

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 an important inflow. Mexico has different government entities in charge of foreign investment regulation and supervision.

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

According to Pro México, an agency affiliated to the Ministry of Economy, the main sectors of foreign direct investment (FDI) in the country are the following:

- 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 FDI. Also, an energy legislative reform is being discussed in Congress. If approved, an 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 first semester of 2013) is available on the webpage of the Ministry of Economy (<http://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 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 website of the Ministry of Economy, Mexico has granted foreign investors protection through bilateral investment agreements (BITs, where investment protection is the only subject of the treaty) and through investment protection regulations in free trade agreements (FTAs, where international commerce is regulated broadly).

Mexico has executed BITs with the following countries:

- *America:* Argentina, Cuba, Panama, Trinidad and Tobago, Uruguay;
- *Asia:* China, Korea, India, Singapore;
- *Europe:* Austria, Germany, Belarus, Denmark, Slovak Republic, Spain, Finland, France, Greece, Iceland, Italy, Netherlands, Portugal, United Kingdom, Czech Republic, Sweden, Switzerland, Belgium-Luxemburg Economic Union;
- *Middle East:* Bahrain, Kuwait; and
- *Oceania:* Australia.

All of these BITs are in force.

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

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

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. The ICSID Additional Facility Rules may apply when one of the parties in dispute (eg, Mexico) is not a signatory to the ICSID Convention. Further, arbitration claims 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 publicly acknowledged that the execution of BITs, together with other policies and regulation efforts at the international level (eg, double taxation treaties), serve the purpose of attracting 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 renovating the existing ones. There is a specific government office in charge of negotiating investment treaties in the Ministry of Economy (Dirección de Consultoría Jurídica de Comercio Internacional).

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 Pro Mexico (<http://www.promexico.gob.mx>).

As an agency of the Ministry of Economy, Pro México seeks to promote FDI inflow and outflow. Representatives from Pro México 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, there are some economic activities that can only be performed by the government. These economic activities relate to specific sectors that are defined as strategic areas, and are the following:

- petroleum and hydrocarbons;
- basic petrochemicals;
- electricity;
- radioactive minerals;
- telegraph;
- radiotelegraph;
- mail;
- currency issuing; and
- control, supervision and surveillance of seaports and airports.

Irrespective of this, private investment in energy generation may be possible under several investment schemes or mechanisms which were provided in the 1992 amendment to the Law for the Public Service of Electric Energy. These schemes are self-supply, cogeneration, exportation, importation for self-supply purposes, independent power producer (IPP) and small producer.

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;
- commercialisation of gasoline and distribution of gas;
- developing banks (as regulated under the applicable law); and
- professional and technical services as determined by the applicable law.

Also, under article 7 of the Foreign Investment Act, there are some economic activities in which FDI can participate on a limited basis. Some examples of these activities include the following:

- air transportation and air taxi (25 per cent);
- insurance and bonding companies (49 per cent);
- retirement funds (49 per cent);
- production and commercialisation of explosives, firearms and ammunition (49 per cent);
- printing and commercialisation of newspapers (49 per cent);
- fishing (49 per cent);
- port administration (49 per cent); and
- radio and television broadcasting (49 per cent, subject to reciprocity, as per the Constitutional amendment of 11 July 2013).

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. For example:

- legal services;
- drilling activities for oil and gas wells;
- construction of oil pipelines;
- cellular telephony;
- railroad and
- education.

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 Pro México, 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 Dirección de Consultoría Jurídica de Comercio Internacional.

The three offices above are all 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 Dirección General de Consultoría Jurídica de Comercio Internacional. However, under NAFTA, for example, service should be performed before the Dirección General de Inversión Extranjera. 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 according to a publication of the OECD. This publication can be found at: <http://www.oecd.org/daf/inv/internationalinvestmentagreements/40072428.pdf>.

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

The government entity which acts as the central repository of Mexico's international treaties is the Ministry of Foreign Affairs. All treaties are publicly 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.

