Protectionism vs Protection: NAFTA and Mexico’s Energy Reform
I. The results of NAFTA’s negotiations applicable to energy and basic petrochemicals

II. The protection of foreign investments and investors in Mexico:

   • before the recent energy reforms,
   • in light of the recent energy reforms, and
   • possible subsequent amendments.
I. NAFTA’s Provisions Applicable to Energy and Basic Petrochemicals
NAFTA in Mexico, only cap: the Constitution

Pre-NAFTA
- Constitution
- Constitutional laws – treaties?
- Federal laws

Present
- Constitution & human rights treaties
- Other treaties
- Federal laws

Post-NAFTA
- Constitution
- Treaties
- Federal laws
- Other treaties
- Federal laws
Negotiations

Mexico’s Position

“Not on the table”

If so, **why** did it slip in?

- Strategic nature of the sector
Negotiations – Accommodating Interests

Mexico
Explicit recognition that energy goods, investment and services remained under exclusive control of the State

U.S. and Canada
Preserve trade disciplines under U.S.-Canada FTA (Annex 608.2)

The Three Parties
Acknowledgment of the heavy weight of the sector (Article 601)
Mexico reserves the right to perform exclusively, and to refuse to permit the establishment of investments in:

- exploration and exploitation of crude oil and natural gas
- refining or processing of crude oil and natural gas

Annexes 602.3 and III
Negotiations – Accommodating Interests

Mexico - “not on the table”

- Production of artificial gas, basic petrochemicals and their feedstocks and pipelines
- Foreign trade, transportation, storage, distribution of: crude oil, natural and artificial gas, goods obtained from refining or processing; and basic petrochemicals
- Supply of electricity as a public service, including: generation, transmission, transformation, distribution and sale of *electricity*

Annexes 602.3 and III
Energy and petrochemical goods and activities are governed by several chapters of NAFTA.

- **Energy and Basic Petrochemicals (Chapter VI)**
- **Cross-Border Trade in Services (Chapter XII)**
- **Competition Policy, Monopolies and State Enterprises (Chapter XV)**
- **Government Procurement (Chapter X)**
- **Investment (Chapter XI)**
- **Market Access for Goods (Chapter III)**
- **Exceptions (Chapter XXI)**

**Annexes I and II**

**Annex III**

**how did it slip in?**
II. NAFTA Before and After the Energy Reform
NAFTA Before and After the Energy Reform

Relevant chapters with the same application

- Market access (Chapter III)
- Government Procurement (Chapter X)
- Monopolies, Competition and State Enterprises (Chapter XV)
Chapter XI applies to measures adopted or maintained by a Party relating to:

a) Investors of another Party

b) Investments of investors of another Party in the territory of a Party;

(c) with respect to Articles 1106 (Performance Requirements) and 1114 (Environmental Measures), all investments in the territory of the Party.
# Chapter XI. Investment

## Main Substantive Commitments

<table>
<thead>
<tr>
<th>National Treatment (1102)</th>
<th>No discrimination to foreign investments and investors situated in like circumstances to national investments and investors (e.g. establishment, management or sale of investments).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most-Favored-Nation Treatment (1103)</td>
<td>Equality of treatment between foreign investors of different nationalities (and their investments) in like circumstances</td>
</tr>
</tbody>
</table>
| Minimum standard of treatment (1105) | Treatment in accordance with international law, including:  
- fair and equitable treatment  
- full protection and security |
Chapter XI. Investment

Main Substantive Commitments

**Transfers (1109)**
Free transfer of profits, dividends, capital gains, etc. in and out of the host State.

**Senior Management and Boards of Directors (1107)**
No requirement to appoint to senior management positions individuals of any particular nationality. Board of directors special rule not to impair the ability of the investor to exercise control over its investment.

**Performance requirements (1106)**
- Prohibition to impose or enforce certain requirements (e.g., achieve a given level or percentage of goods and services or domestic content, transfer technology) in connection to the establishment, acquisition, operation, receipt of an advantage, among others.
If Mexico permits private investment to participate, such opening does not affect the State's reservation.

NAFTA Annex III, Section B. Deregulation of Activities Reserved to the State

1. “…Where Mexico allows private investment to participate in such [energy] activities through service contracts, concessions, lending arrangements or any other type of contractual arrangement, such participation shall not be construed to affect the State's reservation of those activities.”
As Mexico opens its energy sector, investments will be protected by Chapter XI, except for non-conforming measures pertaining:

- National Treatment
- Most-Favored Nation
- Performance Requirements
- Boards of Directors

"to the extent that a Party allows an investment be made in an activity set out in Annex III or Annex 602.3, the investment shall be entitled to the protection of Chapter Eleven (Investment)"

With regards to National Treatment (1102), Most-Favored Nation (1103), Performance Requirements (1106) and Senior Management and Boards of Directors (1107) do not apply to:

- any existing non-conforming measure that is maintained by a Party at the federal level, as set out in its Schedule to Annex I or III,
- an amendment to any such non-conforming measure “...to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment...”
NAFTA Before and After the Energy Reform

Chapter XI (Investment) – Second Interpretation

Before 2013:
- totally closed door: no protection

Before 2013:
- slightly opened door (services contracts)

After 2013 (energy reform):
- door more than half opened (e.g. production and profit sharing, license, and services contracts among others).

Further reforms: more than half opened door (cannot close the door again): same or better access

Same level of protection
Trans-Pacific Partnership (TPP)

Some Issues

• Relationship with NAFTA
  o Coexistence?
  o Cases of incompatibility or contradiction between NAFTA and TPP

• Comparison of investment protection vs. NAFTA
  o Substantive provisions
  o Procedural rights and remedies

• Special reservations regarding the energy sector