



GAR *know-how* - Investment Treaty Arbitration - Mexico Questionnaire

The questions below invite answers focused on international arbitration. Please do not explain aspects of domestic arbitration, except where it is useful as context or an illustration.

The order of topics largely mirrors the arbitration process. Though it would be possible in places, please don't give a one-word (yes/no) answer. You can start an answer in that style, but please follow it up with some substance if possible.

Please limit the scope of your answers to international arbitration as it concerns your own jurisdiction.

1. What are the key features of the investment treaties to which this country is a party?

BIT Contracting Party or MIT	Substantive Protections					Procedural Rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and Security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Argentina (22 July 1998)	Yes	Yes	Yes	Yes	NO	6 months	Yes	Yes
Australia (18 July 2007)	Yes	Yes	Yes	Yes	NO	6 months	Yes	Yes
Austria (26 March 2001)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Belarus (27 August 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

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Belgium (20 March 2003)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Cuba (29 March 2002)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Czech Republic (14 March 2004)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
China (6 June 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Denmark (23 September 2000)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Finland (21 August 2000)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
France (11 October 2000)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Germany (23 February 2001)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Greece (17 September 2002)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Iceland (28 April 2006)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
India (23 February 2008)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Italy (4 December 2002)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Korea (28 June 2002)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Luxembourg (20 March 2003)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes

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Netherlands (1 October 1999)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Panama (14 December 2006)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Portugal (4 September 2000)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Spain (4 April 2008)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Singapore (4 April 2011)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Slovakia (8 April 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Sweden (1 July 2001)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Switzerland (11 March 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Trinidad & Tobago (16 September 2007)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
United Kingdom (25 July 2007)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Uruguay (1 July 2002)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

Substantive Protections

Procedural Rights

FTAs	Fair and Equitable Treatment (FET)	Expropriation	Protection and Security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Bolivia (17 May 2010)	Yes	No	Yes	Yes	No	6 months	Yes	Yes
Central America (22 November 2011)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

Colombia (11 June 2011)	No	Yes	Yes	Yes	No	6 months	Yes	Yes
Costa Rica (5 April 1994)	No	Yes	Yes	Yes	No	No	Yes	Yes
Chile (16 April 1998)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
EFTA (27 November 2000)	Yes	No	Yes	Yes	No	No	No	Yes
European Union (23 March 2000)								
Israel (10 April 2000)	No	No	No	Yes	No	No	Yes	Yes
Japan (17 September 2004)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
NAFTA (17 December 1992)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Nicaragua (18 December 1997)	No	Yes	Yes	Yes	No	6 months	Yes	Yes
Peru (6 April 2011)	Yes	No	Yes	Yes	No	6 months	Yes	Yes
El Salvador, Honduras, Guatemala, (29 June 2000)	No	No	Yes	Yes	No	6 months	Yes	Yes
Uruguay (15 November 2003)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

2. Definition of “investor”

What are the distinguishing features of the definition of “investor” in this country’s investment treaties?

Issue

Distinguishing features in relation to the definition of “investor”



There is no specific rule that applies in this regard.

Some investment treaties do not provide the definition of “investor”, such as the treaty signed with Germany.

Meanwhile, other treaties, such as the treaty signed with Australia, provide that an investor must have its substantive business operations in the territory of the Contracting Party, if constituted or organised in accordance to its laws.

Seat of the investor/place of business

The treaty signed with Korea focuses on the investment made by a Contracting Party, rather than the investors’ place of its substantive business.

Therefore we could say that the BIT signed with Australia follows an investor’s territory criteria while the BIT signed with Korea follows investment territory criteria.

For instance, the BIT signed with Greece follows both criteria.

Control by a non-national

Generally, most of the BITs, MITs or FTAs signed by Mexico exclude non-nationals from seeking BIT protection. The general rule for seeking BIT protection is for the investor(s) to be a national of any of the Contracting Parties. Even in the case where an entity owns or controls an investment, the entity must be a national.

