Investment Treaty Arbitration 2021

Contributing editors
Stephen Jagusch QC and Epaminontas Triantafilou
Investment Treaty Arbitration

2021

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Epaminontas Triantafilou and Stephen Jagusch QC
Quinn Emanuel Urquhart & Sullivan LLP

Lexology Getting The Deal Through is delighted to publish the eighth edition of Investment Treaty Arbitration, which is available in print and online at www.lexology.com/gttd.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bangladesh, China, France, Israel, Lithuania, Mexico and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Stephen Jagusch QC and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, for their continued assistance with this volume.

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Table of Contents

Austria 3
Miloš Ivković
OBLIN Attorneys at Law

Bangladesh 9
Junayed Ahmed Chowdhury, Shyikh Mahdi and Maliha Ahmed
Vertex International Consulting

Belgium 15
Françoise Lefèvre, Xavier Taton, Guillaume Croisant and
Nicolas Delwaide
Linklaters LLP

China 21
Lijun Cao, Sylvia Jiang and Angela Yan
Zhong Lun Law Firm

Egypt 30
Girgis Abd El-Shahid and Inji Fathalla
Shahid Law Firm

France 39
Michael Ostrove and Lara Elborno
DLA Piper

Israel 45
Ehud (Udi) Arzi, Tal Glezer and Rotem Bavli Dvir
S Horowitz & Co

Japan 50
Yoshimasa Furuta and Aoi Inoue
Anderson Mōri & Tomotsune

Lithuania 57
Gediminas Dominas
Walless

Malaysia 61
Tan Sri Dato’ Cecil WM Abraham, Dato’ Sunil Abraham and
Syukran Syafiq
Cecil Abraham & Partners

Mexico 66
Carlos Vejar, Laura Yvonne Zelinski, Juan Pablo Moyano,
Josafat Paredes and Daniel Jimenez
Holland & Knight LLP

Nigeria 71
Olasupo Shasore SAN and Bello Salihu
ALP NG & Co

Romania 76
Cristiana-Irinel Stoica, Irina-Andreea Micu, Daniel Aragea and
Alin-Gabriel Oprea
STOICA & Asociații

Singapore 84
Alvin Yeo, Swee Yen Koh and Sean Yu Chou
WongPartnership LLP

Spain 93
Ben Sanderson
DLA Piper

Switzerland 98
Kirstin Dodge, Nicole Cleis and Gabrielle Nater-Bass
Homburger

Ukraine 104
Olexander Droug
Sayenko Kharenko

United Kingdom 116
Stephen Jagusch QC and Epaminontas Triantafillou
Quinn Emanuel Urquhart & Sullivan LLP

United States 121
David M Orta and Julia Peck
Quinn Emanuel Urquhart & Sullivan LLP
Spain

Ben Sanderson
DLA Piper

BACKGROUND

Foreign investment

1. What is the prevailing attitude towards foreign investment?

Spain has a modern and open economy that welcomes foreign investment. The Foreign Direct Investment Regulatory Restrictiveness Index from the Organisation for Economic Co-operation and Development ranks Spain as the ninth most accessible economy worldwide for foreign investors.

The Spanish economy (pre-covid) was the world’s 14th largest. It offers one of Europe’s most attractive domestic markets, and following the United Kingdom’s departure, is now the fourth largest economy of the European Union. With a gross domestic product of US$1.4 billion, Spain has more than 46 million consumers, as well as more than 75 million tourists annually.

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

Historically, the energy sector has been one of the largest recipients of foreign investment in Spain. There are also significant foreign investors active in the manufacturing, financial services and telecoms sectors. Spain is positioning itself to be a significant hub for research, and its biotechnology and life sciences sector is growing rapidly.

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


Investment agreement legislation

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

The framework rules for foreign investment in Spain are set out in Law 18/1992 of 1 July 1992 and Royal Decree 664/1999 of 23 April on external investments (RD 664/1999). There are specific rules that apply to non-EU investors in the following sectors: defence, gambling, television, radio and aviation.

Intra-EU investments are subject to EU law.

Regulatory controls also exist for the telecoms, energy and finance sectors.

In response to the covid-19 pandemic, emergency legislation has been passed which has significant effects on the investment framework.

