

INVESTMENT TREATY ARBITRATION

Spain



Investment Treaty Arbitration

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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BACKGROUND

Foreign investment

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 economy. It offers one of Europe's most attractive domestic markets, and following the United Kingdom's departure from the EU is now the fourth largest economy within the 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 who visit annually.

Law stated - 12 January 2023

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.

Law stated - 12 January 2023

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

According to the United Nations Conference on Trade and Development 2022 World Investment Reports, Spain experienced a decline in foreign direct investment (FDI) from US\$57 billion in 2018 to US\$9.7 billion in 2021. Outflows remained largely steady at around US\$20 billion.

According to the Foreign Direct Investment Bulletin 2021, published by the Ministry of Industry, Trade and Tourism, the three countries that account for more than half of the total investment flows received by Spain are France (25.9 per cent), the United States (14.5 per cent) and the United Kingdom (10.5 per cent).

Law stated - 12 January 2023

Investment agreement legislation

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 is also the Ministerial Order of 28 May 2001 establishing the applicable procedures for declaring foreign investments, amended by Order ICT/1408/2021.

Marketable securities have their own specific regulation under the Resolution of 31 May 2001 of the General Directorate of Commerce and Investment.

There are also 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 FDI in Spain (from investors outside the EU 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 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.

This Royal Decree has been updated and amended by a series of other decrees, including Royal Decree 11/2020 and Royal Decree 34/2020, which are designed to ensure the proper functioning of the authorisation procedure for investments whose liberalisation regime is suspended, and to restrict the freedom of movement of capital in the most proportionate and limited manner possible. The suspension is currently in force until December 2024.

Law stated - 12 January 2023

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

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.

As a member of the EU, Spain is also a party to those trade and investment agreements that 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, as well as by the Ministry of Industry, Commerce and Tourism .

Law stated - 12 January 2023

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

Not applicable.

Law stated - 12 January 2023

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

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.

Law stated - 12 January 2023

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

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 termination treaty expressly abrogates 'sunset clauses' included in most intra-EU BITs, which extend the protections enjoyed by existing investments for an additional 10 or 20 years following the BIT's termination. The treaty entered into force on 29 August 2020.

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).

Law stated - 12 January 2023

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Spain is 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.

Law stated - 12 January 2023

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.

Law stated - 12 January 2023

Mauritius Convention

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

No.

Law stated - 12 January 2023

Investment treaty programme

Does the state have an investment treaty programme?

Spain does not have a specific investment treaty programme.

Law stated - 12 January 2023

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Does the state have a foreign investment promotion programme?

Spain has an investment aid agency called the Spanish Institute for Foreign Trade (ICEX), a government body chaired by the Secretary of State for Trade of the Ministry of Industry, Trade and Tourism.

Law stated - 12 January 2023

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

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.

It should be noted that, in response to the covid-19 pandemic, 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. This law significantly amends the investment framework in Spain.

Investment from an EU member state is exempt from all declarations irrespective of value.

Non-EU direct investments must be registered with the Register of Foreign Investments at the Ministry of Industry, Trade and Tourism.

Law stated - 12 January 2023

Relevant regulatory agency

Identify the state agency that regulates and promotes inbound foreign investment.

Spain has an investment aid agency called ICEX.

Law stated - 12 January 2023

Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

Notice provisions set out in relevant agreements with the state must be complied with.

Investment claims should be notified to the Office of the State Attorney, Calle General Castaños, 1, 28004 Madrid.

Law stated - 12 January 2023

INVESTMENT TREATY PRACTICE

Model BIT

Does the state have a model BIT?

Spain does not currently negotiate its BITs on the basis of a published current model BIT. Various historic models have been the basis for BITs concluded in recent years, but they do not give insight into the current thinking of the state.

Spain's most recent BIT was negotiated with Colombia in 2021. It is not yet in force.

Law stated - 12 January 2023

Preparatory materials

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

Spain does not make treaty preparatory materials public.

Law stated - 12 January 2023

Scope and coverage

What is the typical scope of coverage of investment treaties?

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.

Law stated - 12 January 2023

Protections

What substantive protections are typically available?

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.

Law stated - 12 January 2023

Dispute resolution

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

The majority of investment disputes with Spain have been brought before the International Centre for Settlement of Investment Disputes (ICSID). However, 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.

Law stated - 12 January 2023

Confidentiality

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

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

Law stated - 12 January 2023

Insurance

Does the state have an investment insurance agency or programme?

No.

Law stated - 12 January 2023

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

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

Spain has been involved in more than 50 investment arbitrations. At present, there are 29 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.

Law stated - 12 January 2023

Industries and sectors

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

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 €1 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)).

Law stated - 12 January 2023

Selecting arbitrator

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 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.

Law stated - 12 January 2023

Defence

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

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.

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

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?

Spain is a party to the 1958 UN 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.

Law stated - 12 January 2023

Award compliance

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

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.

Law stated - 12 January 2023

Unfavourable awards

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

In the majority of instances, where an award has been made against Spain, Spain has sought to challenge the award. Spain is currently pursuing 10 annulment proceedings at ICSID (details are available on ICSID's website). In the majority of these proceedings, the relevance and application of the Achmea (Case C-284/16) decision is a key aspect of annulment application.

Law stated - 12 January 2023

Provisions hindering enforcement

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

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.

Since 2020, a series of decisions by the Spanish Constitutional Court have applied a narrow and restrictive interpretation of public order as the basis for the annulment of an award. To date, investors have focused their efforts on enforcing awards outside of the jurisdiction, notably in Australia and the United States.

UPDATE AND TRENDS**Key developments of the past year**

Are there any emerging trends or hot topics in your jurisdiction?

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 BIT, the Energy Charter Treaty (ECT), 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 long-standing professional relationship with one of the claimant's expert witnesses.

On 16 June 2022, Spain achieved a landmark victory in the case of Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain (SCC Case No. V2016/135). The tribunal in this ECT case found that it lacked jurisdiction due to the intra-EU nature of the dispute. This is the first known arbitration ruling to uphold the intra-EU objection that Spain has pursued unsuccessfully in a number of other cases.

Law stated - 23 June 2022

Jurisdictions

| | | |
|---|-----------------------|---------------------------------------|
|  | Bangladesh | Vertex International Consulting |
|  | Belgium | Linklaters LLP |
|  | Canada | Wasel & Wasel |
|  | China | Zhong Lun Law Firm |
|  | Egypt | Shahid Law Firm |
|  | European Union | Van Bael & Bellis |
|  | France | Laborde Law |
|  | Japan | Anderson Mōri & Tomotsune |
|  | Kazakhstan | GRATA International |
|  | Malaysia | Cecil Abraham & Partners |
|  | Romania | STOICA & Asociații |
|  | Russia | BGP Litigation |
|  | Spain | DLA Piper |
|  | Switzerland | Schellenberg Wittmer |
|  | United Kingdom | Quinn Emanuel Urquhart & Sullivan LLP |
|  | USA | Quinn Emanuel Urquhart & Sullivan LLP |
|  | Uzbekistan | Putilin Dispute Management |
|  | Vietnam | LNT & Partners |