Some investment treaties executed by Mexico refer to the local laws of each contracting party to determine the nationality of the entity or individual. Most treaties signed by Mexico define “investors” as nationals of any of the Contracting Parties, and the majority of the treaties refer to the domestic law of the Contracting Party to define nationality.

Permanent residents

Therefore a residency requirement would depend on whether the domestic law of the Contracting Party defines nationality on a residency basis.

In Mexico, the nationality of a person does not depend on residency; therefore as long as the investor is Mexican, there is no need to reside in Mexico in order to seek BIT protection.

3. *Definition of “investment”.*

What are the distinguishing features of the definition of “investment” in this country’s investment treaties?

Issue

Distinguishing features in relation to the concept of “investment”

Most Mexican investment treaties define “investment” broadly. They tend to include every kind of asset, owned or controlled, directly or indirectly, by investors of one Contracting Party admitted in accordance with the laws, regulations and policies of the other.

Eligible assets

Nevertheless, other treaties include a definition of what does not constitute investment. For instance, the BIT signed with Australia at Article 1(a), provides that “investment” does not mean a loan to an enterprise nor a claim for money. Another example of agreements that provide what is not considered as investment is the FTA signed with Nicaragua, and the FTA signed with Uruguay.

Profit and interest, etc

There is no general rule, it depends on the treaty. For instance, the BIT signed with Trinidad and Tobago provides in its Article 1(5), that profit and interest, capital gains, dividends, royalties and fees are comprised within the investment definition.

Duration of investment

There is no general rule, it depends on the treaty. The BIT signed with Denmark contains a specific provision about duration, by stating in its Article 1(1) that the BIT covers only those investments that have the purpose of establishing lasting economic relations with an enterprise.

4. *Fair and equitable treatment.*

What are the distinguishing features of the fair and equitable treatment standard in this country’s investment treaties?

Issue

Distinguishing features of the fair and equitable treatment standard

Most of the treaties provide for the FET standard.

Illustrations of the FET standard

Most of the BITs *e.g.* Australia, Austria, Czech Republic, Portugal, include full protection and security as part of the FET standard; however there are others that do not even mention it as part of the FET standard; such as the BIT signed with Germany and the BIT signed with Argentina.

5. *Expropriation.*

What are the distinguishing features of the protection against expropriation standard in this country’s investment treaties?

Issue	Distinguishing features of the “expropriation” standard Most of the investment treaties signed by Mexico contemplate the act of expropriating under the term “expropriation”; while some other treaties, such as the BIT signed with Spain and the BIT signed with Greece, contemplate expropriation as “nationalisation”.
Definition	Most Mexican treaties follow the typical expropriation clause providing that neither party will “nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation the investments of investors of the other Party”, unless certain conditions are fulfilled.
Interest and compensation	There is no rule. Generally, most of the investment treaties signed by Mexico do not consider interest paid and resulting from an expropriation as part of the compensation; however some, such as the BITs signed with Korea, Australia, Greece and France, do. Most of the treaties refer to similar grounds for expropriation, including:
Grounds for expropriation	<ul style="list-style-type: none">• it must serve a public purpose;• it must be non-discriminatory;• it must be carried out in accordance with due process of law; and• it must be accompanied by payment as means of compensation. Nevertheless, some BITs do not include these exceptions: Germany, Korea, Denmark, Spain, Greece, Italy, Portugal and United Kingdom.

6. *National treatment/most-favoured-nation treatment.*

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country’s investment treaties?

Issue	Distinguishing features of the “national treatment” and/or “most favoured nation” standard
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The principles of non-discrimination (MFN treatment) and national treatment are the rule in investment treaties and BITs executed by Mexico.

Difference between the most favoured nation (MFN) and the national treatment (NT) clauses.

With respect to NAFTA, Article 1102 contemplates national treatment; Article 1103 deals with MFN treatment. The NAFTA model addresses the two concepts in different articles, and is followed by the investment treaties and BITs executed with Australia, Bolivia, China, Costa Rica, Japan and Nicaragua.

