of 2006 and part of 2007 respectively, if the bill were approved.

If we compared the fact of the accumulated neutral inversion of 1989 until 2007 ³² (1,257.9 millions of dollars) and the IED (194,560.4 millions of dollars) that understood the period of 1999-2007 in a graphic (Graphic 1) it is noticeable the insignificant of the neutral inversion.



Foreign Investment

Graphic 1

Given the not meaningful of the neutral inversion cyphers we should not be afraid of the foreign capital not even of the neutral inversion. The neutral inversion is not an important amount yet. However, helps the national companies to improve its productive efficiency and human capital.

The Economy Secretary will send an initiative, that until now have not been presented, to the Congress of the Union to promote the growth of the neutral inversion in some activities, not specified yet. The initiative created favorable expectative in the American Chamber of Commerce because its members are 2000 companies, with a potential of more than 100,000 millions of dollars of foreign inversion in Mexico.

Some of the national companies that have neutral inversion are: Televisa radio that participates in the Prisco Company that belongs to Spanish capital and Telefonica which also belong to Spanish capital in Pegaso.

³²Since 2008 the Economy Secretary, is going to provide facts about neutral inversion on its annual inform.

Also the Americans had done it in UPS message and the telecommunications Maxcom ang Acir Group, which have investments of Clear Channel and Enlaces Terrestres Nacionales (ETN), as well Telefonos de Mexico (Telmex) and the Group of Mexican telecommunication (GTM) this last with Spanish foreign capital.

Application of the neutral inversion concept has carried some confrontations between many companies. For example, recently Telmex had a confrontation with GTM because was consider that this company violated the article 7 of the LIE, having 97.7% in direct investment and 89.6% under control of its Spanish subsidiary Telefonica de Moviles, S.A, with which would be overloading the allowed limits of the foreign investment.

Telmex requested, in September 4th of 2007, to the Federal Commission of Telecommunication (COFETEL), to determinate if its forced to provide the interconnection to its telephonic networks to GTM, which will allow the expansion of its telephonic services, despite to considerate that was violating the LIE. In October 31th of 2007, Eduardo Ruiz Vega, Commissioner of COFETEL, said that GTM “has a shareholding of 51% of a Mexican company and 49% of Telefonica Moviles. With conformity to the LIE was possible to give an authorization for the participation in the Mexican stock capital through the neutral inversion way.”³³.

This resolution points that for participate GTM through neutral inversion, this participation, is not consider as percentage of the foreign investment in the social capital, according with the disposition of the LIE.

In August of 2008, was a discussion the initiative to eliminate the current restriction that only allows a maximum of the 49% in fixed telephony, which will make necessary modify the LIE³⁴, many sectors are in favor of this posture, for example, Luis Tellez, CEO of the Secretary of communication and Transport (SCT) said “We would see with new eyes the opening of the segment to this investment that is present in the mobile telephony, because this will imply more competence”³⁵.

The arguments of Tellez to support this initiative are that the fixed telephony has operated in a regime of inversion not very optimum that has expressed in a low penetration of its services, high level of tariffs and low level of quality. Telmex has showed in favor of this initiative because consider that the help to transparent the presence of foreign companies which search to participate in the fixed telephony, avoiding confrontations between the companies, if the legislation is more clearly, to the respect.

Conclusions

The necessity to promote the development of specific activities, motived that the Regulation of the Law to Promote the Mexican Inversion and Regulate the Foreign Investment of 1989, as will the LIE of 1993, include the concept of neutral information.

³³Periódico Reforma, October 31th of 2007.

³⁴Since June of 2008 is a discussion in the Congress of the Union an initiative to reform the current limit of foreign participation of 49% in fixed telephony.

³⁵Notimex/Síntesis Informativa, August 1th of 2008.

The neutral inversion allows the participation of the foreign investment in reserved activities for Mexicans or in those that are attached to the limits of foreign participation consider in the LIE (article six and seven respectively).

It is considerate neutral because is made through special series of stocks or neutral investment tools in Mexican societies or in trusts respectively, which do not give right to the vote about the decision of the company because its participation is not consider for effects of the percentage in foreign investment consider in the LIE. Giving respect of societies pecuniary rights, in other words rights about the utilities of the Mexican societies, which are derived of its participation in the inversion of these societies. The rejection to the Senate's letter, April 4th of 2006, by the Chamber of Deputies was justify why it was against the principles of investors attraction and of the signed trade by Mexico with different nations of the word.

The neutral inversion is not meaningful in relation with the IED, of 1989 to December of 2007, is just 1,257.9 millions of dollars while the IED of 1999 to 2007 of 188,636.8 millions of dollars, having preference and power in the economy. The neutral inversion is insignificant but represents a relief for the companies to improve their efficiency as much as technologic as of human capital. The confrontations between companies for the application of the neutral inversion concept had been solved by the COFETEL, according to the dispositions of Telmex and GTM, end in favor of this last one, because its inversion more than 49% was made under the scheme of neutral inversion and according to the LIE, this participation is not consider as percentage of foreign investment.

Fixed telephony subject, in August of 2008, is discussed an initiative to eliminate the maximum limit of foreign participation of 49% being agree with this initiative many sectors, between them, the SCT because favor the competence between companies a will give more efficiency to the services and better prices.

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