Enforcement of Investment Treaty Arbitration Awards

A Global Guide
Second Edition

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Spain

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Cuatrecasas

1. Overview

1.1 General trends

Spain is one of the most experienced countries in investment arbitration in the world. First, many Spanish-based companies have launched arbitration proceedings against other states under investment treaties to which Spain is a party (especially against Latin American countries). Secondly, Spain has been sued under the same treaties at least 52 times, particularly after a series of regulatory changes passed by the Spanish government affecting its renewable energy sector since 2010. At the time of writing, at least 25 investment awards and decisions have been rendered in cases against Spain.[1]

1.2 Historical background

Spain acceded to the ICSID Convention in 1994[2] within the context of a government plan to internationalise the Spanish economy with the aim of protecting Spanish investments overseas, particularly in Latin America.

Spain is a party to bilateral investment treaties (BITs) with 76 other states.[3] Five

1 See section 3.3.

2 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965 (575 UNTS 159) (*Spanish Official Gazette* (*BOE*) 219, 13 September 1994).

3 See the full list of BITs in Spanish at https://comercio.gob.es/InversionesExteriores/AcuerdosInternacionales/Paginas/APPRIs.aspx (updated as of 15 February 2019). BITs with Albania, 5 June 2003 (*BOE* 38, 13 February 2004; *BOE* 83, 6 April 2004); Algeria, 23 December 1994 (*BOE* 59, 8 March 1996); Argentina, 3 October 1991 (*BOE* 277, 18 November 1992); Bahrain, 22 May 2008 (*BOE* 80, 3 April 2015); Bolivia, 29 October 1991 (*BOE* 247, 15 October 2002); Bosnia and Herzegovina, 25 April 2002 (*BOE* 158, 3 July 2003); Bulgaria, 5 September 1995 (*BOE* 143, 16 June 1998); Chile, 2 October 1991 (*BOE* 67, 19 March 1994); China, 14 November 2005 (*BOE* 164, 8 July 2008); Colombia, 31 March 2005 (*BOE* 219, 12 September 2007); Costa Rica, 8 July 1997 (*BOE* 170, 17 July 1999); Croatia, 21 July 1997 (*BOE* 259, 29 October 1998); Cuba, 27 May 1994 (*BOE* 276, 18 November 1995); Czechoslovakia (applicable to the Czech Republic and Slovakia since 1 January 1993), 12 December 1990 (*BOE* 33, 7 February 1992); Dominican Republic, 16 March 1995 (*BOE* 282, 22 November 1996); Ecuador, 26 June 1996 (*BOE* 86, 10 April 1998); Egypt, 3 November 1992 (*BOE* 155, 30 June 1994); El Salvador, 14 February 1995 (*BOE* 114, 10 May 1996); Equatorial Guinea, 22 November 2003 (*BOE* 10, 12 January 2004; *BOE* 41, 17 February 2015); Estonia, 11 November 1997 (*BOE* 168, 15 July 1998); Gabon, 2 March 1995 (*BOE* 22, 25 January 2002); Guatemala, 9 December 2002 (*BOE* 146, 17 June 2004); Honduras, 18 March 1994 (*BOE* 175, 20 July 1996); Hungary, 9 November 1989 (*BOE* 217, 9 September 1992); India, 30 September 1997 (*BOE* 3 February 1999); Indonesia, 30 May 1995 (*BOE* 31, 5 February 1997); Iran, 29 October 2002 (*BOE* 192, 10 August 2004); Jamaica, 13 March 2002 (*BOE* 11, 13 January 2003); Jordan, 20 October 1999 (*BOE* 10 January 2001); Kazakhstan, 23 March 1994 (*BOE* 104, 30 April 1996); Republic of Korea, 17

of them have been denounced by their counterparties, of which four currently remain applicable under their sunset clauses;[4] the fifth will be terminated after the expiry of a final five-year renewal, but remains applicable under its own sunset clause.[5] Ten other BITs with 11 EU member states will be terminated pursuant to a multilateral agreement entered into by the majority of EU member states in 2020.[6] Spain is also a party to the Energy Charter Treaty (ECT).[7]

Since the European Union was afforded exclusive competence over foreign direct investment (FDI) under the Common Commercial Policy of the Union on

January 1994 (*BOE* 297, 13 December 1994); Kuwait, 8 September 2005 (*BOE* 79, 1 April 2008); Latvia, 26 October 1995 (*BOE* 134, 6 June 1997); Lebanon, 22 February 1996 (*BOE* 122, 22 May 1997); Libya, 17 December 2007 (*BOE* 237, 1 October 2009); Lithuania, 6 July 1994 (*BOE* 22, 25 January 1996); North Macedonia, 20 June 2005 (*BOE* 43, 19 February 2007); Malaysia, 4 April 1995 (*BOE* 59, 8 March 1996); Mauritania, 24 July 2008 (*BOE* 74, 26 March 2016); Mexico, 10 October 2006 (*BOE* 81, 3 April 2008; *BOE* 121, 19 May 2008); Moldova, 11 May 2006 (*BOE* 37, 12 February 2007); Morocco, 11 December 1997 (*BOE* 86, 11 April 2005); Namibia, 21 February 2003 (*BOE* 199, 18 August 2004); Nicaragua, 16 March 1994 (*BOE* 98, 25 April 1995); Nigeria, 9 July 2002 (*BOE* 36, 11 February 2006); Pakistan, 15 September 1994 (*BOE* 142, 12 June 1996); Panama, 10 November 1997 (*BOE* 254, 23 October 1998; *BOE* 277, 19 November 1998); Paraguay, 11 October 1993 (*BOE* 8, 9 January 1997); Peru, 17 November 1994 (*BOE* 59, 8 March 1996); Philippines, 19 October 1993 (*BOE* 275, 17 November 1994); Poland, 30 July 1992 (*BOE* 133, 4 June 1993); Romania, 25 January 1995 (*BOE* 280, 23 November 1995); Saudi Arabia, 9 April 2006 (*BOE* 287, 28 November 2016); Senegal, 22 November 2007 (*BOE* 67, 19 March 2015); Slovenia, 15 July 1998 (*BOE* 113, 11 May 2000); South Africa, 30 September 1998 (*BOE* 26, 31 January 2000); Syria, 20 October 2003 (*BOE* 42, 18 February 2005); Trinidad and Tobago, 3 July 1999 (*BOE* 252, 19 October 2004); Tunisia, 28 May 1991 (*BOE* 172, 20 July 1994); Turkey, 15 February 1995 (*BOE* 71, 24 March 1998); Ukraine, 26 February 1998 (*BOE* 108, 5 May 2000); Uruguay, 7 April 1992 (*BOE* 126, 27 May 1994); the Union of Soviet Socialist Republics (USSR) (currently applicable to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Russia, Tajikistan and Turkmenistan since 21 December 1991), 26 October 1990 (*BOE* 301, 17 December 1991); Uzbekistan, 28 January 2003 (*BOE* 78, 31 March 2004); Venezuela, 2 November 1995 (*BOE* 245, 13 October 1997); Vietnam, 20 February 2006 (*BOE* 303, 17 December 2011); and Yugoslavia (applicable to Montenegro and Serbia since 3 June 2006), 25 June 2002 (*BOE* 135, 4 June 2004; *BOE* 188, 4 August 2010).

4 The BITs with Bolivia, India, Indonesia and South Africa were terminated on, respectively, 9 July 2012 (*BOE* 231, 23 September 2014), 23 September 2016 (*BOE* 122, 23 May 2017; *BOE* 124, 25 May 2017), 18 December 2016 (publication in *BOE* still pending) and 22 December 2013 (*BOE* 41, 17 February 2016). The Spanish Ministry of Industry, Trade and Tourism has affirmed that these BITs will remain in force until (respectively) 9 July 2022, 23 September 2031, 18 December 2016 and 22 December 2023 (see https://comercio.gob.es/InversionesExteriores/AcuerdosInternacionales/Paginas/APPRIs.aspx).