In contrast to NAFTA, some investment treaties like the one executed with Colombia and some BITs like the ones executed with Argentina, Cuba, France, Korea and Spain address the two principles in the same article. Mexico's investment treaties commonly include a reservation providing that, by virtue of a treaty to avoid double taxation, there is no obligation to extend to the investors or investments of one Contracting Party advantages granted to investors or investments of the other Contracting Party or of a country that is not a party.

Taxation measures

For instance, such a provision can be found in Article 17–06 of the FTA between Colombia and Mexico.

Similarly, Article 16–07 of the investment treaty executed with Nicaragua establishes that MFN treatment and national treatment do not apply to purchases made by a party or a state company, nor to subsidies or contributions – including governmental loans – guarantees and insurance granted by a party or a state company.

Duty to report

We are unaware of any.

7. Protection and security.

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue Distinguishing features of the “protection and security” standard

The general rule provided by the investment treaties signed by Mexico is the general obligation of the host state to provide full protection and security. Most treaties do not define the scope of such obligation.

Extent of obligation

Nevertheless, to avoid problems of interpretation, Article 5 of the BIT executed by China and Mexico asserts that “for greater clarity the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require additional treatment to what is required by the minimum level of treatment of foreigners under customary international law.”

8. *Umbrella clause.*

What are the distinguishing features of the umbrella clauses contained within this country’s investment treaties?

Issue

Distinguishing features of any “umbrella clause”

Most authors and judicial authorities agree that there is no standardised definition of an umbrella clause because its scope is ambiguous.

Standardisation

Several treaties define it as: *“Each Party shall observe any obligation it may have entered into with regard to investments.”*

Since its scope may be too ambiguous, most of the Contracting Parties decide not to include the referred clause.

Specific chapter for umbrella clause

As a result Mexico has concluded twelve BITs containing an umbrella clause (Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Luxembourg, Netherlands, Portugal, Spain and Switzerland BITs).

Most of the treaties that contain this clause have a specific chapter that regulates it. Only two, Denmark and Netherlands BITs do not have a specific chapter regulating the umbrella clause.

9. *Other substantive protections.*

What are the most important substantive rights provided to qualifying investors in this country’s investment treaties?

Issue

Other substantive protections

1. Compensation for losses

Several investment treaties guarantee protection and security for investments of the other Contracting Party referring to special situations. For instance, the typical clause says that if the investment of a Contracting Party suffers losses because of war, or other armed conflict, resulting from a state of national emergency, civil disturbance or other similar events, investments should be treated with the same national investments privileges as those of nationals. For instance, the BITs signed with Germany, Australia, Austria, Korea, and India provide such protection.

10. Are there any pertinent issues related to procedural rights in this country's investment treaties?

Issue

Procedural Rights

Some of the investment treaties signed by Mexico contain fork-in-the-road provisions (Spain, Germany, Argentina, Australia, Korea, Greece, India, Iceland, Netherlands, Panama, Portugal, UK, Czech Republic, Sweden, Switzerland, Trinidad and Tobago, and Uruguay).

Fork-in-the-road

Under most of these treaties, investors must opt to pursue their claim through the local courts or by means of international arbitration. They cannot do both.

Coexistence of local remedies and international arbitration

There is the possibility of a Contracting Party submitting a claim to arbitration that has already been brought before a national court, provided that the competent national tribunal has not rendered judgment in the first instance or on the merits of the case (Germany and Australia BITs)

BITs that prioritise arbitration.

Some investment treaties signed by Mexico give more importance to arbitration than to local court proceedings, such as the Germany, Argentina and Panama BITs.

11. To which governmental entity (eg, Ministry of Justice) should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent

In an arbitration claim against Mexico, notice of arbitration must be submitted before the *Dirección General de Consultoría Jurídica de Negociaciones*, which is subordinate to the Ministry of Economy.

12. Which government department or departments (eg, Ministry of Justice, Ministry of Finance and/or the Attorney General) manage investment treaty arbitrations on behalf of this country?

Government department which manages investment treaty arbitrations

In Mexico the Ministry of Economy manages investment treaty arbitrations.

13. Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/External Counsel In recent cases, the legal counsel serving with the Dirección General de Consultoría Jurídica de Negociaciones in the Ministry of Economy has represented Mexico.

The state does not go through a formal public procurement for hiring external counsel.

14. Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (*the Washington Convention*)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation Mexico has not signed the Washington Convention. Therefore, it only participates in ICSID proceedings under the Additional Facility Arbitration Rules.

15. Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (*the New York Convention*)?

Please identify any legislation implementing the New York Convention.

Mexico signed the New York Convention on 14 April 1971.

New York Convention implementing legislation Mexico is also party to the Inter-American Convention on International Commercial Arbitration (Panama Convention), and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention). In addition, by incorporation of the UNCITRAL Model Law on Arbitration into Mexico's Commerce Code (applicable to local and international arbitration), UNCITRAL provisions are now found in domestic legislation.

16. Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?



There is no specific legislation governing non-ICSID investment arbitrations. However, claims have been brought against the United Mexican States outside ICSID, under the UNCITRAL Arbitration Rules in cases like:

Legislation governing non-ICSID arbitrations

- *GAMI Investments Inc v Mexico*

International Thunderbird Gaming Corp v Mexico

17. *Adverse awards*

Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards Mexico has a good record when it comes to complying with awards. Currently all awards have been ultimately satisfied.

18. Describe the national government's attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration It is favourable; the execution of over twenty BITs granting access to investment arbitration to foreign investors confirms it.

19. To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration I am not aware of any award that has not been voluntarily recognised by Mexico.

20. Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National Legislation	Substantive Protections			Procedural Rights	
	FET	Expropriation		Local courts	Arbitration
Law of Foreign Investment	No	No	This law regulates and provides legal certainty to foreign investment in several economic sectors, and abolishes restrictions in most areas. It does not provide specific types of protections or rights.	No	No
Expropriation Law	No	Yes	This provides a specific procedure and guarantees in favour of the person subject to expropriation.	Yes	No



21. Does the country have an investment guarantee scheme (or offer political risk insurance) that protects local investors when investing abroad?

If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections

Relevant guarantee scheme Qualifying criteria, substantive protections provided and practical considerations

No No

22. Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

CASE NO.	CLAIMANT	UNDER
ARB/97/1	Metalclad Corp	NAFTA
ARB/97/2	Robert Azinian and Others	NAFTA
ARB/98/2	Waste Management, Inc.	NAFTA
ARB/99/1	Marvin Roy Feldman Karpa	NAFTA
ARB/00/2	Técnicas Medioambientales Tecmed SA	Bilateral investment treaty (BIT) between Mexico and Spain
ARB/00/3	Waste Management, Inc	NAFTA
ARB/02/1	Fireman's Fund Insurance Co	NAFTA
ARB/04/1	Corn Products International, Inc	NAFTA
ARB/04/5	Archer Daniels Midland Co and Tate & Lyle Ingredients Americas, Inc	NAFTA
ARB/04/3; ARB/04/4	Gemplus SA, SLP SA, and Gemplus Industrial SA de CV, and Talsud SA	BITs between France and Mexico and Argentina and Mexico, respectively
ARB/05/1	Bayview Irrigation District and Others	NAFTA
ARB/05/2	Cargill, Inc	NAFTA

Cases initiated and pending resolution

KBR, Inc. y Corporación Mexicana de Mantenimiento Integral v. los Estados Unidos Mexicanos



Telefonica V. Estados Unidos Mexicanos ICSID ARB. No. AF/12/4

See <http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado>
23. Reading list

Article/Book

Dolores Bentolila: *Hacia Una Jurisprudencia Arbitral En El Arbitraje Internacional De Inversiones*, Anuario Mexicano de Derecho Internacional: México, Décimo Aniversario, 2012, pp. 373-420.

Gonzalez de Cossio, Francisco: *Arbitraje*, Porrúa: México, 3th ed., 2011.

Gonzalez de Cossio, Francisco: *Arbitraje de Inversión*, Porrúa: México, 2009.

