Cómo citar este artículo en formato APA:
Soto Pineda, J.A, Gacitúa, E., González, F., & Lucas, E. (2025). Spain, and the Crisis of Investment Arbitration: Extra-EU Jurisdictions as Alternative enforcement forums. *Behavior & Law Journal, 11*(2), 131-147. DOI: 10.47442/blj.2025.147

Behavior & Law Journal
Año 2025
Volumen 11 Número 2

Spain, and the Crisis of Investment Arbitration: Extra-EU Jurisdictions as Alternative enforcement Forums

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Abstract

The purpose of this paper is to examine the structural crisis that currently faces the international investment arbitration regime within the European Union, with particular attention to the growing incompatibility between the Energy Charter Treaty (ECT) and the principles of EU law. Building on the jurisprudence of the Court of Justice of the European Union (CJEU) in Achmea and Komstroy, Member States have relied on EU law to resist compliance with arbitral awards, thereby undermining investor confidence and generating unprecedented legal uncertainty. Against this backdrop, this document analyses the case of investment awards in which Spain was condemned under the ECT and its investors recourse to external jurisdictions, notably the United Kingdom, the United States, and Australia, as alternative forums to seek enforceability against this nation. Through a comparative examination of landmark cases, the study identifies the legal arguments that have enabled enforcement abroad, the limits investors encounter in practice, and the broader consequences for the coherence of EU public order and the legitimacy of the international investment law system.

Keywords

Investment disputes, European Union, International energy agreements, Breach of treaty, Enforcement of foreign arbitral awards, Rule of law.

Fecha de envío: 10/10/2025

Fecha de aceptación: 25/11/2025

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I. INTRODUCTION

The main appeal of investment arbitration has been, above all, its potential to provide foreign investors with a neutral forum to resolve their disputes with host States.

The consolidation of this alternative dispute resolution jurisdiction materialized not only in the growing number of investment treaties—both bilateral and multilateral—but also in the institutionalization of arbitration procedures such as those promoted by ICSID or the UNCITRAL Rules (UNCTAD, 2009). Through these mechanisms, the aim was to balance the traditional asymmetry between private actors and States, guaranteeing a legal framework that would allow disputes to be resolved without relying on local judicial systems, which are often perceived as biased or ineffective (Speechlys, 2023). This reality is reflected in the following figures: more than 3,000 investment treaties contain provisions that refer disputes to arbitration as a means of dispute resolution (UNCTAD, 2009).

However, it is now possible to affirm that we are witnessing a paradigm shift. A set of regulatory, institutional, and political tensions has given rise to what may be described as a structural crisis in investment arbitration, particularly within the European context. In recent decades, a series of fundamental conflicts has emerged, questioning the compatibility between the traditional arbitration system and the core principles of European Union law, as well as international commitments on sustainable development and the energy transition (Newman & Eymond-Laritaz, 2024).

In this context, the Energy Charter Treaty (ECT) has emerged as the main source of friction. Signed in 1994 in Lisbon, the purpose of this instrument was to facilitate the flow of energy investments following the collapse of the Soviet bloc. For this reason, the ECT was conceived under economically liberal premises, prioritizing market liberalization over environmental protection (UNCTAD, 2009). Its legal architecture aligns with the logic of the GATT and the WTO, prioritizing investment protection—even when such investments are linked to highly polluting energy sources such as gas, coal, or oil.

As environmental awareness gained prominence on the international agenda, this approach became increasingly problematic. In particular, the European Union has, in recent years, undertaken a series of binding commitments regarding sustainability and decarbonization, both internally and within the framework of international instruments such as the Paris Agreement. This normative transformation has clashed directly with the stabilization clauses, fair and equitable treatment guarantees, and protections against expropriatory measures contained in the ECT (EU Council, 2024). The direct consequence of this conflict has been a proliferation of arbitration claims by investors—many of them European—against Member States of the European Union that have adopted regulatory measures aimed at promoting renewable energy or limiting the exploitation of fossil fuels (Greenly, 2023).

One of the most paradigmatic examples of this situation is the case of Spain. Following a series of reforms to its renewable energy incentive policy in the early 2010s, Spain became the subject of over fifty arbitration claims by international investors. Of these, fifteen awards have been issued against the State and remain unpaid, making Spain the Member State with the highest number of unpaid arbitration awards within the EU (Lavranos, 2024). What is striking about this phenomenon is that the lack of compliance does not stem from insolvency or institutional collapse, as might be observed in deeply crisis-stricken countries, but rather from a deliberate legal and political strategy, which receives direct or indirect support from European institutions (Guardian, 2024).

The main argument advanced by the European Union, as well as by several of its Member States, is firmly grounded in a consolidated jurisprudential doctrine of the Court of Justice of the European Union (CJEU), particularly in light of the rulings in the cases of *Achmea BV* (C-284/16) and *Komstroy LLC* (C-741/19). In these decisions, the CJEU interpreted that the arbitration mechanisms provided for in bilateral investment treaties between Member States (the so-called intra-EU BITs) are incompatible with EU law. The core of the legal reasoning lies in the defence of the principle of autonomy of

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the EU legal order, enshrined, among other provisions, in Article 267 of the TFEU, which establishes the preliminary ruling mechanism as the exclusive means by which EU law may be interpreted by the CJEU.

In the *Achmea* case, decided on 6 March 2018, the CJEU held that the arbitration clause contained in the bilateral investment treaty between the Netherlands and Slovakia was incompatible with Article 267 TFEU and the principle of autonomy of EU law. The Court reasoned that arbitral tribunals constituted under such treaties do not form part of the EU's judicial system nor are they subject to mechanisms that ensure review by a national court capable of referring preliminary questions to the CJEU. This absence of a functional connection to the EU legal order, according to the judgment, poses a direct threat to the uniform and autonomous nature of EU law.