5 The BIT with Ecuador was denounced by Ecuador on 18 May 2017. The Spanish Ministry of Industry, Trade and Tourism has affirmed that the BIT will be terminated on 18 June 2022 and will remain in force until 18 June 2032 (see https://comercio.gob.es/InversionesExteriores/AcuerdosInternacionales/Paginas/APPRIs.aspx). Spain has requested the European Commission's authorisation to negotiate a new BIT with Ecuador (see note 45 below) instead of an amendment to the existing BIT (see note 46 below).

6 See the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020 (OJ L 169, 29 May 2020), applied provisionally by Spain since 4 August 2020 (*BOE* 259, 30 September 2020). The Agreement affects the BITs with Bulgaria, Croatia, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovenia. Annex B notes that the BIT with Poland was terminated on 16 October 2019, but such termination is yet to be published in *BOE*.

7 Energy Charter Treaty, 17 December 1994 (2080 UNTS 100) (*BOE* 117, 17 May 1995; *BOE* 167, 14 July 1995; *BOE* 65, 17 March 1998; *BOE* 191, 11 August 1999). Contracting parties (as of 18 February 2019): Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, the European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, Netherlands, North Macedonia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, and Yemen; www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/. Australia and Norway have applied Part VII of the ECT only provisionally since they signed the ECT; Belarus has applied the ECT provisionally since its signature; and Russia ceased to apply the ECT provisionally and confirmed its intention not to be considered a signatory of the ECT.

1 December 2009,[8] Spain (as an EU member state) needs the European Commission's consent to sign new treaties or to ratify treaties that it had signed before that date.[9] BITs between Spain and eight non-EU member states that have yet to enter into force are subject to this situation.[10]

Moreover, the European Union has signed some investment protection agreements (IPAs) with third countries pursuant to its competence over FDI. The Court of Justice of the European Union (CJEU) stated in Opinion 2/15 that the specific competence to negotiate provisions on investor-state dispute settlement (ISDS) in IPAs is nonetheless mixed.[11] Consequently, the EU member states must also become parties to those IPAs, which will replace any BITs that the member states might have with those third states. Spain provisionally applies the Comprehensive Economic and Trade Agreement (CETA) between the European Union and its member states and Canada,[12] save for its investment chapter. The IPAs between the European Union and its member states with third states do not apply provisionally before being ratified.[13]

These treaties provide substantive standards of protection for investors (eg, fair and equitable treatment (FET); no expropriation without compensation; prohibition of impairment of investments by arbitrary or discriminatory measures), and contain *ex ante* ISDS provisions[14] under the auspices of:[15]

- the International Centre for Settlement of Investment Disputes (ICSID), including under the 1978 Additional Facility Rules;

8 That is, the date of entry into force of the Treaty of Lisbon, which added FDI to Article 207(1) of the Treaty on the Functioning of the European Union (consolidated version at OJ C 326, 26 October 2012).

9 See section 2.2.

10 LÓ Moreno and C Pérez Ibáñez, *La nueva política de la Unión Europea de protección de inversiones, Arbitraje. Revista de arbitraje comercial e inversiones*, Vol VII, 2014(1), pp37–60, at p52. Writing as senior officials at the then Spanish Ministry of Economy and Competitiveness, the authors stated that Spain still intended to ratify the BITs it had signed before 1 December 2009. This position was officially confirmed by the Spanish government on 2 March 2014 at the *Plan Estratégico de Internacionalización de la Economía Española (2014–2015)* by the Ministry of Economy and Competitiveness, p42, www.mineco.gob.es/stfls/mineco/comercio/140228_Plan_Internacionalizacion.pdf. Those BITs are included in the list of BITs referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (see note 43 below), which most recent update is at OJ C 179, 28 May 2020 (Spain's section at pp31–34): BITs with Angola (21 November 2007), Congo (18 December 2008), Ethiopia (17 March 2009), Gambia (17 December 2008), Ghana (6 October 2006) and Yemen (29 January 2008). After 1 December 2009, Spain has signed BITs with Haiti (17 November 2012) and Mozambique (18 October 2010).

11 CJEU, Opinion 2/15, 16 May 2017 (ECLI: EU:C:2017:376), http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN.

12 OJ L 11, 14 January 2017. It applies provisionally since 21 September 2017.

13 IPAs with Singapore (19 October 2018) and Vietnam (30 June 2019).

14 For a comprehensive discussion of the network of Spanish BITs, see I García Rodríguez, *La protección de las inversiones exteriores (los Acuerdos de Promoción y Protección Recíproca de Inversiones celebrados por España)*, Valencia (2005).

15 The BITs also provide for resort to the courts of justice of the host state. In an unusual move, the investor in *Grupo Francisco Hernando Contreras v Republic of Equatorial Guinea* (ICSID Case ARB(AF)/12/2) started a claim under the Spain-Equatorial Guinea BIT in Spain, the home state, after an ICSID(AF) tribunal dismissed its claim on jurisdictional grounds. The Madrid Court of Appeal confirmed the Spanish courts' jurisdiction to hear such claim against Equatorial Guinea. See Order (*Auto*) of the Provincial Court of Madrid (Section 10) 149/2017, 26 April 2017 (ECLI: ES:APM:2017:1500A); M Gómez Jene, *International Commercial Arbitration in Spain*, Kluwer Law International, 2019), p39.

- other arbitral institutions (International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) or the Organization for the Harmonization of Business Law in Africa (OHADA)); or
- *ad hoc* arbitral tribunals constituted pursuant to the UNCITRAL Arbitration Rules.[16]

Spain is also a party to the Multilateral Investment Guarantee Agency Convention.[17]

At the time of writing, at least 25 investment awards and decisions have been rendered in cases against Spain.[18] Spain honoured the award in *Maffezini v Spain* several months after being issued by an ICSID arbitral tribunal, while the rest of awards and decisions in which it has been ordered to pay compensation to investors are yet to be complied with by the state. In addition, the Spanish courts have been seized twice for the enforcement and execution of ICSID awards, pursuant to Article 54 of the ICSID Convention.[19]

2. International conventional instruments

2.1 International agreements

In addition to the ICSID Convention,[20] Spain has been a party to the New York Convention since 1977.[21] Spain has not adopted any of the reservations available to contracting states under Article I(3).[22] As a result, the Spanish courts will not deny the recognition or enforcement of a foreign arbitral award that:

- is rendered in the territory of a state that is not a party to the convention ('reciprocity reservation'); or
- adjudicates a difference arising from a legal relationship, whether contractual or not, that is not considered as 'commercial' under Spanish law ('commercial reservation').

From the standpoint of ISDS, particularly with regard to investment treaty disputes, the fact that Spain has not adopted the reciprocity reservation allows the Spanish courts to recognise and enforce awards rendered anywhere in the

16 The exceptions are CETA and the IPAs with Singapore and Vietnam (notes 12 and 13 above), which provide for the resolution of investment disputes between investors and states by the submission of claims to permanent tribunals.

17 Convention Establishing the Multilateral Investment Guarantee Agency, 11 October 1985 (1508 UNTS 99) (*BOE* 167, 14 July 1995).

18 See section 3.3. below.

19 See section 3.4. below.

20 Note 2 above.

21 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (330 UNTS 38) (*BOE* 164, 11 July 1977). On its application in Spain, see in general M Gómez Jene, *International Commercial Arbitration in Spain*, Kluwer Law International, 2019), pp260–332.