On 17 March 2020, the Spanish government passed Royal Decree Law 8/2020, on the urgent and extraordinary measures against the economic and social impact of covid-19, which includes a restriction on foreign direct investments in Spain (from investors outside the European Union and the European Free Trade Association) in certain strategic sectors affecting public policy, national security and public health. The law specifies that the relevant sectors are:

- critical infrastructure (both physical and virtual) – this is deemed to include infrastructure relating to energy, health, water, transport, communications, media, data processing and storage, aerospace, military, electoral services, and financial services;
- critical technology – this is deemed to include goods, software and technology of either civil or military applications including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, military and defence, energy storage, quantum and nuclear technology, nanotechnology and biotechnology;
- essential commodities – including energy and food;
- sectors with access to sensitive data; and
- the media.

Investment over the threshold requirements in these sectors can only be carried out with prior authorisation obtained pursuant to the regulations set out in the Law 19/2003, of 4 July 2003.

Further sectors may be added to the list if the government determines this to be in interest of the country’s national security, public policy or public health.

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

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.

Spain is a party to around 70 bilateral investment treaties (BITs) that are currently in force. On 5 May 2020, Spain, together with the majority of EU member states, signed a plurilateral treaty for the termination of all BITs applicable between them.

As a member of the EU, Spain is also a party to those trade and investment agreements which have been entered into by the EU.

Spain is a member of the Energy Charter Treaty (ECT), as well as many other multilateral treaties.

An online directory of the treaties to which Spain is a party is maintained by the Ministry of Foreign Affairs. An online directory is also maintained by the Ministry of Industry, Commerce and Tourism.

6. If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Not applicable.
On 5 May 2020, Spain, together with the majority of EU member states, signed a plurilateral treaty for the termination of all BITs applicable between them. It is not standard practice for Spain to issue additional protocols and exchanges of notes are not published unless it is part of the treaty itself as published in final form in the office government gazette.

Further, the treaty provides for pending arbitrations initiated under an intra-EU BIT before 6 March 2018. Either the investor or Spain may request the other party to enter into a ‘structured dialogue’ for an out-of-court settlement of the dispute. Alternatively (or should the settlement procedure fail), the treaty grants a six-month window to the investor to access judicial remedies under national law regarding the measure contested in the pending arbitration. This right is subject to a number of conditions, including that the investor withdraws its pending arbitration claim, waives its right to bring any future arbitration claims, and renounces the award already rendered (if any).

Spain has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention). It entered into force on 17 September 1994.

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Spain has an investment aid agency called ICEX Spain Trade & Investment, a government body chaired by the Secretary of State for Trade of the Ministry of Industry, Trade and Tourism.

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

The state has a foreign investment promotion programme?

The state has an investment treaty programme called

Investment treaty programme

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

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Spain has a party to the ECT and has concluded a number of BITs with other ECT member states (although BITs between Spain and other members of the EU have now been terminated). Article 16 of the ECT expressly provides for the operation of overlapping provisions in parallel.

ICSID Convention

Is the state party to the ICSID Convention?

Spain has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention). It entered into force on 17 September 1994.

Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Spain does not have a specific investment treaty programme. With respect to intra-EU BITs, on 5 May 2020, Spain, together with the majority of EU member states, signed a plurilateral treaty for the termination of all BITs applicable between them. The treaty entered into force on 29 August 2020.

Investment treaty programme

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

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INVESTMENT TREATY PRACTICE

Model BIT

17 | Does the state have a model BIT?

Spain does not make treaty preparatory materials public.

Preparatory materials

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

Spain’s BITs contain broad definitions of ‘investor’ and ‘investment’, in line with common treaty practices.

Each BIT, however, needs to be considered on its own terms as occasionally there are differences in the specific drafting of these provisions.

Scope and coverage

19 | What is the typical scope of coverage of investment treaties?

Spain’s BITs reflect the general standards of treatment and protection that are commonly available under such treaties. These include:

- protection against unlawful expropriation (expropriation is legal provided it is accompanied by prompt, adequate and effective compensation, is carried out in the public interest, in a legally established manner, and is non-discriminatory);
- fair and equitable treatment (Spain’s BITs, in line with those of many countries, are broadly drafted and leave significant discretion to the tribunal to interpret this standard);
- national treatment;
- most favoured nation treatment;
- non-discrimination; and
- an umbrella clause.