Subsequently, in the *Komstroy* case (judgment of 2 September 2021), the CJEU extended the *Achmea* doctrine to the context of the Energy Charter Treaty (ECT), declaring that its arbitration clause likewise could not be applied to disputes between an investor from one Member State and another Member State. The CJEU reiterated that an international arbitral tribunal that is not part of the EU judicial system, and whose decisions are not subject to effective review mechanisms under European Union law, cannot guarantee the primacy, effectiveness, and coherence of EU law. Notably, in *Komstroy*, even though the treaty in question was multilateral and not bilateral, the Court asserted with equal clarity that the arbitration system infringes the EU legal framework when invoked between intra-European actors.

These rulings have had immediate practical consequences. Numerous national courts—particularly in Germany, the Netherlands, and Sweden—have proceeded to annul arbitral awards rendered on the basis of intra-EU investment treaties or have refused their enforcement, even when the arbitral proceedings were conducted under widely recognized conventions such as the ICSID Convention. Specifically, courts such as the Oberlandesgericht Frankfurt have directly applied the *Achmea* doctrine to deny the enforcement of awards issued against Member States (Lavranos, 2025).

Consequently, many investors have opted not to initiate new arbitration proceedings, given the high risk of award annulment or unenforceability within the EU. This situation has generated a climate of legal uncertainty for both investors and States, in which the principle of legal certainty comes into conflict with the imperative to safeguard the autonomy of EU law (Freshfields, 2023).

However, this strategy of non-compliance and delegitimization of the arbitration system has not emerged in isolation. On the contrary, it has triggered a series of responses from investors who, facing the impossibility of enforcing their claims within the European legal space, have begun turning to external jurisdictions to seek recognition and enforcement of the arbitral awards (Linklaters, 2021). In this new context, countries such as the United Kingdom, the United States, and Australia have emerged as alternative fora, where domestic courts have shown greater willingness to apply international investment law autonomously, without being constrained by the limits imposed by the CJEU's case law or by political decisions of the European Commission (Freshfields, 2023).

The use of these jurisdictions is driven by multiple factors. Firstly, they are perceived as robust legal systems with a strong tradition of upholding international arbitration and honouring commitments derived from the ICSID Convention. Secondly, they operate under legal logics that are not subordinated to the primacy of EU law, which allows them to adopt decisions more favourable to investors—even when the respondent State is an EU Member. Thirdly, these jurisdictions have developed a growing body of jurisprudence that sets favourable precedents for the enforcement of arbitral awards, even when such awards have been challenged or deemed incompatible within the European space (DLA Piper, 2023).

For the reasons set out above, this reality raises serious questions regarding the future of investment arbitration, given its demonstrated difficulty in interfacing with regional legal systems. On one hand, the current situation has led to a loss of confidence among investors in the capacity of a long-established legal system such as the European one to guarantee the protection of their rights. On the other hand, third-party States are increasingly assuming a decisive role in the resolution

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of disputes between investors and European countries—a phenomenon not without consequences, as it may provoke diplomatic frictions, damage the reputation of debtor States, and increase the financial risks associated with their international obligations.

In this sense, as previously indicated, this paper will further explore in subsequent sections the growing recourse to fora external to the European Union for the enforcement of investment arbitration awards, due to the proven difficulty of securing their effectiveness within EU jurisdictions.

The necessity of articulating legal architecture mechanisms that enable litigants to resort to extra-European courts in order to obtain compensation granted through arbitral decisions—not annulled but practically unenforceable within the EU—calls into question the effectiveness of the European public order itself. This public order is understood as the set of fundamental principles that underpin the legality and legitimacy of EU law.

The existence of such a disconnect in regulatory harmonization—one that allows third-country courts to continue recognizing and enforcing arbitral awards contrary to the guidance of the CJEU or the European Commission—opens the door to a scenario of increased legislative fragmentation, where contradictory interpretations of the same legal framework coexist. This situation may undoubtedly weaken the EU's position in international law, undermine its institutional coherence, and reduce its influence in shaping global standards on investment.

Within this framework, this research aims specifically to analyse the growing use of jurisdictions external to the European Union as mechanisms for enforcing arbitral awards rendered against Member States, focusing on the particular case of arbitral awards in Spain was ordered to compensate investors following a finding of non-compliance.

Through the examination of emblematic cases emerging in common law jurisdictions such as the United Kingdom, the United States, and Australia, this study seeks to:

(i) identify the legal arguments that have allowed for the enforcement of such awards,
(ii) determine the limits faced by investors in their implementation, and
(iii) assess the broader consequences of this trend for the governance of the international investment system.

Based on the foregoing analysis, the study aims to deepen the understanding of the strategy pursued by the European Union in the realm of investment arbitration, from a critical perspective. To that end, the legal arguments invoked in the tactical responses offered by third countries—through the recognition of awards against EU Member States—will be examined.

II. EXTRA-EU ENFORCEMENT OF INVESTMENT AWARDS AGAINST SPAIN

Following the 2008 financial crisis, the Spanish government withdrew all the subsidies it had introduced in the early 2000s to attract foreign investment in the country's renewable energy sector. That decision sparked a wave of over 50 investment arbitration proceedings against Spain, resulting over two thirds of the awards in favour of investors (Lavranos, 2025). However, Spain, backed by the EU, has refused to pay the resulting awards, maintaining that intra-EU arbitration is incompatible with EU law (Devoise & Plimpon, 2023).

Consequently, according to the 2024 International Law Compliance Index, Spain ranks as the world's most non-compliant state, with 24 unpaid awards totalling USD 1.5 billion (Lavranos, 2025).