22 For the effects of Article I(3) reservations on investment arbitration, see J Á Rueda García, *La aplicabilidad del Convenio de Nueva York al arbitraje de inversiones: efectos de las reservas al Convenio, Cuadernos de Derecho Transnacional*, Vol II, 1 (March 2010), pp203–232, www.uc3m.es/cdt.

world, including the common places of arbitration for non-ICSID proceedings (Geneva, The Hague, London, New York, Paris, Singapore, Stockholm and Washington DC). It may even be used to enforce non-pecuniary obligations imposed by an ICSID award, as these are not covered by Article 54(1) of the ICSID Convention.[23]

Furthermore, an award rendered in an investment dispute shall not be subject to examination by the competent Spanish courts as to whether the investment dispute falls within the category of a 'commercial' dispute under Spanish law. In this regard, the Spanish courts will not need to solve either of the following problems:

- If the investment dispute arose from a contract between the investor and the host state (horizontal relationship), its consideration as 'commercial' according to Spanish domestic law may in principle be feasible, notwithstanding the fact that Spanish law contains specific provisions for public contracts to which administrative (but not private) law applies.
- If, however, the investment dispute arose from a purely vertical relationship (eg, an expropriation of assets without any previous commercial relationship between the investor and the host state), it may be more difficult for it to qualify as 'commercial' under Spanish law.[24]

In an attempt to address the second problem, some states have included in their investment treaties provisions affirming that a dispute under them qualifies as 'commercial' for the purposes of the New York Convention. Mention can be made to Article 1136(7) of the North America Free Trade Agreement (NAFTA).[25] For Spain, mention can be made only to Article XVII(5) of the Spain-Mexico BIT,[26] which is identical *mutatis mutandis* to Article 1136(7)

23 Which provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

24 This problem was solved in the affirmative in the annulment proceedings of non-ICSID awards in *United Mexican States v Metalclad Corporation* [2001] BCSC 664, 5 ICSID Reports 236 (Supreme Court of British Columbia); and *Czech Republic v CME Czech Republic BV* (Case T8735-01), 9 ICSID Reports 439 (Svea Court of Appeal, Sweden). M Pryles, "Reservations Available to Member States: The Reciprocal and Commercial Reservations", in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (Cameron May, 2009), pp161–185, at p183, contends that investor-state disputes under BITs are 'commercial': "The host State's obligations are provided to encourage and promote investment and these obligations extend not only to the signatory States but directly confer rights on investors themselves. It is submitted, therefore, that they should be considered commercial."

25 North America Free Trade Agreement, 17 December 1992 (32 ILM 289), Article 1136(7). See also J Á Rueda García, *La aplicabilidad del Convenio de Nueva York al arbitraje de inversiones: efectos de las reservas al Convenio, Cuadernos de Derecho Transnacional*, Vol II, 1 (March 2010), pp229–231. This is in line with the proposal made by Professor van den Berg in his seminal work on the New York Convention: "what is non-commercial in domestic relations may be considered as commercial for the purpose of the Convention": A J van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*, TMC Asser Institute (Kluwer Law International, 1981), p54.

26 See note 3 above.

of NAFTA. However, Article XVII(5) of the BIT has lost some importance in practice since Mexico became a contracting state to the ICSID Convention on 26 August 2018, as investors are thus entitled to use ICSID arbitration.

Spain is also a party to other multilateral treaties containing provisions for the recognition and enforcement of arbitral awards in general matters, which have been superseded by the New York Convention.[27]

Finally, Spain is also a party to 10 bilateral treaties that provide for legal frameworks for developing private international law relationships and are also applicable to the recognition and enforcement of arbitral awards rendered in the territory of the other contracting party.[28] The relevance of these treaties to the recognition and enforcement of an investment award in Spain (save those with Bulgaria and China)[29] depends on whether they are regarded as containing a legal regime more favourable (*favor executionis*) than that of the New York Convention.[30] In this regard, as Spain has not adopted the reciprocity and commercial reservations, the New York Convention may be regarded as more favourable for the recognition and enforcement of an investment award rendered in the territory of either of those states.[31]

It remains to be seen how any of the treaties mentioned in this section will be interpreted by the Spanish courts for the purposes of recognition and enforcement of investment treaty awards in Spain. Two case law decisions from the Superior Court of Justice (TSJ) of Madrid merit citation with regard to the use of the New York Convention in awards with state parties:

- The TSJ granted the exequatur of an award rendered in Libreville by an OHADA tribunal under a state contract for the establishment of a bank in Equatorial Guinea. On the one hand, the TSJ rejected Equatorial Guinea's argument of immunity from jurisdiction because the failed transaction qualified as commercial and had been entered into with a domestic Equatorial Guinean company subject to foreign control. On the other hand, the TSJ limited itself to checking that the request for exequatur and the award complied with Articles IV and V of the New York Convention.[32]
- The TSJ granted the exequatur of an award rendered in Geneva pursuant to a bilateral treaty between Spain and France for the construction of a cross-border high-speed rail link. The award recognised compensation to the private concessionaire of the works due to some delays caused by Spain. Spain did not oppose the exequatur. The TSJ limited itself to checking that the request for the exequatur and the award complied with Articles IV and V of the New York Convention.[33]

2.2 Model investment treaties

Spain has not formally developed any official model investment treaty to use in negotiations with other states. This notwithstanding, it may be deduced, from a systematic analysis of all BITs entered into by Spain, that the country has followed some patterns[34] under which BITs may be classified into different 'generations' of treaties.[35]

With regard to the recognition and enforcement of investment arbitral awards, most of the BITs entered into by Spain[36] include one of the following types of wording in the ISDS clause:

- wording that refers merely to the final and binding character of the awards for the disputing parties; or[37]
- wording that refers to both the final and binding character of the awards and the commitment of states party to BITs to enforce investment awards according to the provisions of its domestic laws (*lex fori*).[38]

27 Convention on the Execution of Foreign Arbitral Awards, 25 September 1927 (*Gazette of Madrid*, 29 May 1930); Protocol on Arbitration Clauses, 24 September 1923 (*Gazette of Madrid*, 8 May 1926); European Convention on International Commercial Arbitration, 21 April 1961 (*BOE* 238, 4 October 1975), which may nonetheless be applicable simultaneously with the New York Convention for awards rendered in a state party to the European Convention; see M Gómez Jene, *International Commercial Arbitration in Spain* (Kluwer Law International, 2019), pp288–290.

28 Conventions with Brazil, 13 April 1989 (*BOE* 164, 10 July 1991; *BOE* 193, 13 August 1991); Bulgaria, 23 May 1993 (*BOE* 155, 30 June 1994); China, 2 May 1992 (*BOE* 26, 31 January 1994; *BOE* 60, 11 March 1994); Czechoslovakia, 4 May 1987 (*BOE* 290, 3 December 1988; *BOE* 22, 26 January 1989), applicable to both the Czech Republic and Slovakia since 1 January 1993; France, 28 May 1969 (*BOE* 63, 14 March 1970); Italy, 22 May 1973 (*BOE* 273, 15 November 1977); Mexico, 17 April 1989 (*BOE* 85, 9 April 1991; *BOE* 108, 6 May 1991; *BOE* 226, 20 September 1991); Morocco, 30 May 1997 (*BOE* 151, 25 June 1997); Switzerland, 10 November 1896 (*Gazette of Madrid* 190, 9 July 1898); and Uruguay, 4 November 1987 (*BOE* 103, 30 April 1998).

29 The treaties with Bulgaria (Article 22(1)) and China (Article 24(2)) (note 28 above) do not contain provisions for the recognition and enforcement of arbitral awards, but expressly refer *en bloc* to the New York Convention (note 21 above).

