

GETTING THE
DEAL THROUGH 

Investment Treaty Arbitration 2015

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Mexico

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Background

1 What is the prevailing attitude towards foreign investment?

Mexico is a country open to foreign investment as it has significant inflow. Mexico has diverse government entities in charge of foreign investment regulation and supervision.

2 What are the main sectors for foreign investment in the state?

According to ProMéxico, an agency affiliated to the Ministry of Economy, the main sectors of foreign direct investment in the country are:

- manufacturing companies operating under the North America Free Trade Agreement (NAFTA) or other free-trade agreements;
- financial services;
- beverages and tobacco;
- the automotive industry;
- transport and communication; and
- the chemical industry.

Additionally, construction and infrastructure are important sectors for foreign direct investment (FDI). Also, reforms to the country's energy legislation have been recently approved and inflow of FDI in oil and gas should be expected.

3 Is there a net inflow or outflow of foreign direct investment?

In general terms, there is a net inflow of FDI. A chart that illustrates this inflow on a tri-monthly basis (from 2009 to the second trimester of 2014) is available on the webpage of the Ministry of Economy (www.economia.gob.mx/trade-and-investment/foreign-direct-investment/official-statistics-on-dfi-flows-into-mexico).

The largest FDI inflow in Mexico comes from the United States.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

There is no specific regulation for investment agreements in Mexico. However, under specific circumstances, some contracts between the state and foreign investors, or between state-owned companies and foreign investors, may qualify as protected investments under the bilateral investment treaties and investment chapters of the free-trade agreements entered into by Mexico.

No Mexican domestic law provides foreign investment protection similar to that found in the investment treaties Mexico has executed.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

According to the Ministry of Economy, Mexico has granted foreign investors protection through bilateral investment agreements (BITs) and through investment protection regulations in free trade agreements (FTAs).

Mexico has executed BITs with:

- Americas: Argentina, Cuba, Panama, Trinidad and Tobago, Uruguay;
- Asia: China, Korea, India, Singapore;
- Europe: Austria, Belarus, Belgium-Luxembourg Economic Union, the Czech Republic, Denmark, Finland, France, Germany, Greece,

- Iceland, Italy, the Netherlands, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom;
- Middle East: Bahrain, Kuwait; and
- Oceania: Australia.

As to FTAs with specific foreign investment protection regulation, Mexico has entered into the following:

- NAFTA (chapter XI of the North America Free Trade Agreement between the United States, Canada and Mexico);
- CAFTA (Central America Free Trade Agreement); and
- FTAs with Chile, Costa Rica, Colombia, Peru; Uruguay and Japan.

All BITs and FTAs are in force.

6 Is the state party to the ICSID Convention?

No. Mexico is one of the few countries in the world that is not a signatory party to the ICSID Convention. Different lobbying efforts by various chambers of commerce have been undertaken to encourage the Mexican government to adhere to this convention, but they have been unsuccessful.

Irrespective of this, some countries with which Mexico has executed bilateral or multilateral investment treaties are signatory parties to the ICSID Convention. And in these cases, foreign investors may submit investment arbitration claims against Mexico through the ICSID Additional Facility Rules. Arbitration claims also may be brought against Mexico under other arbitration rules, such as the UNCITRAL Arbitration Rules.

7 Does the state have an investment treaty programme?

No, there is no specific investment treaty programme in Mexico. However, Mexican officials have acknowledged that the execution of BITs, together with other policies and regulation efforts at international level (for example, double-taxation treaties), attract foreign investments that are beneficial to the country's economy. In this respect, Mexico has entered a substantial number of investment treaties and nothing indicates that it will stop executing new treaties or renewing the existing ones. There is a specific government office, the Undersecretariat of Foreign Trade, in charge of negotiating investment treaties in the Ministry of Economy.

Regulation of inbound foreign investment

8 Does the state have a foreign investment promotion programme?

Yes, Mexico has a foreign investment promotion programme. This programme is managed by ProMéxico (www.promexico.gob.mx).