This situation has been further supported by the rulings of the Court of Justice of the European Union (CJEU) in the previously mentioned Achmea (2018) and Komstroy (2021) cases, complicating the enforcement of arbitral awards within the European Union. As a result, investors who are unable to enforce arbitral awards within the EU are increasingly turning to other jurisdictions, specially, those of common law legal tradition to enforce them such as the United Kingdom, United

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States an Austria, whose most emblematic cases will be analysed in the following sections in order to examine the main legal arguments invoked for the enforcement of these awards.

A. Enforcement In Extra-EU Jurisdictions: The Case of United Kingdom

Since Brexit, the United Kingdom has adopted a more flexible approach to the enforcement of international arbitral awards. Despite the Court of Justice of the European Union (CJEU) ruling that intra-EU arbitration agreements are incompatible with European law, the United Kingdom has maintained its jurisdiction to enforce arbitral awards, strengthening its position as a key jurisdiction for the enforcement of investment awards. As a result, investors benefited from decisions *NextEra* (ICSD Case No. ARB/14/11), *Isolux-Corsán*, (SCC Case No. V2013/153) *Antin Infrastructure Services*, (ICSID Case No. ARB/13/36), *Micula Brothers* (UK Supreme Court 2018/0177), and *Eiser Infrastructure Limited* (ICSID Case No. ARB/13/36) choose the United Kingdom when seeking enforcement of unpaid awards.

Among the key factors that make the United Kingdom proactive in the enforcement of investment arbitral awards, the State Immunity Act 1978 and its exceptions must be mentioned. The State Immunity Act 1978 of the United Kingdom establishes the conditions under which a sovereign state may be sued in British courts. This act is based on the principle of sovereign immunity, which generally prevents sovereign states from being sued without their consent. However, the act includes several exceptions to this immunity, allowing UK courts to have jurisdiction in certain cases involving sovereign states.

The exceptions to immunity set forth in the State Immunity Act 1978 are as follows:

Art. 3 Commercial transactions and contracts to be performed in the United Kingdom states in Section (1) that "*A State is not immune as respects proceedings relating to (a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom*." Therefore, a state loses its immunity in matters involving commercial transactions or contractual obligations that are to be carried out, either fully or partially, within the United Kingdom.

In Art. 8**,** Section (1) specifies that "*A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which— (a) has members other than States; and (b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners*." This allows legal proceedings against a state in relation to its participation in corporate bodies, partnerships, or organizations based in the United Kingdom, where the state is involved in commercial or business activities.

Special attention should be given to Section 9 regarding Arbitrations, as it explains that: (1) "*Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration*." (2) "*This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.*"

Considering the exceptions outlined, it is of interest to analyze the most relevant cases in which these exceptions have been applied to better understand the legal reasoning of the British courts in carrying out the enforcement of arbitral awards. First, we mention the case *NextEra Energy v. Spain***.** NextEra was awarded compensation due to the damage caused by Spain's policy shift in the renewable energy sector. However, Spain opposed compliance with the award, relying on the European Union's position that intra-EU arbitration is incompatible with EU law. This led NextEra to seek the enforcement of the award outside the European Union, in this case, the United Kingdom.

The legal basis for enforcement in the UK was the State Immunity Act 1978, as it was argued that by participating in the arbitration and accepting the Energy Charter Treaty (ECT), Spain had waived its immunity under this law. The commercial

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exception supported by Section 3 of the 1978 Act was used to enforce arbitral awards arising from commercial disputes. The UK court considered that the dispute between NextEra Energy v. Spain was a commercial dispute between a private investor and a sovereign state, as Spain was engaging in commercial activities by offering incentives in the renewable energy sector and then withdrawing them without compensating the investors.

On the other hand, Section 9 establishes that a sovereign state may not invoke immunity in relation to judicial proceedings arising from arbitration agreements previously consented to. In this case, Spain had agreed to submit to international arbitration directly under the signing of the Energy Charter Treaty agreement, thereby waiving its sovereign immunity concerning the enforcement of the arbitral award.

The award established that Spain must compensate the investors for the withdrawal of subsidies, as this action violated the principles of fair and equitable treatment set forth in the ECT**.** As part of the enforcement process, the UK courts authorized NextEra to seek anti-suit injunctions to prevent Spain from obstructing the enforcement of the awards. Additionally, Spain's assets in the UK were seized to satisfy the debt, which amounted to 290 million euros.

Following the same line of reasoning, we find the cases of *Isolux-Corsán v. Spain*, *Eiser Infrastructure Limited v. Spain*, and *Antin Infrastructure Services v. Spain*. All these cases are based on disputes related to the ECT. Additionally, all of them were in the same situation in that the claimant companies argued that the subsidy reforms by Spain severely impacted their investments, and they sought compensation for the damages suffered. Moreover, all of them resorted to the United Kingdom as a venue for the enforcement of their arbitral awards, and the UK courts also invoked the exceptions previously outlined in the State Immunity Act 1978. Spain did not present a notably different argument in any of the cases regarding why it opposed the enforcement of the awards, arguing the incompatibility of these with European Union law and attempting to argue that it should not be subject to the jurisdiction of foreign courts due to sovereign immunity, which the UK courts dismissed, once again relying on the exceptions of the State Immunity Act 1978.

Furthermore, it is particularly relevant to develop the *Micula case* (2019), as, although it is not directly related to Spain, it is significant due to the similarities in the proceedings for the enforcement of arbitral awards. Its resolution is crucial for understanding how UK courts handle the enforcement of arbitral awards when a sovereign state opposes compliance with the decision. Just like in the cases against Spain (such as *NextEra, Isolux-Corsán, Eiser,*etc.), Romania attempted to invoke sovereign immunity to avoid complying with the award. However, UK courts, have demonstrated that sovereign immunity cannot be applied when a state has agreed to submit to arbitration and has explicitly waived that immunity. This sets a fundamental precedent for Spain, which has also waived its immunity by signing the ECT and participating in international arbitration.