30 Article VII(1) of the New York Convention: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any rights he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." See also *Ley 60/2003, de 23 de diciembre, de Arbitraje* (Spanish Arbitration Act) (*BOE* 309, 26 December 2003), Article 46(2).

31 Spanish case law and doctrine have traditionally considered that the New York Convention is more favourable for the recognition and enforcement of commercial awards than the treaties in note 28 above. See C Esplugues Mota, "*Artículo* 46", in S Barona Vilar, (Coord), *Comentarios a la Ley de Arbitraje. Ley 60/2003, de 23 de diciembre, tras la reforma de la Ley 11/2011, de 21 de mayo* (2nd edn) (Thomson-Civitas, 2011), pp1957–2010, at pp2008–2010.

32 Order of the TSJ of Madrid (Civil and Criminal Chamber) 12/2016, 14 November 2016, §§VI-VII (ECLI: ES:TSJM:2016:468A).

33 Order of the TSJ of Madrid (Civil and Criminal Chamber) 4/2018, 30 April 2019, §III *in fine* (ECLI: ES:TSJM:2019:452A).

34 The exception is the BIT with Mexico (note 3 above), which is strongly influenced by Chapter 11 of NAFTA (note 25 above), to which Mexico is a party.

35 See F J Pascual Vives, *Las obligaciones de promoción y protección de las inversiones extranjeras en la segunda generación de APPRI españoles*, Revista Española de Derecho Internacional, Vol LXI (2009), 2, pp411–440.

36 No mention whatsoever can be found in the BIT with the Philippines (note 3 above).

37 BITs with Chile, Article 10(5); Hungary, Article 10(3); and Nigeria, Article 12(5) (note 3 above). A similar provision may be found in Article 26(8) of the ECT (note 7 above).

38 BITs with Albania, Article 11(5); Algeria, Article 11(4); Argentina, Article 10(6); Bahrain, Article 11(5); Bolivia, Article 11(5); Bosnia and Herzegovina, Article 11(6); Bulgaria, Article 11(5); China, Article 9(4); Colombia, Article 10(11); Costa Rica, Article 11(6); Croatia, Article 11(4); Cuba, Article 11(4); *Czechoslovakia*, Article 10(4); Dominican Republic, Article 11(2); Ecuador, Article XI(4); Egypt, Article 11(4); El Salvador, Article 11(4); Equatorial Guinea, Article 11(5); Estonia, Article 11(4); Gabon, Article 11(4); Guatemala, Article 11(5); Honduras, Article 11(4); India, Article 12(6); Indonesia, Article 10(3);

Furthermore, two other BITs merit separate mention:

- Article 11(5) of the BIT with Kuwait also includes a commitment by states parties to enforce awards promptly and to order the effective application of the dispositive parts of awards within their territories;[39] and
- Article XVII of the BIT with Mexico[40] contains Spain and Mexico's undertaking to abide by awards and comply with them without undue delay, and for the disputing state party to enforce awards within its territory. The BIT also recognises the investor's right to rely on the ICSID Convention or the New York Convention, whichever may apply;[41] and clarifies that a dispute under the BIT shall be considered 'commercial' for the purposes of Article I(3) of the New York Convention.[42]

Finally, model BITs lost a significant part of their relevance for EU member states since the European Union acquired exclusive competence on FDI in December 2009 and it enacted Regulation 1219/2012 in December 2012.[43] In any event, they may still be used by member states wishing to amend an existing BIT or to conclude a new BIT with a third country after being authorised to enter into negotiations by the European Commission.[44] At the time of writing, after obtaining permission from the European Commission, Spain is negotiating new BITs with third states[45] and amendments to existing BITs with third states.[46]

Iran, Article 11(3); Jamaica, Article 11(4); Jordan, Article 12(5); Kazakhstan, Article 11(4); Republic of Korea, Article 9(4); Latvia, Article 11(4); Lebanon, Article 11(5); Libya, Article 11(5); Lithuania, Article XI(4); North Macedonia, Article 11(5); Malaysia, Article VIII(4); Mauritania, Article 11(5); Moldova, Article 11(5); Morocco, Article 11(5); Namibia, Article 11(5); Nicaragua, Article XI(4); Pakistan, Article 11(4); Panama, Article XII(5); Paraguay, Article 11(4); Peru, Article 9(4); Poland, Article 11(4); Romania, Article 8(4); Saudi Arabia, Article 11(4); Senegal, Article 11(5); Slovenia, Article XI(5); South Africa, Article XI(4); Syria, Article 11(5); Trinidad and Tobago, Article 12(6); Tunisia, Article 11(4); Turkey, Article IX(4); Ukraine, Article 11(5); Uruguay, Article 11(6); the *USSR*, Article 10(4); Uzbekistan, Article 11(5); Venezuela, Article XI(6); Vietnam, Article 11(5); and Yugoslavia, Article 11(5) (note 3 above).

39 Note 3 above.

40 *Ibid.*

41 See section 2.1. above.

42 *Ibid.*

43 Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 20 December 2012).

44 *Ibid*, Chapter III, Articles 7-11.

45 Commission Implementing Decisions authorising the Kingdom of Spain to open formal negotiations to conclude bilateral investment agreements with Qatar (C(2014)4994/F1, 23 July 2014; C(2020)102/1, 9 January 2020), Kenya (C(2018)4008/1, 22 June 2018), United Arab Emirates (C(2018)663/F2, 27 June 2019), Ecuador (C(2019)8093/1, 11 November 2019), Cape Verde (C(2020)21/1, 7 January 2020) and Ivory Coast (C(2020)3400/F1, 29 May 2020); available upon request at https://ec.europa.eu/transparency/regdoc/?

46 Commission Implementing Decisions authorising the Kingdom of Spain to conclude amendments to the bilateral investment agreements with Albania, Algeria, Bosnia and Herzegovina, El Salvador, Georgia, Iran, Kazakhstan, Kuwait, Lebanon, North Macedonia, Moldova, Montenegro, Nicaragua, Panama, Senegal, Serbia, Tajikistan, Trinidad and Tobago, Turkey, Ukraine, Uruguay, and Uzbekistan (C(2017/2995/1, 2 May 2017), Colombia (C(2017)8229/F1, 12 December 2017; C(2019)6834/1, 19 September 2019) and individually with Kazakhstan (C(2019)4067/1, 27 May 2019); https://ec.europa.eu/transparency/regdoc/?.

2.3 Dispute resolution clauses in investment-related conventional instruments and practice

Spain's domestic law permits Spanish authorities to include arbitration clauses in contracts that they conclude with private parties.

The main set of rules applicable to public contracts, the *Ley de Contratos del Sector Público* (LCSP),[47] contains some provisions in this regard, which nonetheless demonstrate the state's traditional reluctance to rely on arbitration in public contracts for the purposes of settling disputes.[48] In fact, the current LCSP has deleted the express possibility set out in Article 50 of the 2011 act which allowed public 'power adjudicators' that do not qualify as 'public administrations' to settle by arbitration disputes arising from the effect, performance or termination of contracts.[49] Some authors consider that such deletion would mean that each public administration shall now decide whether it agrees to settle disputes by arbitration.[50]

The First Additional Provision of the LCSP allows the inclusion of arbitration clauses in contracts entered into outside Spain with foreign companies. However, the same provision prioritises the inclusion of forum selection clauses in favour of the Spanish courts, although it does not impose them strictly, as foreign companies would probably be very reluctant to agree to submit disputes to the Spanish courts.[51]

In addition, Article 11(3) of the LCSP excludes contracts relating to services in arbitration and conciliation from the application *ratione materiae* of the LCSP. In other words, the legal relationships between a Spanish public entity and the arbitrators who hear the claim or an arbitral institution that administers the case are not subject to the LCSP. On another note, Article 19(2)(e)(1) of the LCSP indicates that the LCSP applies to contracts for the representation and legal defence of the state in arbitration (ie, procurement of legal services by private law firms), but such contracts are not subject to the so-called 'harmonised regulation' (ie, the application of EU directives on public procurement) in Articles 19 to 23 of the LCSP.