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 (see definition below) in Mexican territory; and
- definition of investment. The definition of investment is generally broad in Mexico's investment treaties. And although it varies depending on the treaty in question, the definition usually covers the following concepts:
 - 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
 - the resultant 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 turn key), concessions, among others.
- 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 main substantive provisions of Mexico's investment treaties are the following:

Protection against expropriation

The treaties usually cover direct and indirect expropriations, as well as measures equivalent to expropriation. In general terms, to be lawful under Mexican investment treaties, these acts need to comply with the following requirements:

- they must pursue a public policy purpose;
- they must be executed on a non-discriminatory basis;
- they must observe due process of law; and
- the investor has to be fairly compensated.
- fair market value. Mexico's treaties generally use fair market value as the standard to determine compensation. Regarding how to assess the fair market value, treaties use the following to contemplate 'going concern value', 'asset value' and 'other criteria':
 - national treatment;
 - most favoured nation treatment;
 - fair and equitable treatment, and full protection and security;
 - in general, Mexico does not incorporate umbrella clauses in its investment treaties; and
 - right to make transfers. Mexican investment treaties use 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 of the day of the transfer. These transfers include dividends, interests, capital gains, payments for services such as technical assistance, residual claims and sale of the investment, among others. However, some treaties contemplate that the host state may limit such transfers in a bona fide and non discriminatory basis in cases of bankruptcy, insolvency, criminal or administrative offences, and in some treaties also for 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 (PCA); 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.

It is worth mentioning that 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 forums, 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: <http://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 around 16 investment arbitration cases. The results of the 14 reported concluded cases that are publicly available at the website of the Ministry of Economy can be summarised as follows:

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

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

Below, please find a summary of 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 the following Mexican measures breached the treaty: a) imposition of a tax on soft drinks containing the special syrup produced by Cargill and b) Mexico's failure to issue import permits. Cargill sought a compensation of not less than US\$100,000,000. The tribunal decided that Mexico breached the minimum standard of treatment, national treatment and

performance requirements provisions of NAFTA chapter 11, and awarded US\$77,329,240 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\$16,685,000 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 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 breached the national treatment obligation against the claimant. As a result, the tribunal ordered Mexico to pay approximately 17,000,000 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. Due to administrative reorganisations, TECMED applied for the renewal of said licence, but the renewal 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 US\$5,533,017.
- *Fireman's Fund Insurance Company* (United States) invoked NAFTA and utilised the ICSID Additional Facility. Fireman's Fund claims that the Government of Mexico 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, like 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 a compensation of US\$33,510,091 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\$10,000,000 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.

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, concession for the operation of the National Vehicle Registration, 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 Dirección General de Consultoría Jurídica de Comercio Internacional 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).

Update and trends

We consider that the issuance of the arbitration award, its annulment by Mexican courts under public policy grounds (arbitrability) and the subsequent recognition order of the same award by a New York District Court in the *COMMISA v PEMEX* case is an important topic regarding the practice of international arbitration in our country.

In the interest of full disclosure, one of the authors of this article, Claus Von Wobeser, participated as an expert in Mexican law before the New York District Court.

In this case, Mexican courts annulled an award against PEMEX, applying a statute that was issued after the contract was executed and after the arbitration was initiated. Specifically, the Mexican court ruled that the termination of the contract could not be subject to arbitration, therefore annulling the award on arbitrability grounds. The

provisions the judge applied to reach this conclusion were not in force at the time the contract was executed and the arbitration initiated.

COMMISA sought enforcement of the annulled award before New York District Courts. The judge considered that the Mexican court's decision violated basic notions of justice and, as a result, decided to recognise the award under the Panama Convention.

The decision of the New York District Court judge is subject to appeal. However, his judgment is undoubtedly a landmark in the practice of international arbitration, particularly in the US-Mexico region.

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. In these three cases, Mexico's requests to set aside the award were rejected by the Canadian courts.

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 defenses against awards rendered against it if compared to 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 favorable regime regarding the enforcement of awards. And in this respect, investors may seek enforcement of an award against Mexico in countries different than Mexico. For example, in the context of a commercial case, COMMISA, a subsidiary of SK Engineering, is now seeking to enforce an award against PEMEX before the courts of New York.

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 recognized autonomy in the Mexican Constitution may not be subject to seizure.



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