1) Anti-Suit Injunctions as a Reinforcement of UK Jurisdiction

In addition to traditional enforcement processes, the British courts have also embraced proactive procedural remedies aimed at enhancing the effectiveness of international arbitral awards, particularly in response to obstructive or dilatory tactics employed by sovereign states. Among these mechanisms, the issuance of anti-suit injunctions stands out as a powerful legal tool, whose strategic significance has increased considerably in the post-Brexit legal landscape.

The United Kingdom Supreme Court, in its judgment of 23 April 2024, confirmed a decision of the English Court of Appeal in *UniCredit Bank v. RusChemAlliance* (EWCA Civ 64, 2024), holding that English courts may grant an anti-suit injunction even where the arbitration is seated abroad, as long as English law governs the arbitration agreement.

An anti-suit injunction prevents a party from initiating or continuing legal proceedings in a different jurisdiction. This type of legal remedy is a powerful and effective tool for parties engaged in international litigation. Furthermore, since the United Kingdom's departure from the European Union, the use of anti-suit injunctions has broadened considerably, now applying

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to a wider range of cases Dougherty & Mackenzie, 2022).

This remedy is particularly relevant in the case of Spain, which has repeatedly pursued parallel proceedings in courts across EU Member States—such as the Netherlands, Belgium, and Luxembourg—in an effort to challenge or delay the enforcement of arbitral awards issued under the Energy Charter Treaty. In response, UK courts have granted anti-suit injunctions at the request of investors, effectively preventing Spain from taking steps in other jurisdictions that would interfere with enforcement proceedings in the United Kingdom.

As it occurred in the case of *NextEra Energy v. Spain (CSID Case No. ARB/14/11),* where the company NextEra sought an anti-suit injunction to prevent Spain from obstructing the enforcement of its arbitral award through court proceedings within the European Union, particularly in countries such as the Netherlands and Luxembourg. Spain had attempted to challenge enforcement in these jurisdictions, arguing that the award was incompatible with European Union law. In response, the English courts issued an anti-suit injunction restraining Spain from interfering with enforcement efforts in the United Kingdom, thus allowing NextEra to proceed with the attachment of Spanish assets located there.

Beyond the context of investment treaties, the case of *QBE Europe SA/NV and another v. Generali España de Seguros y Reaseguros*, decided by the High Court of England and Wales, Case No: CL-2022-000322 (2022), is also particularly relevant. In the mentioned case, the Spanish insurer had initiated proceedings in Spain despite a valid arbitration clause governed by English law. The claimants successfully applied for an anti-suit injunction, with the English court finding that the commencement of parallel litigation breached the arbitration agreement and risked undermining the integrity of the arbitral process.

Although this case did not arise under the Energy Charter Treaty, it is significant because it confirms the willingness of English courts to issue injunctive relief against proceedings brought in other States — including European jurisdictions — when those proceedings breach a valid arbitration agreement governed by English law. This approach marks an important development in the use of anti-suit injunctions and reinforces the United Kingdom's position as a reliable venue for arbitration and the enforcement of arbitral awards, offering effective judicial protection against procedural strategies designed to frustrate agreed dispute resolution mechanisms.

2) Precautionary measures and seizures against Spain

It is equally important to highlight the measures taken to ensure that investors were able to recover the debts owed by Spain. Returning to the *NextEra Energy* case, the company successfully secured orders from the UK courts to seize assets and property belonging to the Kingdom of Spain located within the United Kingdom, starting with assets related to AENA (AENA, 2024).

This decision was not a procedural rarity, considering Spain's repeated failure to pay the compensation awarded in relation to the withdrawal of subsidies for renewable energy investments, several courts in the United Kingdom have authorized the seizure of Spanish state-owned assets. These measures have been adopted in response to Spain's non-compliance with various arbitral awards, particularly those arising from disputes in the renewable energy sector (Spanish Renewable Debt Initiative, 2024).

As such, in April 2023, the High Court of England and Wales authorised the provisional seizure of the Instituto Cervantes' premises in London, located at 15–19 Devereux Court, Temple. This measure was part of enforcement proceedings in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), following Spain's failure to comply with a €290 million arbitral award issued under the Energy Charter Treaty (ECT). The estimated market value of the property ranged between €5 and €10 million. (De Miguel, 2023).

During the same month, the UK Supreme Court authorised the seizure of the premises of the Catalan Government's Trade

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and Investment Office (ACCIÓ), located at 17 Fleet Street. This enforcement action was connected to the same set of proceedings and arose from Spain's persistent refusal to satisfy its payment obligations under the arbitral award. The building, valued between €3 and €5 million, was deemed subject to execution under UK law (González Navarro 2023).

Another significant enforcement measure occurred in August 2023, when British courts ordered the seizure of the properties of the Vicente Cañada Blanch Spanish School in London, located at 317 and 318 Portobello Road. These buildings also host offices for the Spanish National University of Distance Education (UNED) and examination rooms for the Instituto Cervantes. The seizure formed part of broader efforts to enforce awards in favour of claimants such as *Antin Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V.* (ICSID Case No. ARB/13/31), with an estimated value of €10 to €15 million (ICSID, 2018).

In November 2023, a British court also authorised the freezing of four bank accounts held by the Kingdom of Spain with Banco Santander UK Plc, with a total balance of approximately €800,000. Although modest in value compared to the real estate assets, this action was indicative of a broader creditor strategy to target both tangible and financial assets to recover sums awarded by international arbitral tribunals (De Miguel, 2023).

These measures have been taken within a legal framework in which the United Kingdom has adopted a firm stance on the enforcement of international arbitral awards, even against sovereign states. One illustrative example is the case involving the Instituto Cervantes, where the British courts scrutinised the nature of the property and its potential connection to diplomatic functions to determine whether it was exempt from enforcement.