As an agency of the Ministry of Economy, ProMéxico seeks to promote FDI inflow and outflow. Representatives from ProMéxico are based in all major capitals and economic centres of the world and are usually members of the Mexican diplomatic corps.

9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The domestic laws that apply are as follows:

- articles 25, 27 and 28 of the Mexican Political Constitution;
- the Foreign Investment Act (issued by Congress); and

- the Regulations of the Foreign Investment Act and the National Registry of Foreign Investments (issued by the executive branch).

These laws establish registration and authorisation requirements, and also regulate the economic sectors in which foreign investment is prohibited or limited. Under article 5 of the Foreign Investment Act some economic activities can only be performed by the government. These are:

- exploration and extraction of petroleum and hydrocarbons, as provided for in articles 27, paragraph 7 and 28, paragraph 4 of the Constitution and applicable law;
- planning and control of the national electrical system, as well as the transmission and distribution of electricity to the public, as provided for in articles 2, paragraph 6 and 28, paragraph 4 of the Constitution and applicable law;
- nuclear energy generation;
- radioactive minerals;
- telegraph;
- radiotelegraph;
- post;
- currency issuing;
- coin minting;
- control, supervision and surveillance of seaports, airports and heliports; and
- others specifically provided for in the applicable legal provisions.

Irrespective of this, private investment in energy generation may be possible under several investment schemes or mechanisms that have been provided in the 2014 Mexican Energy Reform. The types of contracts that may be executed include rendering of services, profit or production sharing, licence agreements or a combination of all the above.

Further, under article 6 of the Foreign Investment Act, the following economic activities can only be performed by Mexican nationals:

- ground transportation, excluding courier services;
- development bank institutions; and
- professional and technical services.

Article 7 of the Foreign Investment Act sets out some economic activities in which FDI can participate on a limited basis. For example:

- cooperative production companies (10 per cent);
- national air transportation, air taxi transportation and specialised air transportation (25 per cent);
- production and commercialisation of explosives, firearms and ammunition (49 per cent);
- printing and commercialisation of newspapers for exclusive circulation in national territory (49 per cent);
- fresh water, coastal or exclusive economic-zone fishing, with the exclusion of aquaculture (49 per cent);
- integrated port administration (49 per cent); and
- radio broadcasting (49 per cent, subject to reciprocity).

Finally, there are some limited economic activities where FDI can participate in percentages larger than the ones above, but that require authorisation from the National Commission of Foreign Investments, as provided for in article 8 of the Foreign Investment Act. For example:

- legal services;
- construction, operation and exploitation of railroad tracks and railroad services; and
- private education services

10 Identify the state agency that regulates and promotes inbound foreign investment.

We should differentiate between promotion and regulation of inbound foreign investment. The agency in charge of FDI promotion is ProMéxico, and the agency in charge of regulating inbound investment is the National Commission of Foreign Investments. Among others, the Commission has the power to:

- issue policy guidelines regarding FDI;
- make decisions about the application of FDI authorisation requests; and
- serve as a consultation body for other public entities.

As stated previously, the public office in charge of negotiating and executing investment treaties is the Undersecretariat of Foreign Trade. The Office of Legal Counsel for International Trade reviews the treaties from

a juridical point of view and is in charge of coordinating the defence of the Mexican Government in investor-state arbitration. All three of the above offices are affiliated to the Ministry of Economy.

11 Identify the state agency that must be served with process in a dispute with a foreign investor.

This question should be answered on a case-by-case basis. Some investment treaties designate a specific state agency, while domestic law designates another. Under the internal regulations of the Ministry of Economy, the agency that should be served with process is the Office of Legal Counsel for International Trade. However, under NAFTA, for example, service should be performed before the Office of Foreign Investment. In cases such as this one, serving both agencies should be considered.