Each BIT needs to be considered on its own terms as there are occasional differences in the specific drafting of these provisions.

Protections

20 | What substantive protections are typically available?

The majority of investment disputes with Spain have been brought before International Centre for Settlement of Investment Disputes, although a few claims have been registered with the International Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce, and one claim is being administered by the Permanent Court of Arbitration under the United Nations Commission on International Trade Law rules.

Dispute resolution

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

Spain typically insists that all aspects of an arbitration remain confidential.

Confidentiality

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

No.

Insurance

23 | Does the state have an investment insurance agency or programme?

Spain has been involved in more than 50 investment arbitrations. There are presently 34 International Centre for Settlement of Investment Disputes (ICSID) arbitrations listed as pending, including those subject to annulment proceedings.

The significant number of claims against Spain in the renewables sector have received extensive coverage in the business and legal press. The majority of these claims have been brought at ICSID, details of which can be found on ICSID’s website.

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

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

The overwhelming majority of investment cases involving Spain relate to the renewable energy sector. The Spanish Promotion Plan for Renewable Energy, originally promulgated in 2000 and revised in 2005 created a favourable investment regime for the sector, notably in respect of feed-in tariff incentives offered by Spain. Following the global financial crisis of 2007-2008, these incentives were largely withdrawn and provoked an avalanche of claims against the state. More than 50 such claims have been brought against Spain in respect of the measures taken affecting the renewables sector.

A high-profile claim is currently pending in the banking sector. A group of Mexican investors is challenging the sale of Banco Popular to Banco Santander for one euro following the intervention of the European and Spanish banking regulators to avoid a public bailout (Antonio del Valle Ruiz et al v Kingdom of Spain (PCA Case No. 2019-17)).

Industries and sectors

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

The state typically plays a very active role in the appointment of the tribunal. Spain does not have a history appointing specific arbitrators, rather it has brought a number of applications to seek to disqualify arbitrators nominated by the investor.

Selecting arbitrator

26 | 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?

The state typically undertakes its own defence, represented by the Office of the State Attorney. The state has a large and established team of practitioners.

Defence

27 | Does the state typically defend itself against investment claims? Give details of the state’s internal counsel for investment disputes.

Spain is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which entered into force on 10 August 1977, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention), which entered into force on 17 September 1994.
**Enforcement agreements**

28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The current trend is that Spain avails itself of all opportunities to challenge or annul investment awards made against it, and vigorously resists enforcement proceedings.

However, it has been widely reported that Spain is seeking to negotiate settlements with a number of investors in the renewables sector who have pending claims.

**Award compliance**

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

In the majority of instances, where an award has been made against Spain, Spain has sought to challenge the award. Spain is currently pursuing 12 annulment proceedings at ICSID. (Details are available on ICSID’s website.) In the majority of these proceedings, the relevance and application of the Achmea decision is a key aspect of annulment application.

**Unfavourable awards**

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Spain’s law of sovereign immunity (Organic Law 16/2015) establishes the base principles of sovereign immunity subject to various exceptions, notably the commercial assets exception.

To date, investors have focussed their efforts in enforcing awards outside of the jurisdiction, notably in Australia and the United States.

**Provisions hindering enforcement**

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

For a number of years, Spain has been the centre of attention in respect of investment claims arising from the renewables sector. As a number of these claims have been brought by European investors (whether pursuant to a bilateral investment treaty, the Energy Charter Treaty, or both), the impact and interpretation of the Achmea decision has been a consistent area of contention for the disputing parties.

Recently, the jurisdictional decision in Portigon AG v Kingdom of Spain (ICSID Case No. ARB/17/15) has opened the door to banks and other project finance entities to be potential claimants under investment treaties.

Arbitrator impartiality remains a hot topic globally. In June 2020, Spain successfully argued for the annulment of the Eiser award (ICSID Case No. ARB/13/36) on the basis that one of the arbitrators had failed to disclose a longstanding professional relationship with one of the claimant’s expert witnesses.

**Coronavirus**

33 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Spanish government has adopted a programme of exceptional economic measures to mitigate the impact of covid-19.

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• critical technology – this is deemed to include goods, software and technology of either civil or military applications including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, military and defence, energy storage, quantum and nuclear technology, nanotechnology and biotechnology;
• essential commodities – including energy and food;
• sectors with access to sensitive data; and
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