Specifically, the courts assessed whether the premises were entitled to immunity under Section 13 of the State Immunity Act 1978, which provides protection for property used for diplomatic or consular purposes. However, they concluded that the Instituto Cervantes functioned primarily as a cultural institution, without engaging in core diplomatic activities. Given the predominantly educational and cultural nature of its operations, the property was found not to qualify for sovereign immunity and was therefore subject to enforcement measures.

This trend has been reinforced by decisions such as *Infrastructure Services Luxembourg SARL and Energia Termosolar BV v. Kingdom of Spain (Case* No: CA-2023-001556, *2024),* where the High Court rejected Spain's sovereign immunity defenses, citing Spain's prior consent to ICSID jurisdiction and the application of relevant British legislation. In this regard, the Court of Appeal of England and Wales, in the previous case, reaffirmed that States cannot invoke sovereign immunity to resist the registration and enforcement of ICSID awards in the United Kingdom, pursuant to Article 54 of the ICSID Convention and the State Immunity Act 1978.

These developments illustrate a robust approach by the British courts in addressing Spain's non-compliance, underscoring the United Kingdom's role as a key jurisdiction for the enforcement of international arbitral awards. In all of these cases, the rulings have been favourable to the creditors, thereby increasing the pressure on the Spanish government to honor its financial obligations.

B. Enforcement In Extra-EU Jurisdictions: The Case of The United States

U.S. courts have shown a progressively favourable attitude towards the enforcement of intra-EU arbitration awards, providing a new avenue for investors to seek redress. The origins of U.S current position regarding enforcement, could be located in 2019, when the D.C. District court in *Micula v. Romania* (D.C. Cir. 2024) issued a landmark decision, as it was one of the first cases in which an U.S. court upheld the enforcement of an intra-EU award.

In the previously mentioned case, Romania argued that, following *Achmea*, there was no valid intra-EU arbitration agreement and, therefore, no jurisdiction under the FSIA's arbitration exception. Nonetheless, the court ruled that *Achmea* did not apply since the dispute arose before Romania joined the EU. More recently, in May 2024, on appeal, the D.C.

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Circuit affirmed the District Court decision, and once again upheld the enforcement of the Micula award.

Regarding the Spanish Intra-EU Arbitration saga, three EU Investors, the companies: NextEra (D.D.C. 2023), 9REN Holding (D.D.C. Feb. 15, 2023), and Blasket (D.D.C. 2023 D.D.C. 2023) have sought to enforce their arbitration awards in US courts. However, the District Courts, in deciding their cases reached conflicted decisions. While in *NextEra* and *9REN* the court held that it had jurisdiction to enforce the awards under the FSIA (Foreign Sovereign Immunities Act)'s arbitration exception, in *Blasket,* the District Court granted Spain´s motion to dismiss and deemed Spain immune.

On appeal, the DC Circuit on August 16, 2024, in *NextEra v. Spain,* resolved the appeals from the three cases – *NextEra, 9REN Holding*, and *Blasket Renewable Investments*- and affirmed the legitimacy of arbitration awards made under the Energy Charter Treaty (ECT), even when these awards were against EU member states such as Spain, and ruled that US courts have jurisdiction to enforce arbitral awards issued in intra EU disputes.

The significance of these decisions relay in US courts deciding, in a relatively short period of time, that they have jurisdiction to enforce intra-EU awards, and by doing so, they develop the bases for the enforcement awards stemming from intra EU awards in non-EU jurisdictions, which could open the door to investors who are unable to enforce the awards on Europe, to try a new way and seek enforcement in the US courts.

In response to the adverse rulings, Spain petitioned the D.C. Circuit to rehear the case, asserting that the panel erred in holding that U.S. courts had jurisdiction under the Foreign Sovereign Immunities Act (FSIA) and in finding that the Energy Charter Treaty provided valid consent to arbitrate intra-EU disputes

More specifically, Spain petitions to dismiss the enforcement of the awards in the U.S. focused on two main arguments. First, it contended that U.S. courts lacked jurisdiction because Spain, as a sovereign state, is immune from suit. It further argued that, considering the CJEU's rulings in *Achmea* and *Komstroy*, investment arbitration between EU member states is incompatible with EU law, and that the arbitration agreement in the ECT is invalid and thus inapplicable between EU members. Second, Spain initiated legal proceedings in the Netherlands and Luxembourg, seeking, among other remedies, to enjoin the companies under EU law from pursuing enforcement in U.S. courts.

However, on December 2, 2024, the D.C. Circuit denied Spain's petition for rehearing. Subsequently, on May 1st Spain filed a petition before the U.S. Supreme Court, asking it to determine whether U.S. courts may exercise jurisdiction over sovereign states in actions to enforce intra-EU arbitral awards. The Supreme Court's decision on whether to hear the case is still pending and will undoubtedly impact the future of investment treaty enforcement in the United States.

1) United States Jurisdiction, a Matter of Sovereignty

The key legal question according to the previously cited precedent rely upon whether U.S. Tribunals have jurisdiction over foreign states and if so, under what conditions.

Traditionally, sovereign states enjoy immunity from lawsuits in foreign Courts, as a principle rooted in the doctrine of sovereign immunity. This immunity is not a of a general reach, and it only applies when the state is acting in its sovereign capacity (*jure imperii*) and not when engaging in commercial or business activities (*jure gestionis*). This distinction, long recognized in international law, was explained by Justice Souter, according to Sicard-Mirabal & Derains (2018):

> *"Under the restrictive, as opposed to the absolute, theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gestionis) … a state engages in commercial activity under the restrictive theory where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market."*

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In the United States, the previously mentioned Foreign Sovereign Immunities Act (FSIA) is the exclusive legal framework that establishes specific circumstances under which US courts may exercise jurisdiction over a foreign state. According to the FSIA, sovereign immunity is not absolute and may be waived or limited if certain exceptions apply. These exceptions include situations where the foreign state has engaged in commercial activities that have a direct effect in the United States, committed tortious acts within US territory, or violated international agreements involving arbitration.