Investment treaty practice

12 Does the state have a model BIT?

Mexico does not have a model BIT.

13 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

The central repository of Mexico's international treaties is the Ministry of Foreign Affairs. All treaties are available on its website. In general, treaty preparatory materials are not available on the Ministry's website, but copies are available to the public upon request. Investment treaties are also available at the website of the Ministry of Economy.

14 What is the typical scope of coverage of investment treaties?

Following international practice, Mexico's investment agreements (or investment chapters contained in trade treaties), include the following provisions:

- definition of investor – in broad terms, an investor is a national (both individuals and entities) of the state with which Mexico has executed an investment treaty and that carries out an investment in Mexican territory; and
- definition of investment – the definition of investment varies depending on the treaty in question, but usually covers:
 - a company;
 - stocks or shares of a company;
 - debt instruments issued by a company;
 - participation in a company that grants special rights, such as the residual claim;
 - real estate, immovable property;
 - intangible assets including intellectual property; and
 - participation of an economic activity in the territory of the host state in contracts that require the presence of the investor, such as construction (including Turkey) concessions.
- statute of limitations and applicability;
- negotiating periods before submitting an arbitration claim (cooling-off period);
- substantive foreign investor protections; and
- access to international arbitration as the means to resolve any controversy regarding a breach of the treaty by a host country.

15 What substantive protections are typically available?

The protections available in Mexico's investment treaties mainly cover direct and indirect expropriation. To be lawful under Mexican investment treaties, generally these acts must:

- pursue a public policy purpose;
- be executed on a non-discriminatory basis;
- observe due process of law; and
- give fair compensation to the investor.

Mexico's treaties generally use fair market value as the standard to determine compensation. Regarding how to assess fair market value, treaties use the following criteria:

- going concern value, asset value and other criteria;
- national treatment;
- most-favoured-nation treatment;
- fair and equitable treatment and full protection and security;
- no umbrella clause. In general, Mexico does not incorporate umbrella clauses in its investment treaties; and

Update and trends

A comprehensive energy reform at the constitutional and legislative level was enacted this year in Mexico. The oil and gas industry was previously monopolised and controlled by PEMEX and CFE in many respects, but this reform will open the sector to foreign investment, and a substantive inflow is expected.

- right to make transfers. Mexican investment treaties incorporate the right to make transfers as a substantive protection for the investor. This includes the right to transfer currency freely, convertible according to the market exchange rate. Transfers include dividends, interest, capital gains, payments for services, such as technical assistance, residual claims and sale of the investment. Some treaties, however, give the host state the right to limit such transfers in a bona fide and non-discriminatory basis in cases of bankruptcy, insolvency, criminal or administrative offences and gross imbalance in the balance of payments.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

The most common mechanisms to arbitrate investment cases against Mexico have been the ICSID Additional Facility and ad hoc arbitration, pursuant to UNCITRAL Arbitration Rules.

However, some treaties also give investors the option to file an arbitration claim under:

- the arbitration rules of the Permanent Court of Arbitration; or
- other arbitration rules, if parties so agree.

The investor, as claimant, generally has the right to choose the applicable arbitration rules at its convenience. Mexico's investment treaties also contemplate the applicability of the ICSID Convention as a possibility, but this is currently inoperative because Mexico is not a party to the ICSID Convention. Besides the eligible arbitration fora, Mexican investment treaties include provisions about institution and consolidation of proceedings and the method of appointing the arbitration tribunal. Also, cooling-off periods are very common.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

Generally, investment arbitration cases are not treated as confidential. Documents and important information relating to the cases in which Mexico has acted as defendant can be found at: www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias.

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

Mexico has been respondent in 17 investment arbitration cases. Fifteen of them have been concluded and two are active. The results of the 15 reported concluded cases - available on the website of the Ministry of Economy - can be summarised as:

- dismissed because of lack of jurisdiction: one case;
- dismissed on the merits in favour of Mexico: five cases; and
- successful claims for the investor: nine cases.