Spanish domestic law also permits the state to include arbitration clauses in

47 *Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014* (*BOE* 272, 9 November 2017).

48 See A Dorrego de Carlos, *El arbitraje en los contratos públicos*, *Revista Jurídica de Castilla y León*, 29 (2013), pp1–18, at pp3–6.

49 See the first edition of this chapter in J Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Business, 2015), pp409–410.

50 See J M Gimeno Feliú, *Hacia una nueva ley de contratos del sector público. ¿Una nueva oportunidad perdida?*, *Revista Española de Derecho Administrativo*, 182 (January-March 2017), pp181–221, at p208; A Soriano Hinojosa, *"Arbitraje, contratación pública y defensa de la competencia. Sentencia 5/2018 Tribunal Superior de Justicia País Vasco (Sala de lo Civil y Penal) de 30 mayo 2018"*, *Arbitraje. Revista de arbitraje comercial e inversiones*, Vol XI, 2018(3), pp789–816, at pp798–799.

51 See the still valid comment by M Pillado Quintáns, 'Disposición adicional primera', in L Parejo Alfonso and A Palomar Olmeda (eds), *Comentarios a la Ley de Contratos del Sector Público*, Vol IV (Bosch, 2009), pp2663–2697, at p2692.

public debt instruments and apply them in different financial markets in accordance with the rules applicable to those markets.[52]

Finally, some Spanish senior civil servants promote the use of the *Tribunal de Arbitraje para la Contratación Pública* as a specific institution for the administration of arbitral proceedings relating to public contracts.[53] In the past, public entities were permitted to insert arbitration clauses in their contracts providing for ICC arbitration.

3. State practice in ICSID and investment treaty arbitration with regard to enforcement

3.1 Legislation

At the time of writing, Spain has not yet enacted any provisions – in particular, on the basis of Articles 54(2) and 69 of the ICSID Convention[54] – for the specific purpose of recognising and enforcing investment arbitral awards, whether rendered against a private investor or a sovereign state (whether the latter be Spain or a third state). As a result, the usual provisions for the recognition and enforcement of foreign judgments or awards are applicable wherever necessary.

From the standpoint of the recognition and enforcement of awards:

- Article 54(1) of the ICSID Convention exempts ICSID awards from the need to be granted a previous exequatur for the enforcement in Spain of pecuniary obligations contained in the award; and
- non-ICSID awards are subject to the previous grant of an exequatur pursuant to the New York Convention or any other more favourable instrument.[55]

Since 2011, the competent courts for the issuance of an exequatur are the civil and criminal chambers of the TSJs of the autonomous communities (17 courts throughout the country),[56] unless an applicable international treaty provides otherwise.[57]

52 *Ley 47/2003, de 26 de noviembre, General Presupuestaria* (LGP), Article 98(3), as amended by *Ley 17/2012, de 27 de diciembre, de Presupuestos Generales del Estado para el año 2013* (*BOE* 312, 28 December 2012), Final Provision 14(7). Article 116(b) of the LGP also allows the state to insert arbitration clauses in bank guarantees ensuring the operations of foreign credit.

53 Within the *Asociación Europea de Arbitraje*: www.asociacioneuropeadearbitraje.org/contratacion-publica-tacop/.

54 Note 2 above.

55 See section 2.1 above.

56 *Ley Orgánica 6/1985, de 1 julio, del Poder Judicial* (LOPJ) (*BOE* 157, 2 July 1985; *BOE* 264, 4 November 1985), Article 73(1)(c), added by *Ley Orgánica 5/2011, de 20 de mayo, complementaria a la Ley 11/2011, de 20 de mayo, de reforma de la Ley 60/2003, de 23 de diciembre, de Arbitraje y de regulación del arbitraje institucional en la Administración General del Estado para la modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (*BOE* 121, 21 May 2011); Spanish Arbitration Act (note 30 above), Article 8(6).

57 The courts of first instance are designated in the treaties with Brazil (Article 22(a)), Bulgaria (Article 20(4)), China (Article 18), Mexico (Article 19), and Uruguay (Article 9(a)) (note 28 above).

The court seized with jurisdiction shall apply relevant provisions of Spanish procedural law (*lex fori*) in granting exequatur.[58]

After complying with the private international law requirements for the deployment of effects of the award in Spain (if necessary), the enforcement of any investment award (be it ICSID or non-ICSID) shall be subject to the same domestic rules that apply to the execution of judgments against the debtor (*lex fori*).[59] As a general matter, the competent courts for the enforcement of awards are the courts of first instance (*Juzgado de Primera Instancia*) of:

- the domicile or place of residence of the party against which recognition of the award is requested;
- the domicile or place of residence of the party to which the effects of the award are referred; or
- the place of enforcement or the place where the award will be effected.[60]

In addition, in 2016, Spain designated the courts of first instance as the competent courts for the purpose of recognising and enforcing awards rendered pursuant to the ICSID Convention.[61]

In 2014, the Spanish government unveiled a draft proposal for the enactment of a new Organic Law on the Judiciary (LOPJ),[62] which aimed to confer jurisdiction on certain courts for the enforcement of investor-state awards; but it was never enacted.[63] The question of whether the courts of the administrative branch of the judiciary (*Orden jurisdiccional contencioso-administrativo*) should deal with a request for enforcement against the Spanish state or its constituent subdivisions or agencies seems to have disappeared in part after Spain designated the courts of first instance for the enforcement of ICSID awards.

If the respondent state is a third country, the dispute will be treated – as is usual in Spanish case law – as a purely private relationship, so that the civil branch of the judiciary (Orden jurisdiccional civil) will have competence to deal with the request for execution of the award, as occurred in the ICSID case of *Pey Casado v Chile* in 2013.[64]

Finally, Spain has also passed legislation to deal with potential awards against it that establish breaches of international treaties and order payment of

58 Spanish Arbitration Act (note 30 above), Article 46(2), forwarding to *Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil* (Juridical Cooperation Act) (*BOE* 182, 30 July 2015), Articles 52–55.

59 ICSID Convention (note 2 above), Article 54(3); Spanish Arbitration Act (note 30 above), Article 44; Juridical Cooperation Act (note 58 above), Article 50(2).

60 Spanish Arbitration Act (note 30 above), Article 8(6); LOPJ (note 56 above), Article 85(5).

61 https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST127.

62 *Anteproyecto de Ley Orgánica del Poder Judicial*, 4 April 2014, https://dialnet.unirioja.es/descarga/articulo/5778851.pdf.

63 A critical analysis of its provisions can be found in the first edition of this chapter in J Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Business, 2015), pp412–413.

64 See section 3.4. below.

compensation.[65] Under those provisions, the Council of Ministers (central administration) shall have the power to claim against a regional or local public administration whose acts or omissions constituted a breach of international or EU law.[66]

3.2 Domestic legal provisions

In October 2015, Spain passed specific domestic legislation on the sovereign immunity of foreign states.[67] In line with state practice before the enactment of this legislation, Spanish law acknowledges the existence of immunity from execution of assets belonging to foreign states according to customary international law where those assets are subject to *acta jure imperii* functions.[68] Meanwhile, Spanish law bans a foreign state from invoking immunity from jurisdiction before a Spanish court of justice to avoid the enforcement of a foreign award stemming from an arbitration agreement relating to a commercial relationship with a private party (whether physical or juridical) of another state.[69]

On 21 September 2011, Spain acceded to the United Nations Convention on Jurisdictional Immunities of States and Their Property.[70] The convention has thus far not entered into force.[71] Nonetheless, as this convention is regarded as having codified existing rules of customary international law, Spanish courts may rely on it when dealing with sovereign immunity issues and construing Spanish domestic law on sovereign immunity.[72]

3.3 State experience in ICSID/investment treaty arbitrations

At the time of writing, Spain has been a respondent in at least 52 investment treaty arbitrations.