Specifically, the FSIA contemplates six exceptions, codified in 28 U.S.C. § 1605, under which a foreign state is not immune from the jurisdiction of U.S. courts: (i)When the foreign state has waived its immunity, either explicitly or by implication; (ii) When the action is based on a commercial activity carried out by the foreign state in the United States or having a direct effect in the United States; (iii) When rights in property taken in violation of international law are at issue, and that property (or property exchanged for it) is present in the United States in connection with a commercial activity carried out by the foreign state; (iv) When rights in property located in the United States, acquired by succession or gift, or involving immovable property situated in the United States, are at issue; (v) When money damages are sought against a foreign state for personal injury, death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state; and (vi) When the action is brought to enforce an agreement in which the foreign state has agreed to submit disputes to arbitration, either with or for the benefit of a private party.

To determine whether it had subject matter jurisdiction to enforce the arbitral awards in the United States, the courts first had to assess whether any FSIA exceptions applied. If no exception under 28 U.S.C. § 1330(a) applied, U.S. courts would lack jurisdiction over the foreign state.

In the *NextEra v. Spain* case, the investors claimed that the court had jurisdiction to enforce the arbitral award against Spain because two FSIA exceptions applied, the waiver and arbitration exceptions, thereby allowing Spain to be subject to judicial proceedings.

The waiver exception provides that:

> "*A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States, in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver*".

The arbitration exception, codified in the Section 1605(a)(6) 28 U.S.C., states that:

> *"A foreign state shall not be immune from the jurisdiction of courts of the United States in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate."*

In this case the DC Circuit found that it had jurisdiction because the arbitration exception applied and decided not to analyse the waiver exception as the law is still unsettled in that circuit.

The DC Circuit then recalled that three jurisdictional facts must be satisfied to proceed under the FSIA's arbitration exception: (i) An arbitration agreement, (ii) an arbitration award, and (iii) a treaty potentially governing award enforcement. Finding that Spain did not oppose the existence of the award and a treaty governing the enforcement in the United States, the court focused only on the existence of the arbitration agreement.

To find the existence of an arbitration agreement, the FSIA requires an agreement made by the foreign state, either *with* or *for* the benefit of a third party. The distinction between the two is that in an arbitration agreement made with the investors,

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the state enters into a direct agreement with a private investor. In contrast, an agreement made for the benefit of investors is one where the state enters into an agreement with another party, not the investor itself, but that ultimately benefits the investor (Allen, 2025).

Because in investment arbitration the arbitration provision is contained in an investment treaty, and no investor is a party to a treaty, since it is a contract between nations, an investment treaty cannot constitute an agreement to arbitrate with an investor (Simmons, 2025). Therefore, for the FSIA's arbitration exception to apply, the court had to determine whether Spain consented to arbitration through the arbitration clause in the ECT, and whether the treaty was intended for the benefit of the investors.

In examining whether Spain had consented to arbitrate under the ECT, the DC Circuit found that Article 26(3)(a) of the ECT13 contained Spain's unconditional offer and consent to arbitrate with investors. Assessing whether the ECT was intended to benefit investors, Spain acknowledged that the treaty benefited certain investors but argued that, under *Komstroy*, it did not extend to the companies because the ECT does not permit intra-EU arbitration, and the companies are based in the UE. However, the D.C. Circuit rejected Spain's argument, ruling that by signing and ratifying the ECT, Spain had given 'unconditional consent' to arbitrate with investors from all signatory nations, not just those outside the EU, and therefore it satisfies the FSIA´s arbitration exception.

Finally, the DC court clarified that to apply the arbitration exception, the FSIA focuses only on jurisdictional questions, such as the validity or existence of the agreement, and that disputes about the scope of the arbitration agreement decide the award's enforceability on the merits, and that question corresponds to the lower court, the District Court, to be answered.

2) Anti-Suit Injunctions as a Reinforcement of US Jurisdiction

As an additional effort to prevent the enforcement of the awards in the US, when the investors filed a petition to enforce the arbitral award before the D.C. District Court, Spain initiated proceedings in the courts of Luxembourg and the Netherlands,—the investors' home countries—seeking an anti-suit injunction to bar them from pursuing enforcement in the US (Simmons, 2025).

In response, investors protected themselves in two ways: First, they sought anti-anti suit injunctions in the US Courts to prevent Spain from continuing the Dutch proceedings. Second, AES and Ampere Equity, both Dutch companies, assigned their awards to Blasket Renewable Investments, a US company. By assigning their awards and asking the DC Circuit to substitute Blasket as a petitioner, the Dutch companies attempted to change the nationality of the party enforcing the award before domestic courts so that Blasket could continue with the enforcement. Despite Spain´s objections, the court granted the motion and Blasket continued with the proceedings.

The anti-suits injunctions were granted by the District Court, who also issued a temporary restraining order against Spain. The court held that the injunctions were warranted because Spain purpose for initiating the Dutch and Luxemburgish suits was to terminate the ongoing district court actions, and the injunctions served as a defensive method.

In appeal, the DC Circuit reversed the District Court's decision and denied the anti-suit injunctions on the grounds that they were an abuse of discretion. The court noted that injunctions against sovereign entities are unprecedented, that such injunctions implicate different interests when directed at private parties versus sovereigns, and that granting them would *'impinge on the sovereignty*' of both the Spanish government in its litigation rights and the Dutch and Luxembourgish courts in their authority to decide an issue that Spain and the EU regard as a critical matter of EU law.

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C. Enforcement In Extra-EU Jurisdictions: The Case of Australia

Australia is one of the primary jurisdictions to which countries affected by Spanish debt frequently turn for the enforcement of arbitral awards. The underlying reason for this is that Australian courts tend to be reluctant to accept the criteria of sovereignty often argued by Spain, which, within the Australian legal context, tend to result solely in a significant increase in Spain's indebtedness.