More detailed information can be found at: www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado.

Some important investment arbitration cases against Mexico.

- Cargill Inc, a United States producer and marketer of food, invoked NAFTA and utilised the ICSID Additional Facility, claiming that an imposition of a tax on soft drinks containing the special syrup produced by Cargill and a failure to issue import permits breached its treaty with Mexico. Cargill sought a compensation of not less than US\$100 million. The tribunal decided that Mexico breached the minimum standard of treatment, national treatment and performance requirements provisions of NAFTA chapter 11, and awarded over US\$77 million in favour of Cargill.

- Robert Azinian (United States) invoked NAFTA and utilised the ICSID Additional Facility, based on the fact that a concession for waste disposal services was revoked by the Municipality of Naucalpan. Azinian's claims were dismissed.
- Metalclad Corporation (United States) invoked NAFTA and utilised the ICSID Additional Facility. According to Metalclad, the government of San Luis Potosí and the Municipality of Guadalupe de Victoria deprived it of its hazardous waste landfill investment by ordering the termination of construction when, according to Metalclad, it had all the necessary permits. The tribunal awarded US\$16.685 million to Metalclad.
- GAMI Investments Inc (United States) invoked NAFTA. The arbitration measures were ad hoc, pursuant to UNCITRAL Arbitration Rules. GAMI claimed that its company was mistreated by Mexico, alleging discrimination in the application of a new sugar production regime and discrimination in the expropriation of the company's sugar mills. GAMI's claims were dismissed.
- Marvin Roy Feldman Karpa (United States) invoked NAFTA and utilised the ICSID Additional Facility. According to Feldman, Mexico's application of tax laws regarding tobacco breached the treaty because they were applied in a different manner for Mexican investors, on the one hand, and for Feldman's companies (foreigner), on the other. Also, according to Feldman, Mexico did not issue the necessary permits to Feldman's company, CEMSA. The tribunal held that Mexico did not expropriate Feldman's investment, but that it had breached the national treatment obligation against the claimant. As a result, the tribunal ordered Mexico to pay approximately 17 million Mexican pesos to Feldman.
- Técnicas Medioambientales SA (TECMED, Spain) invoked the Spain-Mexico BIT and utilised the ICSID Additional Facility. TECMED held a licence to operate its hazardous industrial waste plant. Because of administrative reorganisations, TECMED applied for a renewal of the licence, but was denied. According to TECMED, this constituted an expropriation and also a breach in the fair and equitable treatment, and national treatment. The tribunal ruled that Mexico breached the fair and equitable treatment and expropriated TECMED's investment. As a result, the tribunal awarded a compensation of over US\$5.5 million.
- Fireman's Fund Insurance Company (United States) invoked NAFTA and utilised the ICSID Additional Facility. Fireman's Fund claimed that the Mexican government expropriated its investment in Grupo Financiero BanCrecer SA, in violation of article 1110 of NAFTA. Fireman's claims were rejected.
- Waste Management Inc (waste disposal services, United States) invoked NAFTA and utilised the ICSID Additional Facility. The claimant argued that the Municipality of Acapulco's lack of payment of the bills to the concessionaire were a breach of the fair and equitable treatment obligation. For its part, Mexico upheld Acapulco's argument that such failure to pay was justified in the defects of the performance of the service and Waste Management's claims were dismissed.
- Thunderbird (United States) invoked NAFTA. The arbitration measures were ad hoc, pursuant to UNCITRAL Arbitration Rules. Thunderbird argued that the Mexican government authorised it to operate gaming facilities. However, when a new director took office it ordered Thunderbird to close its gaming facilities. Thunderbird's claims were dismissed.
- Archer Daniels et al (a United States producer and marketer of food) invoked NAFTA and utilised the ICSID Additional Facility. The claimants sustained that an amendment in the Mexican tax legislation was against NAFTA investment provisions, because the tax modification only applied to soft drinks that used a sweetener other than sugar, such as high-fructose corn syrup. The tribunal held that Mexico did not expropriate Archer Daniels' investment, but breached the national treatment obligation. As a result, it awarded compensation of over US\$33.5 million in Archer Daniels' favour.
- Gemplus SA (France) and Talsud SA (Argentina) invoked Mexico's BITs with Argentina and France and utilised the ICSID Additional Facility. The claimants alleged that the Ministry of Economy's intervention and repudiation of the concession contract constituted a breach to the fair and equitable treatment standard, national treatment and also amounted to an expropriation. The tribunal held that Mexico breached its fair and equitable treatment obligation. It awarded a compensation of approximately US\$10 million to the claimants.