The first known case against Spain was the pioneering case of *Maffezini v Spain*,[73] which related to a failed investment made by an Argentine investor in

65 *Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera* (*BOE* 103, 30 April 2012), Article 8(1) and Second Additional Provision as amended by *Ley Orgánica 9/2013, de 20 de diciembre, de control de la deuda comercial en el sector público* (*BOE* 305, 21 December 2013).

66 These provisions are additional to Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party (OJ L 257, 28 August 2014) on sharing responsibility between the EU and the member state at stake.

67 *Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España* (*BOE* 258, 28 October 2015).

68 *Ibid*, Article 20.

69 *Ibid*, Article 16(d). See also Order of the TSJ of Madrid (Civil and Criminal Chamber) 12/2016, 14 November 2016 (note 32 above).

70 New York, 2 December 2004, https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf. See C Gutiérrez Espada, *La adhesión española (2011) a la Convención de las Naciones Unidas sobre las Inmunidades Jurisdiccionales de los Estados y sus Bienes (2005)*, in Cuadernos de Derecho Transnacional, Vol III, 2 (October 2011), pp145–169, www.uc3m.es/cdt.

71 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en.

72 Pursuant to LOPJ (note 56 above), Article 21(2). See Judgment of the Spanish Supreme Court (1st. Chamber) 3012/2019, 3 October 2019, §IV.3 *in fine* (ECLI: ES:TS:2019:3012).

the Autonomous Community of Galicia. The claim was pursued under the Argentina-Spain BIT of 1991 and was adjudicated in 2000 after the tribunal allowed the investor to use the most favoured nation clause to bypass some procedural requirements set out in the BIT.[74] Spain has since been a party to investment treaty disputes related to construction,[75] mining[76] and finance.[77]

The bulk of investment treaty cases brought against Spain (47 at the time of writing) derive from a series of regulatory measures taken since 2010 in the renewable energy sector and are reportedly based on the ECT.[78] The cases, grouped according to the measures to which they relate, are as follows:

- The 2010 measures prompted two arbitration proceedings;[79] and
- The 2012–2014 measures have thus far prompted 35 arbitration proceedings administered by ICSID[80] and a further 10 by the SCC and the Permanent Court of Arbitration (PCA).[81]

73 *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case ARB/97/7).

74 Award, 13 November 2000, http://italaw.com/sites/default/files/case-documents/ita0481.pdf; and Decision on the Rectification of the Award, 31 January 2001, http://italaw.com/sites/default/files/case-documents/ita0483.pdf.

75 *Inversión y Gestión de Bienes, IGB, SL* and *IGB18 Las Rozas, SL v Kingdom of Spain* (ICSID Case ARB/12/17), under the BIT with Venezuela (note 3 above).

76 *Corcoesto SA v Kingdom of Spain* (PCA Case 2016-26), under the BIT with Panama (note 3 above).

77 *Valle Ruiz v Kingdom of Spain* (PCA Case 2019-17) and *GBM Global, SA de CV v Kingdom of Spain* (ICSID Case ARB/18/33), both under the BIT with Mexico (note 3 above).

78 Note 7 above.

79 *The PV Investors v Kingdom of Spain* (PCA Case 2012-14); *Charanne BV v Kingdom of Spain* (SCC Case V 2012/062).

80 *RREEF Infrastructure (GP) Limited v Kingdom of Spain* (ICSID Case ARB/13/30); *Infrastructure Services Luxembourg Sàrl v Kingdom of Spain* (ICSID Case ARB/13/31); *Eiser Infrastructure Limited v Kingdom of Spain* (ICSID Case ARB/13/36); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (ICSID Case ARB/14/1); *NextEra Energy Global Holdings BV v Kingdom of Spain* (ICSID Case ARB/14/11); *InfraRed Environmental Infrastructure GP Limited v Kingdom of Spain* (ICSID Case ARB/14/12); *Renergy, Sàrl v Kingdom of Spain* (ICSID Case ARB/14/18); *RWE Innogy GmbH v Kingdom of Spain* (ICSID Case ARB/14/34); *Stadtwerke München GmbH v Kingdom of Spain* (ICSID Case ARB/15/1); *STEAG GmbH v Kingdom of Spain* (ICSID Case ARB/15/4); *9REN Holding Sàrl v Kingdom of Spain* (ICSID Case ARB/15/15); *BayWa re renewable energy GmbH v Kingdom of Spain* (ICSID Case ARB/15/16); *Cube Infrastructure Fund SICAV v Kingdom of Spain* (ICSID Case ARB/15/20); *Mathias Kruck v Kingdom of Spain* (ICSID Case ARB/15/23); *KS Invest GmbH v Kingdom of Spain* (ICSID Case ARB/15/25); *JGC Holdings Corporation (formerly JGC Corporation) v Kingdom of Spain* (ICSID Case ARB/15/27); *Cavalum SGPS, SA v Kingdom of Spain* (ICSID Case ARB/15/34); *E.ON SE v Kingdom of Spain* (ICSID Case ARB/15/35); *OperaFund Eco-Invest SICAV PLC v Kingdom of Spain* (ICSID Case ARB/15/36); *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case ARB/15/38); *Hydro Energy 1 Sàrl v Kingdom of Spain* (ICSID Case ARB/15/42); *Watkins Holdings Sàrl v Kingdom of Spain* (ICSID Case ARB/15/44); *Landesbank Baden-Württemberg v Kingdom of Spain* (ICSID Case ARB/15/45); *Eurus Energy Holdings Corporation v Kingdom of Spain* (ICSID Case ARB/16/4); *Sun-Flower Olmeda GmbH & Co KG v Kingdom of Spain* (ICSID Case ARB/16/17); *Infracapital F1 Sàrl v Kingdom of Spain* (ICSID Case ARB/16/18); *Sevilla Beheer BV v Kingdom of Spain* (ICSID Case ARB/16/27); *Portigon AG v Kingdom of Spain* (ICSID Case ARB/17/15); *DCM Energy GmbH & Co Solar 1 KG v Kingdom of Spain* (ICSID Case ARB/17/41); *ITOCHU Corporation v Kingdom of Spain* (ICSID Case ARB/18/25); *EBL (Genossenschaft Elektra Baselland) v Kingdom of Spain* (ICSID Case ARB/18/42); *European Solar Farms A/S v Kingdom of Spain* (ICSID Case ARB/18/45); *Canepa Green Energy Opportunities I, Sàrl v Kingdom of Spain* (ICSID Case ARB/19/4); *Sapec, SA v Kingdom of Spain* (ICSID Case ARB/19/23); *VM Solar Jerez GmbH v Kingdom of Spain* (ICSID Case ARB/19/30).