As previously noted in the case of UK jurisdiction, Spain -among other claims- raises the issue of immunity, specifically invoking the doctrine of sovereign immunity. The core of Australia's rejection of Spain's position hinges on its disagreement with this assertion.

This stance primarily stems from Australia's interpretative approach to the criteria outlined in the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)*, commonly referred to as the ICSID. Furthermore, Australia's understanding of its legal terminology diverges from that of countries such as Spain, as well as from interpretations prevalent in the United States and the United Kingdom. This divergence in the hermeneutic application and understanding of legal vocabulary is the fundamental reason why Australia's approach to investment arbitration and the recognition and enforcement of foreign arbitral awards differs from these other legal systems, particularly in the context of the present discussion.

Regarding the interpretation that Australia applies to the ICSID Convention, Australian courts have affirmed that a state's accession to said convention entails a waiver of sovereign immunity. Recognizing that, just as the agreement between the parties to resolve disputes through conciliation or arbitration via these methods is binding, it is equally essential to give due consideration to the conciliators' recommendations and to ensure the enforcement of arbitral awards issued by the arbitrators (Allin and Olins, 2024).

In its judgment of April 12, 2023 the Australian Supreme Court stated that, generally, a foreign state -such as Spain- enjoys immunity from jurisdiction under Australian law. However, it further indicated that this general rule does not necessarily apply to Spain, given the provisions of Australia's Foreign States Immunities Act of 1985.

This Immunities Act regulates when and how a foreign state may be considered immune, and under which circumstances it may be subject to legal proceedings. The law establishes that foreign states generally benefit from sovereign immunity, which prevents them from being sued without their consent. Nonetheless, exceptions exist.

In this context, although Article 9 of the Act initially states that a foreign state is immune from the jurisdiction of Australian courts in proceedings, one notable exception to this general immunity regime is when a state has submitted to the jurisdiction of Australian courts. In such cases, the state would be deemed to have waived its immunity from jurisdiction.

Furthermore, the Australian High Court unanimously determined that Spain's accession to the ICSID Convention constituted a waiver of its right to sovereign immunity. The Court held that this exception applies to Spain because signing the ICSID constitutes an explicit waiver of sovereign immunity. Specifically, Articles 53 and 54 of the Convention reinforce this interpretation: Article 53 states that "*The award shall be binding on the parties and not subject to appeal or any other remedy*," while Article 54 provides that *a foreign state enjoys immunity from jurisdiction in Australia* but also recognizes that *each contracting state - including Australia- will acknowledge as binding any award rendered under the Convention and will enforce monetary obligations arising from it within its territory as if it were a final judgment of a national court*. These provisions collectively constitute an explicit waiver of immunity, rendering applicable the criteria set forth in the Foreign States Immunities Act 1985.

Consequently, regarding the recognition and enforcement of Spanish arbitral awards, Australia does not consider sovereign immunity to be applicable; however, this does not necessarily imply a waiver of the state's immunity from execution.

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The Federal Court of Australia addressed this issue in the *Eiser* case (2020). According to the said Tribunal, the right to execute one of the awards that constituted part of Spain's debt (Dautaj, 2022) under Article 35.1 of the International Arbitration Act 1974, which states: "*An arbitral award, regardless of the country in which it was made, shall be recognized as binding and, upon application to the competent court, shall be enforced in accordance with the provisions of this section and section 36."*

1) Australia Argument on the difference of Recognition, Enforcement and Execution

At this juncture, the Australian court had achieved a singular milestone: it recognized one of the arbitral awards that ordered Spain to settle its debt obligations. While Australia did not proceed to execute these awards, the critical factor lies exclusively in the interpretative hermeneutics of Australian legal criteria.

In many common law jurisdictions, the execution of an arbitral award can be viewed as a procedural step distinct from its recognition and enforcement. This execution may be necessary to give effect to an award in situations where the debtor fails to comply with judicial orders related to it. For example, after the award creditor sought and obtained a court judgment recognizing and enforcing the monetary obligations set forth in the award, if the debtor persists in non-compliance, the creditor may request the court to execute the award against specific assets or property of the debtor (Battinsson and Mills, 2024).

Therefore, a more precise classification, as adopted by the Tribunal, is as follows: Recognition refers to the court's determination that an international arbitral award should be considered binding; Enforcement is the legal process by which the award is accorded the same status as a court judgment; and Execution involves the measures taken to implement the enforcement of the award, typically involving actions against the debtor's property. In investment treaty arbitration, execution often necessitates an additional procedural step when the debtor is a state, which is usually reluctant to comply voluntarily (Battinsson and Mills, 2024).

With these principles in mind, the Australian High Court interpreted that the waiver of immunity by a foreign state from adjudicative jurisdiction in Australian courts applies to recognizing and enforcing, but not to executing, the award. The Court explicitly stated: "*It is unnecessary to engage in that debate for the purposes of the present case because Article 54(3) of the Convention on International Investment requires the execution solely of monetary obligations arising from an award. This would seem to exclude declaratory awards, judicial mandates, and specific performance orders.*

Furthermore, the Court referenced the English text of the ICSID Convention, which clearly distinguishes between recognition, enforcement, and execution. Based on this, Article 54(1) of the Convention provides that an award relating to monetary obligations-i.e., "obligations pecuniary"-shall be recognized as binding and shall be enforced by the designated courts as if it were a court judgment. Additionally, Article 55 preserves only the foreign state's immunity from enforcement post-judgment, and not from recognition or prior enforcement measures; such preservation conflicts with the obligation of the designated courts to enforce awards issued by the Centre under the Convention.

