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A New Investment Law in Guatemala: Will it Attract Foreign Investment?

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On September 19, 2022, the Guatemalan Congress enacted the [Act for Promotion of Investment of Foreign Capital, 46-2022](#) (*Ley de Fomento de Inversión de Capital Extranjero*) (the “Act”), which came into force on September 27, 2022.

The Act aims to promote investment projects from foreign capital in Guatemala. The Act gives special treatment to foreign investment by regulating the conditions and authorizations necessary for its implementation. Article 2 establishes that it applies to all investors, individuals, or foreign companies with foreign capital that will make new investments in the country.

Is the Act entirely clear?

The Act’s objective is to introduce a special treatment for foreign investment to promote investment projects. The intention of the Guatemalan legislators seemed to be noble and towards creating incentives to attract foreign investment but the Act does not provide a list of the incentives of the special treatment that the foreign investors will receive if they decide to apply for the benefits of the Act.

Once the investor has submitted the request to the Ministry of Economy, the Ministry must determine whether it approves or rejects the project. Such resolution from the Ministry of Economy seems to be the most important document according to the Act since it is in that resolution where the investors can finally find out what special treatments they will be granted.

While it is not entirely clear, it seems that the special treatment consists of tax benefits, given that article 13 of the Act includes reforms to the Income Tax Law (*Ley de Actualización Tributaria*), indicating that the investors will maintain their status and preserve the rights granted under the resolution of the Ministry of Economy for a time-lapse that cannot exceed for more than 10 years for each investment project.

Accordingly, it will not be until the end of the road that investors will have certainty about the benefits they will receive in Guatemala for investing their capital. From the reading of the Act, the investors cannot gain knowledge of whether the benefits will refer to labor, tax, environmental, corporate, or administrative matters. This gives a powerful discretion to the Ministry of Economy and such discretion is not necessarily what an investor is looking for when investing in a foreign

country.

Article 15 of the Act establishes that the Executive Branch, through the Ministry of Economy, must issue a regulation (*reglamento*) within the next 60 days of the entry into force of the Act. This regulation will be an important instrument to understand how the Ministry of Economy and the rest of the agencies will apply the Act. It is possible, although not the correct legal mechanism, that the regulation will establish what the benefits for foreign investors will comprise.

Similar legislation in the Latin American region

Panama has enacted the [Act of Legal Stability of Investments](#) (*Ley de Estabilidad Jurídica de las Inversiones*) which registers national and foreign investments equivalent to USD \$2,000,000.00 or more. In Panama, the Ministry of Economy is the entity in charge of the registry and guarantees the investor that it will receive legal stability in tax matters, municipal tax, labor law, free transfer of capital, customs, and exports. Such a guarantee is for a term of 10 years, except for municipal taxes, where a 5-year term applies. In case the conditions vary, the investor may be indemnified.

In *Nations Energy, Inc. and others v. the Republic of Panama, ICSID Case No. ARB/06/19*, Panama's Act of Legal Stability of Investments was discussed. The claims arose out of communications between Panama's General Revenue Directorate and the Ministry of Economy and Finance where they allegedly refused claimants the transfer of certain fiscal tax credits to third parties.

El Salvador also enacted the [Act of Legal Stability of Investments](#) (*Ley de Estabilidad Jurídica para las Inversiones*) to promote national and foreign investment through a contract of legal stability. El Salvador has signed contracts of legal stability in the energy sector, the first one involved an investment of USD \$73,000,000, and the second one an investment of more than USD \$13,000,000. In El Salvador, the contracts of legal stability not only guarantee the stability of the conditions at the time of the contracts and tax regimes but also guarantee migratory conditions to the key persons related to the investment.

The Act and its relation with international investment contracts and treaties

In the international context, the regimes of stabilization are best known as stabilization clauses, freezing clauses, or economic equilibrium clauses. These clauses intend to be incorporated either in public contracts, investment contracts, or international investment agreements.

Stabilization clauses have been interpreted by different arbitral tribunals, for example in *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28)*, the ICSID tribunal determined that the stability foreseen by stabilization clauses goes beyond the mere protection against future changes in laws and also applies to legal interpretations.

In *Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6)* the tribunal analyzed contracts for two exploratory oil properties that included a tax modification clause requiring the application of a correction factor to absorb any increase or decrease in the tax burden resulting from changes to the tax regime, the creation or elimination of new taxes or their

interpretation. While nothing on the contract clauses was clearly designated to protect the contractual bargain, the Tribunal affirmed that they did not constitute stabilization clauses *per se*, since they did not purport to freeze Ecuadorian law at the time of their signing nor prohibit the State from modifying the tax regime.

From the reading of the legislative history of the Act, it seems that the Guatemalan legislator intended to replicate Panama's and El Salvador's model by creating a stabilization regime in Guatemala. Even though it is not expressly stated in the Act, article 13, which reforms the Income Tax Law (*Ley de Actualización Tributaria*), suggests that there is room for the interpretation of a stabilization clause. Such article provides that the investors will maintain their legal status and will preserve their rights covered by the resolution rendered by the Ministry of Economy, which cannot exceed a period of 10 years for each project.

Therefore, it seems that the Guatemalan legislator intended to insert a type of stabilization clause in an administrative act – the resolution of the Ministry of Economy. But the nature of this act is different from what we have in the international scenario, where stabilization clauses are either part of the contract (as is the case of El Salvador) or as part of a provision in an international investment agreement. Either way, depending on the text of the resolution of the Ministry of Economy, in the future this can lead to some potential issues of interpretation in an international context.

Conclusion

Will the Act attract foreign investment to Guatemala? Not yet.

The Act is missing an important component: a list of the benefits that the investors will receive as part of the special treatment when investing their new capital in Guatemala. It is unclear whether the regulation of the Act will establish these benefits or if it will be left to other governmental authorities to issue further guidance.

Finally, the Act alone will not attract foreign investment to Guatemala. Other relevant factors are important for this to happen, such as absence of corruption, due process, and respect for the rule of law, among others.

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