- Corn Products International Inc (United States) invoked NAFTA and utilised the ICSID Additional Facility. The claimant sustained that an amendment in Mexican tax legislation was against NAFTA investment provisions because the tax modification only applied to soft drinks that used a sweetener other than sugar, like high-fructose corn syrup. In its award on liability, the tribunal found that Mexico has breached the national treatment obligation and awarded US\$58 million in favour of the claimant.
- Bayview Irrigation District et al (United States) invoked NAFTA and utilised the ICSID Additional Facility. The claimants stated that Mexico's measures regarding irrigation deprived investors of the possibility of implementing their irrigation activities in Texas. The tribunal considered that it lacked jurisdiction.
- Abengoa, SA y Cofides, SA invoked Mexico's BIT with Spain; the case was heard under the ICSID Additional Facility Rules. The dispute relates to the construction and operation of a complex for the treatment of industrial waste in Hidalgo and the closure of this facility by the municipal authorities. The tribunal ruled in favour of the claimants and determined that Mexico indirectly expropriated the investment in violation of the BIT awarding damages and interests in favour of the prevailing party.

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

The sectors or industries where investment disputes arise vary. There are investment cases in the following industries: food, hazardous waste landfills, waste disposal concessions, tobacco, sugar production, financial institutions, gaming facilities, soft drinks and syrups, and concession for the operation of the National Vehicle Registry, among others.

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Mexico appoints specific arbitrators on a case-by-case basis.

21 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

The Mexican state is represented by the Directorate General of International Trade Legal Counselling of the Ministry of Economy. In some cases, the Ministry of Economy has employed the services of law firms in the United States and Canada.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes, Mexico is a party to some international treaties regarding enforcement of awards, including the following:

- the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
- the Inter-American Convention on International Commercial Arbitration (the Panama Convention); and
- the Inter-American Convention on the extra-territorial validity of judgments and foreign awards (the Montevideo Convention).

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

To our knowledge, Mexico has usually complied with the awards rendered against it in investment treaty arbitrations, with some notable exceptions where challenges to the award have been filed.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

There are some cases where Mexico has tried to challenge the awards, but it has done so before foreign courts as the place of arbitration was not Mexico. For instance, in *Cargill v Mexico* it filed a nullity claim against the award before Ontario's Supreme Court in Canada. In *Metalclad v Mexico*, it challenged the award before British Columbia's Supreme Court in Canada. And in *Feldman v Mexico*, Mexico challenged the award before Ontario's Supreme Court.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

Mexico is not a party to the ICSID Convention and it therefore has broader defences against awards rendered against it compared with the narrow grounds of article 52 of the ICSID Convention. However, as previously mentioned, Mexico is a party to the New York Convention that establishes a favourable regime regarding the enforcement of awards. And in this respect, investors may seek enforcement of an award.

Additionally, Mexico incorporated the UNCITRAL Model Law on International Commercial Arbitration (1985 version) and integrated into the Commerce Code the exact same annulment grounds as the ones established in the Model Law. Finally, article 5 of the General National Assets Law establishes that the assets of the Mexican government entities that have recognised autonomy in the Mexican Constitution may not be subject to seizure.



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