In this context, the Australian Supreme Court recognized Spain's owed debts to the companies that initiated the arbitration. Since then, the judiciary has focused on specific assets, such as those belonging to Navantia's Australian subsidiary, which could potentially be subject to attachment.

Due to the failure of voluntary compliance, the claimants have initiated enforcement measures, including orders aimed at interrogating two Spanish consular officials in Australia to identify and document assets susceptible to attachment both within Spain and in Australia (Redwood et all, 2025).

The "examination of officials" is a common legal mechanism in international enforcement proceedings, particularly when the debtor resists compliance and the creditor need information regarding assets located in foreign jurisdictions. The Spanish government argued that such orders infringe upon diplomatic privileges, asserting that the measure could violate

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immunities. However, the court noted that this issue can be addressed during the procedural phase and does not justify suspending the requested measure.

The Australian judicial authority justified imposing a financial guarantee on Spain based on its status as a "recalcitrant debtor." The court highlighted that Spain has shown no willingness to comply with the award or with previous procedural costs. The measure aims to protect the interests of the claimants by preventing additional legal expenses that they may be unable to recover if their claim succeeds (Redwood et all, 2025). Consequently, if Spain persists in challenging the enforcement through procedural resources aimed at blocking asset identification, it must provide a guarantee of approximately USD 60,000 in an account designated by the Australian court. This amount is intended to cover potential damages and costs, including litigation expenses that could be awarded in the event of an adverse judgment against Spain. (Redwood et all, 2025).

In any case, at the end of August 2025, Australia's Federal Court has ordered the enforcement of multiple ICSID awards against Spain stemming from Spain's 2010–2014 overhaul of renewable-energy incentives. In Blasket Renewable Investments LLC v. Spain, the court reaffirmed that Spain had waived sovereign immunity by adhering to the ICSID Convention and that the awards—worth well over €400 million—are binding and enforceable in Australia.

Spain's defences were rejected across the board: the court found that EU-law objections based on Achmea and Komstroy have no traction in the Australian legal order, dismissed state-aid arguments, and declined the European Commission's bid to intervene. As a result, investors can pursue Spanish assets in Australia to satisfy the awards.

Beyond the immediate enforcement, the ruling is framed as a direct challenge to the EU's stance on intra-EU investment arbitration and as a signal of Australia's arbitration-friendly posture. It may bolster parallel enforcement efforts in other non-EU jurisdictions and intensify pressure on Spain amid broader disputes under the Energy Charter Treaty.

III. CONCLUSIONS

The trajectory of investment arbitration within the European Union illustrates the profound tension between the international investment protection system and other sociopolitical factors such as the supremacy of European Union law and the principle of autonomy.

Spain's persistent refusal to comply with arbitral awards is not a single actor strategy, but a legal remedy, strongly supported by EU institutions and grounded in the CJEU's jurisprudence in *Achmea* and *Komstroy*. Nonetheless the case of Spain is paradigmatic, as by applying CJEU's doctrine, this State has positioned itself as the most non-compliant state worldwide, not due to financial incapacity but as a deliberate political choice.

This posture has eroded the legal security investors need in their operations, lacking sufficient confidence in the EU as a reliable legal space, has driven claimants to seek enforcement abroad. Specially given that strong alternative jurisdictions have responded with strikingly different approaches to their enforcement requests.

The United Kingdom has emerged as one of the most assertive venues for enforcement. Freed from the constraints of EU law after Brexit, British courts have consistently upheld arbitral awards against Spain, dismissing claims of sovereign immunity and even authorizing the seizure of assets belonging to the Spanish state, including cultural and commercial properties.

The use of anti-suit injunctions and precautionary measures demonstrates a firm judicial commitment to safeguarding investor rights and reinforcing London's reputation as a global arbitration hub. In doing so, the UK has sent a clear message: international commitments must be respected, and arbitral awards are not mere symbolic pronouncements but binding obligations that give effect to the rule of law in international investment.

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Australia has adopted a similarly robust stance, interpreting Spain's accession to the ICSID Convention as a tacit waiver of immunity for the recognition and enforcement of arbitral awards. Although this waiver does not extend to immunity from execution, Australian jurisprudence has nonetheless marked a turning point by affirming that Spain's obligations under ICSID cannot be brushed aside by invoking EU law or sovereign immunity. By compelling recognition and creating conditions for asset-related measures, Australian courts have further consolidated the country's role as a credible forum for ensuring that investment arbitration awards are not deprived of practical effect.

By contrast, the United States has thus far displayed greater caution. Although recent rulings of the D.C. Circuit have affirmed jurisdiction under the FSIA's arbitration exception and recognized Spain's consent to arbitrate under the Energy Charter Treaty, no Spanish assets have yet been executed in U.S. territory. The pending merits questions before the District Court—particularly whether the ECT arbitration clause extends to intra-EU disputes—and Spain's petition before the U.S. Supreme Court inject a significant degree of uncertainty into the future of enforcement. Should the Supreme Court agree to hear the case, its ruling could establish a nationwide precedent on the relationship between sovereign immunity and intra-EU arbitration, reshaping the legal landscape for enforcement in the United States.

Taken together, these developments underscore a growing fragmentation in the governance of international investment law. While the EU prioritizes the primacy of its legal order, external jurisdictions are stepping in to fill the enforcement gap, producing a mosaic of contradictory practices.

For investors, this offers new avenues of redress but at the cost of heightened uncertainty and forum shopping. For the EU, the strategy of resisting arbitral enforcement undermines its credibility as a normative actor, weakens its institutional coherence, and risks diminishing its influence in shaping international standards. Unless a consistent and reconciliatory framework is developed, the present trajectory will deepen the divide between regional and global regimes, strain diplomatic relations, and jeopardize the legitimacy of investment arbitration as a neutral and effective mechanism of dispute settlement.

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Fecha de envío: 10/10/2025

Fecha de aceptación: 25/11/2025