81 *CSP Equity Investment, Sàrl v Kingdom of Spain* (SCC Case V 2013/094); *Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case V 2013/153); *Alten Renewable Energy Developments BV v Kingdom of Spain* (SCC Case V 2015/036); *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain* (SCC Case V 2015/063); *Foresight Luxembourg Solar 1 Sàrl v Kingdom of Spain* (SCC Case V 2015/150); *Solarpark Management GmbH & Co Atum I KG v Kingdom of Spain* (SCC Case V 2015/163); *Green Power K/S v Kingdom of Spain* (SCC Case V 2016/135); *EDF Energies Nouvelles SA v Kingdom of Spain* (PCA Case AA-613); *FREIF Eurowind Holdings Ltd v Kingdom of Spain* (SCC Case V 2017/060); *Triodos SICAV II v Kingdom of Spain* (SCC Case V 2017/194).

At the time of writing, at least 25 awards and decisions have been rendered in these investment treaty cases against Spain.[82]

First, in *Maffezini v Spain*, the arbitral tribunal found Spain liable for breaches of Article 3(1) (non-impairment of investments) and Article 4(1) (FET) of the Argentina-Spain BIT. Spain was ordered to pay the equivalent of €180,000 plus interest to the investor. Payment was made voluntarily by Spain some months later: this was done by forwarding the award to SODIGA, a venture capital company founded by Galicia, whose actions were attributed to the state under international law as breaches of the BIT. SODIGA included the amount of the award in its budget and made payment to the investor.[83]

Secondly, in *IGB v Spain*, the sole arbitrator found that Spain had not breached any of the substantive provisions of the Venezuela-Spain BIT that the claimants had invoked.[84] The investors had acquired land in a municipality near Madrid in the expectation that, pursuant to an urban agreement signed with the local authorities, it would be reclassified for multi-family residential use. However, the sole arbitrator considered that the language of the agreement determined that it was a preparatory document that only envisaged the possibility, and not a guarantee, to reclassify the land.

Thirdly, in *Corcoesto v Spain*, it has been reported that the tribunal found by majority that the claimant had engaged in an abuse of process relating to its claim under the Panama-Spain BIT on the termination of a concession agreement for a gold mining project in Galicia.[85]

Finally, in the set of ECT cases relating to the renewable energy sector, Spain has been found in breach of the ECT 19 times[86] (one such decision was

82 In *Solarpark v Spain* (note 81 above), the investor discontinued the proceeding; see the Spanish state attorney's report to the Congress of Deputies on Spain's investment treaty claims, 6 November 2017, www.ecestaticos.com/file/d88ce7a07265dbf8d809b453b848f239/1514204320-186-881-tribunals-arbitratge.pdf. In *GBM v Spain* (note 77 above), the investors discontinued the arbitration in order to consolidate it with that in *Valle Ruiz v Spain* under the UNCITRAL Arbitration Rules.

83 See *Consello de Contas de Galicia. Informe de Fiscalización. Ejercicio 2001 (XesGalicia, SXECR, SA y Sodiga Galicia, SCR, SA)*, at para 4.14, p48, www.consellodecontas.es/sites/consello_de_contas/files/contents/documents/2001/XESGALICIA_2001_C.pdf.

84 Award (excerpts), 14 August 2015, www.italaw.com/sites/default/files/case-documents/italaw7474.pdf.

85 V Djanic, "As tribunal splits on jurisdiction, Spain prevails in under-the-radar UNCITRAL treaty claim," *IA Reporter*, 23 April 2020, relating to the award rendered on 14 April 2020.

86 *Eiser v Spain* (note 80 above), Award, 4 May 2017, www.italaw.com/sites/default/files/case-documents/italaw9050.pdf; *Novenergia v Spain* (note 81 above), Award, 15 February 2018, www.italaw.com/sites/default/files/case-documents/italaw9715.pdf; *Masdar v Spain* (note 80 above), Award, 16 May 2018, www.italaw.com/sites/default/files/case-documents/italaw9710.pdf; Supplementary Decision, November 29 2018 (not public); *Antin v Spain* (note 80 above), Award, 15 June 2018, available at www.italaw.com/sites/default/files/case-documents/italaw9875.pdf; and Decision on Rectification of the Award, 29 January 2019, www.italaw.com/sites/default/files/case-documents/ italaw10891.pdf; *Foresight v Spain* (note 81 above), Award, November 14 2018, www.italaw.com/ sites/default/files/case-documents/italaw10142.pdf; *RREEF v Spain* (note 80 above), Decision on Responsibility and on the Principles of Quantum, November 30 2018, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3224/DS12012_En.pdf; and Award, 11 December 2019, www.pacer.gov; *Cube v Spain* (note 80 above), Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, www.italaw.com/sites/default/files/case-documents/italaw10692.pdf; and Award, 15 July 2019, www.italaw.com/sites/default/files/case-documents/italaw10694.pdf; *NextEra v Spain* (note 80 above), Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, www.italaw.com/sites/default/files/case-documents/italaw10569.pdf; and Award, 31 May 2019, www.italaw.com/sites/default/files/case-documents/italaw10568.pdf; *9REN v Spain* (note 80 above), Award, 31 May 2019, available at www.italaw.com/sites/default/files/case-documents/italaw10565.pdf; Rectification of the Award, 6 December 2019 (not public); *SolEs v Spain* (note 80 above), Award, 31 July 2019, www.italaw.com/sites/default/files/case-documents/italaw10836.pdf; Rectification of the Award, 5 December 2019 (not public); *InfraRed v Spain* (note 80 above), Award, 2 August 2019 (not public); *OperaFund v Spain* (note 80 above), Award, 6 September 2019, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4806/DS12832_En.pdf; Rectification of the Award, 28 October 2019 (not public); *BayWa v Spain* (note 80 above), Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, www.italaw.com/sites/default/files/case-documents/italaw15000.pdf; *RWE v Spain* (note 80 above), Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, www.italaw.com/sites/default/files/case-documents/italaw11004.pdf; *Watkins v Spain* (note 80 above), Award, 21 January 2020, www.italaw.com/sites/default/files/case-documents/italaw11234_0.pdf; Rectification of the Award, 13 July 2020 (not public); *The PV Investors v Spain* (note 79 above), Final Award, 28 February 2020, www.italaw.com/sites/default/files/case-documents/italaw11250.pdf; *Hydro Energy v Spain* (note 80 above), Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, www.italaw.com/sites/default/files/case-documents/italaw11282.pdf; *Cavalum v Spain* (note 80 above), Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, www.iareporter.com; *STEAG v Spain* (note 80 above), Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020, www.iareporter.com.

subsequently annulled),[87] and has won in three cases.[88] The tribunals' findings may be briefly summarised as follows:

- All decisions and awards rendered in these cases (even those that ultimately dismissed the investors' claims) found that the ECT applies to intra-EU disputes,[89] thus rejecting Spain's intra-EU objection made before and after the CJEU rendered its *Achmea* judgment.[90] At the same time, all tribunals upheld Spain's objection to the tribunals' jurisdiction to hear complaints about taxation measures, due to the tax carve-out set out in Article 21 of the ECT.
- The tribunals that found Spain in breach of the ECT upheld the investors' claims as breaches of Article 10(1) of the ECT, which deals with FET. The overall compensation awarded exceeds €1 billion (excluding pre and post-award interest and costs of the proceedings) at the time of writing. The tribunals followed different approaches in finding FET breaches:
  - Some focused on the statements on stability issued by Spain as part of the original regulatory framework applicable to the investments before the disputed measures (*Antin, Masdar*);
  - Others held that the disputed measures altered the essential characteristics of the original regulatory framework in contravention of the investors' legitimate expectations (*Eiser*);
  - Others affirmed that the disputed measures did not guarantee the

87 *Eiser v Spain* (note 80 above), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, www.iareporter.com.

88 *Charanne v Spain* (note 79 above), Award, 21 January 2016, www.italaw.com/sites/default/files/case-documents/italaw7047.pdf; *Isolux v Spain* (note 81 above), Award, 12 July 2016, www.italaw.com/sites/default/files/case-documents/italaw9219.pdf; *Stadtwerke v Spain* (note 80 above), Award, 2 December 2019, www.italaw.com/sites/default/files/case-documents/italaw11056.pdf.

