# Mexico Signs ICSID Convention

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On January 11, 2018, Mexico became the 162nd country to sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).

The ICSID Convention, which entered into force in 1966, is a multilateral treaty formed under the auspices of the World Bank designed to facilitate investments among countries by providing an independent, nonpolitical forum for the resolution of disputes arising out of those investments. The International Centre for Settlement of Investment Dispute (ICSID or the Centre) administers international arbitrations and conciliation procedures for "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."[1] In most cases, states have made themselves amenable to ICSID arbitration (in terms of the treaty, expressed "consent" to ICSID jurisdiction) by agreeing to ICSID arbitration in the text of bilateral investment treaties (BITs) or the investment chapters of free trade agreements. In some other instances, states have entered contracts with ICSID arbitration clauses, or enacted "foreign investment laws" providing for ICSID arbitration of foreign investor claims.

In a typical case, a BIT will provide assurances to investors from a particular home state that seek to invest in the host state — *i.e.*, it will state there will be no expropriation of investments except upon payment of prompt, adequate and effective compensation, and/or that investors will be treated fairly and equitably. If the state violates these assurances, the investor can bring arbitration against it in a designated forum such as ICSID, and (if its claims are upheld) the investor will be entitled to damages. Investor-state arbitral claims, including under the ICSID Convention, are typically adjudicated before a three-person arbitral tribunal in an neutral venue.[2]

Arbitration under the ICSID Convention has several noteworthy and potentially advantageous features, including that ICSID arbitral awards have the status of a final judgment in the domestic courts of all ICSID member states — meaning that recognition or enforcement of an ICSID award is not subject to the grounds available to resist recognition and enforcement under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[3] This places ICSID Convention awards outside the review of national courts — instead, ICSID awards are subject to limited review by *ad hoc* "annulment" committees established under the ICSID Convention.[4]

Mexico has long been proactive in seeking to attract foreign investment, notably through the ratification of 29 bilateral investment treaties and 15 other international agreements containing investment provisions, including the investment chapter of the North American Free Trade Agreement (NAFTA). A majority of these treaties contain an arbitration clause designating arbitration under ICSID Convention or, alternatively, other systems such as the ICSID Additional Facility or UNCITRAL Arbitration Rules. Indeed,

[1] ICSID Convention, art. 25(1).

[2] *I.e.*, the investor picks one arbitrator, the respondent state picks another and a third arbitrator is appointed either by agreement or by an institution. In arbitration under the ICSID Convention, "default" appointments are made from a list of arbitrators held by the ICSID secretary-general.

[3] ICSID Convention, arts. 53-55.

[4] *See* ICSID Convention, arts. 50-52; ICSID Arbitration Rules 50-55.

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since 2000, there have been a number of significant investment disputes brought against Mexico, including under Chapter XI of NAFTA, and these have led, in some cases, to significant damages awards against Mexico in cases where an investor was treated unfairly.[5]

Because Mexico had not signed or ratified the Convention, however, investment disputes involving Mexico could not be arbitrated under the ICSID Convention. As a consequence, arbitration cases against Mexico (brought under UNCITRAL Arbitration Rules or ICSID Additional Facility Rules) were subject to review and enforcement before national courts and could be challenged in the courts of the "seat" of arbitration, on the same grounds as would have applied to commercial arbitration awards venued in those places. For example: (i) in 2001 the British Columbia courts partially overturned a NAFTA award rendered against Mexico for supposed excess of power by the arbitral tribunal, finding its annulment power in the fact that the NAFTA tribunal had been "seated" in Vancouver;[6] and (ii) in 2007, an investor who had lost a claim against Mexico sought (ultimately unsuccessfully) to overcome this result by bringing a petition for vacatur before the courts of Washington, D.C., pursuant to the vacatur provisions of the U.S. Federal Arbitration Act.[7] Had the ICSID Convention applied to those arbitrations, the national courts would not have had this power.

The converse is also true: Mexican investors seeking relief against other states for violation of their own investment rights (to the extent they are contained in BITs or free trade agreements executed by Mexico) have, to date, been unable to reap the advantages of the ICSID Convention.[8]

At this point, Mexico has merely acceded to the ICSID Convention. To be fully bound by it, it needs to ratify the Convention, which will require the approval of the Mexican Senate. Once ratified, the ICSID Convention will come into force *vis-à-vis* Mexico 30 days after the deposit of its instrument of ratification, acceptance or approval.[9] In the meantime, the arbitration avenues already designated under applicable treaties or contracts remain available to foreign investors who may wish to bring investor-state claims against Mexico. Additionally, Mexico's accession to the ICSID Convention will not affect the substantive investment protection standards that already apply in Mexico by virtue of the bilateral and multilateral treaties currently in force — rather, it will only provide an additional pathway for investors to seek redress for any breaches of these standards.

Mexico's signing of the ICSID Convention may be driven in part by the renegotiations of NAFTA, which have created uncertainty as to NAFTA's future, including the continued existence of the investor-state arbitration mechanism available under NAFTA, which has been criticized by the United States negotiating team.[10] Mexico's accession to the ICSID Convention will open another avenue for investors to settle their investment disputes with Mexico — and for Mexican investors to exercise their own investment rights — under the distinctive legal and procedural framework of the ICSID Convention and the ICSID Arbitration Rules, and signifies Mexico's continued commitment to attracting foreign investment.

[5] *See, e.g.*, *Gemplus S.A. v. Mexico*; *Talsud S.A. v. Mexico*, Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award (ICSID 2010) (awarding damages against Mexico for breach of the fair and equitable treatment guarantees of the France-Mexico BIT and Argentina-Mexico BIT, after the state cancelled a vehicle registration concession); *Técnicas Medioambientales Tecmed S.A. v. Mexico*, No. ARB(AF)/00/2, Award (ICSID 2003) (awarding damages against Mexico under the Spain-Mexico BIT for expropriation and unfair treatment of a landfill owned by a U.S. investor); *Metalclad Corp. v. Mexico*, No. ARB(AF)/97/1, Award (ICSID 2000) (awarding damages against Mexico for failure to provide fair and equitable treatment under NAFTA to a U.S. investor in a hazardous waste transfer center).

[6] *The United Mexican States v. Metalclad Corporation*, Decision of the Supreme Court of British Columbia on the challenge by the petitioner, The United Mexican States, of the Arbitration Award issued on August 30, 2000, 2001 BCSC 664 (May 2, 2001).

[7] *In re: Arbitration between International Thunderbird Gaming Corporation and the United Mexican States*, 473 F. Supp. 2d 80 (D.C. Dist. 2007).

[8] In some instances, investors (including Mexican investors) have been able to take advantage of investment treaties signed by other countries that, by their explicit terms, protect companies incorporated in those countries (such as The Netherlands), regardless of where those companies' shareholders are located.

[9] ICSID Convention, art. 68(2).

[10] For more information on this issue, see our July 31, 2017, client alert titled "What to Expect From NAFTA Renegotiations" and December 2017 *Latin America Dispute Resolution Update*.