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Investment Treaty Arbitration

Mexico

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Overview of investment treaty programme

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

1.

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
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
	Yes	Yes	Yes	Yes	No		Yes	Yes

China (6 June 2009)						6 months		
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
Netherlands (1 October 1999)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
	Yes	Yes	Yes	Yes	No	6 months	No	Yes

Panama (14 December 2006)								
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 (14 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 (7 June 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 (13 June 1994)	No	Yes	Yes	Yes	No	6 months	Yes	Yes
Costa Rica (5 April 1994)	No	Yes	Yes	Yes	No	No	Yes	Yes
Chile (17 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,	No	No	Yes	Yes	No	6 months	Yes	Yes

(29 June 2000)

Uruguay (15 November 2003)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
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Qualifying criteria – any unique or distinguishing features?

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”
Seat of the investor/place of business	<p>There is no specific rule that applies in this regard.</p> <p>Some investment treaties do not provide the definition of “investor”, such as the treaty signed with Germany.</p> <p>Meanwhile, other treaties, such as the treaty signed with Australia, provides 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.</p> <p>The treaty signed with Korea focuses on the investment made by a Contracting Party, rather than the investors’ place of its substantive business.</p> <p>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.</p> <p>For instance, the BIT signed with Greece follows both criteria.</p>
Control by a non-national	<p>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.</p>
Permanent residents	<p>Investment treaties executed by Mexico refer to the local laws of each contracting party to determine the nationality of the entity or individual. The 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.</p> <p>Therefore a residency requirement would depend on whether the domestic law of the Contracting Party defines nationality on a residency basis.</p> <p>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.</p>

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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"
Eligible assets	<p>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.</p> <p>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.</p>
Profit and interest, etc	<p>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.</p>
Duration of investment	<p>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.</p>

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Substantive protections – any unique or distinguishing features?

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
Illustrations of the FET standard	<p>Most of the treaties provide for the FET standard.</p> <p>Most of the BITs (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.</p>

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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
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Definition 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".

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.

Grounds for expropriation Most of the treaties refer to similar grounds for expropriation, including:

- 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, eight of the BITs do not include these exceptions: Germany, Korea, Denmark, Spain, Greece, Italy, Portugal and United Kingdom.

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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**

Difference between the most favoured nation (MFN) and the national treatment (NT) clauses. The principles of non-discrimination (MFN treatment) and national treatment are found in all investment treaties and BITS executed by Mexico.

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, the investment treaties executed with Colombia and the BITS executed with Argentina, Cuba, France, Korea and Spain address the two principles in the same article.

Taxation measures

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.

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.

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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

Extent of obligation

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.

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."

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Umbrella clause.

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

8.

Issue Distinguishing features of any "umbrella clause"

Standardisation

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

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.

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

Specific chapter for umbrella clause

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.

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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
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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.
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Procedural rights in this country's investment treaties

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

Issue	Procedural Rights
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Fork-in-the-road	Fifteen 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). 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.
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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)
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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.
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Practicalities of commencing an investment treaty claim against this country

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.

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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.

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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.

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Practicalities of enforcing an investment treaty claim against this country

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.

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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.

New York Convention implementing legislation

Mexico signed the New York Convention on 14 April 1971.

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.

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

Legislation governing non-ICSID arbitrations

Claims have been brought against the United Mexican States outside ICSID, under the UNCITRAL Arbitration Rules:

- *GAMI Investments Inc v Mexico*
- *International Thunderbird Gaming Corp v Mexico*

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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.

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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.

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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.

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National legislation protecting inward investments

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	Other	Local courts	Arbitration courts
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

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National legislation protecting outwards-bound foreign investment

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

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Awards

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
<u>ARB/99/1</u>	Marvin Roy Feldman Karpa	NAFTA
ARB/00/2	Técnicas Medioambientales Tecmed SA	Bilateral investment treaty (BIT) between Mexico and Spain
<u>ARB/00/3</u>	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; <u>ARB/04/4</u>	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

Abengoa, S.A. y COFIDES, S.A. c. los Estados Unidos Mexicanos. ICSID ARB No. (AF)/09/2)

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

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Reading List

23. Reading list

Article/Book

Mario Ibáñez Vázquez, *La Política Exterior de Colombia y Venezuela en Los Últimos Años –*

Lineamientos y Prioridades. (Faculty of International Relations of the Autonomous University of Mexico International).

Dolores Bentollia, *Towards a Doctrine of Precedent in International Investment Arbitration*, (Juridical Investigation Institute of the Autonomous University of Mexico)

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

Secretaría de Economía, Unidad de Coordinación de Negociaciones Internacionales, *Acuerdos para la Promoción y Protección Recíproca de Inversiones, 2006-2012*, available at:

http://www.economia.gob.mx/files/transparencia/informe_APF/memorias/9_md_apris_sce.pdf, last accessed August 19, 2013.

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