89 See also *Landesbank v Spain* (note 80 above), Decision on the "intra-EU" Jurisdictional Objection, 25 February 2019, www.italaw.com/sites/default/files/case-documents/italaw10834.pdf.

90 CJEU, *Slowakische Republik v Achmea B.V.*, C-284/16, Judgment, 6 March 2018 (ECLI: EU:C:2018:158), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2425523.

reasonable rate of return that the original regulatory framework provided (*RREEF*); and

- Still others held that the new regulatory framework had taken into account the remuneration legitimately received by the facilities under the original regulatory framework in order to calculate the remuneration under the new framework (*BayWa*).

- The tribunals that did not find Spain in breach of the ECT found that the investors had no legitimate expectations of the non-application of regulatory changes to their investments, due to:
  - the scarcity of those changes (*Charanne*);
  - the foreseeability of those changes for the specific investor in the specific assets (*Isolux*); or
  - the lack of legitimate expectations stemming from the original regulatory framework (*Stadtwerke*).

3.4 National investors

In 2013, the Madrid Court of First Instance 101 was seized with a request for enforcement and execution of an ICSID award, filed by two Spanish investors which had obtained an award on costs in their favour in *Pey Casado v Chile*.[91] On 6 March 2013, the court issued two parallel decisions in accordance with Spanish law (*lex fori*):

- a general order for enforcement of the award,[92] in which the court indirectly acknowledged that no previous exequatur was required for an ICSID award so far as the pecuniary obligations imposed by the award were concerned. The court ordered Chile to pay more than $3 million plus interest owed to the claimants under the award; and
- a decree[93] which made particular provision for the enforcement of the award by way of attachment of certain assets of the respondent. The copy of the decree released by the claimants is redacted with regard to the specific Chilean assets against which the court ordered attachment. It is therefore unknown whether those assets were entitled to immunity from execution according to international law.

The claimants had been ordered to pay €575,000 plus interest and costs to Chile in two other decisions, issued by the original arbitral tribunal[94] and the *ad hoc* committee, which in 2008 annulled the quantum part of the award pursuant to Article 52 of the ICSID Convention.[95] Because both the decision on revision and the decision on annulment were treated as 'awards' under Article 53(2) of the ICSID Convention, Chile tried to enforce them against the claimants in the same court proceedings in order to reduce the amount of money payable.[96] The Madrid Court of First Instance 101, however, did not accept this move, albeit in terms that were somewhat imprecise.[97] In any event, Article 556 of the Spanish Civil Procedure Code (*Ley de Enjuiciamiento Civil*) does not allow the set-off of claims for payment of money included in arbitral awards.

On another note, in 2009 the claimant in *Sempra v Argentina* attempted to enforce a $128 million award plus interest in its favour in several jurisdictions[98] while a request for the annulment of that award (submitted by Argentina) was pending before an *ad hoc* committee.[99] On 31 July 2009, the Madrid Court of First Instance 83 denied jurisdiction to hear the claimant's request on provisional measures.[100] An appeal against this decision was ultimately dismissed by the Provincial Court (*Audiencia Provincial*) of Madrid on 22 July 2010,[101] after the award had been annulled in its entirety by a decision of the *ad hoc* committee on 29 June 2010.[102]

Finally, the set of ECT cases relating to the Spanish renewable energy sector prompted two relevant developments regarding the enforcement and execution of awards. First, the European Commission issued a decision on 10 November 2017 declaring that the new regulatory framework approved by Spain for the renewable energy sector (notified scheme) complies with EU law on state aid.[103]

91 *Víctor Pey Casado v Republic of Chile* (ICSID Case ARB/98/2), Award, 8 May 2008, http://italaw.com/sites/default/files/case-documents/ita0638.pdf. See JÁ Rueda García, *Primera ejecución forzosa conocida de un laudo arbitral CIADI en España (Víctor Pey Casado y Fundación Presidente Allende c República de Chile): sin exequátur*, Cuadernos de Derecho Transnacional, Vol VI, 1 (March 2014), pp414–430, www.uc3m.es/cdt.

92 Order of the Court of First Instance 101 of Madrid, 6 March 2013, http://italaw.com/sites/default/files/case-documents/italaw1338.pdf.

93 Decree (*Decreto*) of the Court of First Instance 101 of Madrid, 6 March 2013, http://italaw.com/sites/default/files/case-documents/italaw1337.pdf.

94 Decision on Revision, 18 November 2009, http://italaw.com/sites/default/files/case-documents/ita0656.pdf.

95 Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, http://italaw.com/sites/default/files/case-documents/italaw1178.pdf.

96 In its Decision on the Republic of Chile's Request for a Stay of Enforcement of the Unannulled Portion of the Award, of 16 May 2013, http://italaw.com/sites/default/files/case-documents/italaw1431.pdf, the *ad hoc* Committee that partially annulled the 2008 award had recommended that Chile "pay Claimants the 'undisputed' sum of USD 2,470,684.89 which is the sum total of the various obligations of the Parties as described in the table below" (para 46).

97 Order of the Court of First Instance 101 of Madrid, 4 July 2013, http://italaw.com/sites/default/files/case-documents/italaw1529.pdf.

98 *Sempra Energy International v Argentina* (ICSID Case ARB/02/16), Award, 28 September 2007, http://italaw.com/sites/default/files/case-documents/ita0770.pdf.

99 See JÁ Rueda García, *Primera ejecución forzosa conocida de un laudo arbitral CIADI en España (Víctor Pey Casado y Fundación Presidente Allende c República de Chile): sin exequátur*, Cuadernos de Derecho Transnacional, Vol VI, 1 (March 2014), at p415 (fn 7).

100 Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 August 2009, para 24, http://italaw.com/sites/default/files/case-documents/ita0774.pdf.

101 Order of the Provincial Court (*Audiencia Provincial*) of Madrid (Section 9), 22 July 2010 (*La Ley* 138270/2010).

102 Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, http://italaw.com/sites/default/files/case-documents/ita0776.pdf.

103 European Commission, State aid SA.40348 (2015/NN) – Spain. Support for electricity generation from renewable energy sources, cogeneration and waste, C(2017) 7384 final, November 10, 2017, https://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf.

> With regard to the original regulatory framework, the commission held that: *any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in* Eiser v Spain, *or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.*[104]

Consequently, Spain and the investors would both be compelled to notify the European Commission of any award ordering Spain to pay compensation for it to authorise to Spain to pay it.

Secondly, Spain issued Royal Decree-Law 17/2019 on 23 November 2019 inviting foreign investors to terminate their arbitration claims and waive their right to continue or resume them in order to secure a pre-tax rate of return of 7.398% until 31 December 2031 for the renewable facilities in which they invested.[105] If such termination and waivers do not take place, Spain shall apply a pre-tax rate of return of 7.09% to such facilities until 31 December 2025, while the rate of return for the subsequent 2026–2031 regulatory period would be determined in late 2025 (and might be lower).[106] Whether any claimant agreed to terminate its arbitration proceedings under these conditions remains unknown at the time of writing.

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104 *Ibid*, para 165.
105 *Real Decreto-ley 17/2019, de 22 de noviembre, por el que se adoptan medidas urgentes para la necesaria adaptación de parámetros retributivos que afectan al sistema eléctrico y por el que se da respuesta al proceso de cese de actividad de centrales térmicas de generación*, adding Third-bis Final Provision, §3 to *Ley 24/2013, de 26 de diciembre, del Sector Eléctrico* (*BOE* 282, 23 November 2019).
106 *Ibid.*