Legum, Barton, “Lessons Learned from the NAFTA: the New Generation of US Investment Treaty Arbitration Provisions”, *ICSID Review Foreign Investment Law Journal*, Vol. 19 p. 344, 2004

Rodriguez Jimenez, Sonia: *El Sistema Arbitral CIADI*, Porrúa: México, 2006.

Internet links

http://www.economia.gob.mx/files/comunidad_negocios/comercio_exterior/acuerdos_y_tratados_comerciales_de_MExico.pdf

<http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/tlc-acuerdos/acuerdos-internacionales-de-inversion>

<http://www.journals.unam.mx/index.php/amdi/article/view/29742/27650>, last accessed 5th August 2014.

Partner profile

Marco Tulio Venegas



Education: Escuela Libre de Derecho, Mexico City, 1996.

Associations: He is a member of the Mexican Bar Association and the Young Arbitrators Forum of the Mexican Chapter of the ICC.

International Experience: Since 1995 to date he has worked in the law firm Von Wobeser y Sierra, S.C., except for the year 2000, when he worked as assistant to Mr. Eduardo Silva Romero, one of the Advisors of the Secretariat of the International Chamber of Commerce in Paris.

He worked as a foreign associate in the area of arbitration in the firm Freshfields, Bruckhaus & Deringer (2000).

Practice Areas: Currently, Mr. Venegas is the partner in charge of the litigation and arbitration area of the firm Von Wobeser y Sierra, S.C. and is in charge of the International Commercial Arbitration and Investment Arbitration cases, as well as of the Administrative and Intellectual Property Litigation, Civil and Commercial Litigation; Constitutional Litigation.

Mr. Venegas' experience includes the participation in the largest commercial arbitration (considering the amount claimed) in Mexican history as representative of the party who prevailed in the case. In addition, Mr. Venegas has participated as counsel in three arbitrations related to construction disputes involving private parties and governmental entities.

Published articles or books: He participated as technical reviewer of the Spanish version of the book The New Arbitration Rules of the International Chamber of Commerce.

He has published several articles related with arbitrations subjects in Pauta the publication of the Mexican Chapter of the International Chamber of Commerce.

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Firm description

Von Wobeser y Sierra, S.C.

Von Wobeser y Sierra, S.C. is one of the leading firms in arbitration not only in Mexico but also in Latin America. Since the firm was formed, it has been actively involved in the promotion and practice of arbitration.

The firm is an active member of all the relevant national and international arbitration institutions (International Chamber of Commerce, American Arbitration Association, CANACO, London Court of International Arbitration, CAM, etc.)

The experience of our law firm in arbitration includes any possible activity related to an arbitration procedure. As arbitrators (either Co-arbitrators or Chairman of Arbitral Tribunals) we have extensive experience. Members of our law firm participate in an average of 7 arbitrations per year.

Recent significant cases successfully conducted by Von Wobeser y Sierra include the representation of AB-InBev in an arbitration brought by Grupo Modelo and the representation of a Chemicals company, in a case initiated by another competitor.

Moreover, the Firm was involved in creating judicial precedents through a case involving Tradeco Infraestructura, S.A. de C.V. and also obtained a favorable decision before local courts for COMMISA, in an arbitration against Pemex Exploración y Producción.

We have also participated as expert witnesses in international disputes involving Mexican law. In this regard, we have been able to influence the final outcome of some arbitrations by including and explaining some legal arguments not clearly developed in early stages of the arbitrations.

Finally, we have also served as counsel to enforce before Mexican Courts, arbitration awards which were not voluntarily complied with.

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FIRM ADDRESS:

TELEPHONE NUMBER:

WEBSITE ADDRESS:



FIRM LOGO: *Please provide your firm's logo as a separate Jpeg, Tiff or EPS file. **The image must be at least 275 pixels wide.***

FIRM DESCRIPTION: *a 250-word overview of your firm:*

AUTHOR BIOGRAPHY: *Please supply a short 250-word biography for each author:*

AUTHOR PHOTOGRAPH: *Please supply a photograph of the author(s) as a separate Jpeg or Tiff file. **The image must be at least 500 pixels wide.***