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How States Comply with Investment Treaty Arbitration Awards: Insights from a 2022 Report on Compliance

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Amidst the turmoil surrounding the Energy Charter Treaty (ECT) and the announced withdrawal by [Poland](#), Spain, the Netherlands, France, Slovenia and Luxembourg, the very first edition of the [Report](#) on compliance with investment treaty awards by States has been published by the present author.

Whereas the discussion usually focuses on whether international investment agreements (IIAs) and the investor-State dispute settlement mechanism (ISDS) contained in them are pro-investor biased and thus should be reformed or even completely removed as has been the case within the EU, the question to what extent States actually comply with their international obligations and pay awards rendered against them is hardly discussed.

The inspiration for writing this Study, coupled with the wider aim of tracking the compliance level of States on a systematic and regular basis, comes from a highly interesting article written two years ago by the late Emmanuel Gaillard and Ilija Mitrev Penushliski entitled “[State Compliance with Investment Awards](#)”.

The research for this Report has been performed in the first half of this year and is based on publicly available sources (free sources as well as behind paywalls). The research compiled the known investment treaty arbitration disputes regarding the top twenty countries which have faced most of such disputes. Subsequently, the research collected available information regarding the outcome of the disputes, and in all cases of adverse awards against States, tried to find information regarding whether or not the States have complied with those awards by paying the amount of compensation. A State is classified as non-compliant whenever it refuses to pay the award by trying to annul or set aside the award either at the international law level (i.e., through ICSID Annulment) or at the national law level by initiating setting aside procedures before domestic courts.

The Report reveals the following notable outcomes.

Key Trends in State Compliance with Investor-State Treaty Arbitration Awards

First, the Report underscores the high number of EU member states, in particular Spain, Czech Republic, Poland, Romania, Hungary, Croatia, Slovakia, Italy, Bulgaria, Germany, and the

Netherlands, which have faced multiple ECT disputes in the past years.

Second, the International Law Compliance Index, which has been created on the basis of this Report and aims to rank the States according to their non-compliance level, reveals that Spain has been facing more than 50 intra-EU ECT claims resulting in damages claims totalling more than US\$ 9.5 billion so far.

Indeed, adverse ECT awards continue to be rendered against Spain, such as in the *Eurus Energy v. Spain* case (ICSID Case No. ARB/16/4), award issued on 14 November 2022), *Cavalum v. Spain* case (ICSID Case No. ARB/15/34, award issued on 29 September 2022) and the *Mathias Kruck and others v. Spain* case (ICSID Case No. ARB/15/23, award issued on 14 September 2022). Also, on 10 June 2022, the ICSID ad hoc Annulment Committee upheld the adverse ECT award in the *RREEF Infrastructure v. Spain* case (ICSID Case No. ARB/13/30).

More importantly, the Report confirms the fact that Spain ranks second in the world (behind Venezuela and before Russia) the country which most frequently refuses to pay the awards rendered against it, with an outstanding amount of at least US\$ 700 million.

Third, this Study highlights the fact that the overwhelming majority of intra-EU ECT disputes in fact concern renewable energy sources, in particular, the retroactive withdrawal of guaranteed feed-in-tariffs for solar and wind farms.

Fourth, whereas, in contrast to the often-repeated narrative that the ECT mainly protects unclean energy producers, the Study also shows that only a handful of ECT disputes relate to fossil fuel or nuclear energy, which, moreover, are far more often settled than renewable energy cases. Reference can be made to the *Vattenfall v. Germany* case, which Germany settled for EUR 1.5 billion as opposed to the claimed EUR 4.7 billion.

Similarly, the *RWE and UNIPER v. the Netherlands* cases, which relate to the phase-out of recently constructed coal-fired power plants have become effectively halted for different reasons. UNIPER had to withdraw its claim as part of the rescue package, which ultimately resulted in the nationalization of UNIPER. The *RWE* case has been thrown out by a German court following a successful injunction by the Netherlands arguing that the dispute is “inadmissible” because it must be considered to be incompatible with the CJEU’s *Komstroy* and *Achmea* jurisprudence. Although, this judgment can be appealed before the German Supreme Court, it seems unlikely that it will rule differently.

Annual Compliance Report and Index

In sum, this Study provides a fact-based analysis highlighting that most ECT disputes actually concern measures related to renewable energy, rather than fossil fuel, and that several EU member states, in particular, Spain, belong to the most non-compliant States.

Given the dynamic developments in international investment law, in particular fuelled by the behaviour of the EU and the actions taken by the EU member states in terms of preventing the recognition and enforcement of intra-EU BITs and intra-EU ECT awards as per the *Termination Agreement* for intra-EU BITs, the similar proposed inter-se agreement regarding the ECT and the CJEU’s *Micula* judgment, this Compliance Report and the Index will be updated and incrementally

expanded by including more countries on an annual basis.


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