

# Kluwer Arbitration Blog

## States Comply Less With Investment Treaty Arbitration Awards: Insights From a 2023 Report on Compliance

Nikos Lavranos (NL-Investmentconsulting) · Sunday, November 26th, 2023

The second updated edition of the “[Report on compliance with investment treaty awards by States](#)” (the ‘Report’) has been recently released by the present author (see for coverage of the 2022 version of the report [here](#)).

In light of the [termination of intra-EU international investment agreements \(IIAs\)](#), the [failure to approve the modernized Energy Charter Treaty \(ECT\)](#) by the EU and its member states as well as the ongoing discussions of reforming the Investor-State Dispute Settlement (ISDS) mechanism, in particular within [UNCITRAL Working Group III](#), this Report takes stock of the track record of States’ compliance with adverse ISDS awards compared to the first report published in October 2022.

Whereas the discussion usually focuses on whether IIAs and 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 research for this updated Report covers the developments from October 2022 until July 2023 and is based on publicly available sources (free sources as well as behind paywalls such as ICSID, UNCTAD Investment Policy Hub, ITALAW, GAR, IA Reporter and Jus Mundi). 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 those disputes, focusing in particular on the question whether or not the States have complied with those awards by paying the amount of compensation.

More specifically, the following four broad classifications were used to classify the status and outcome of the cases:

- **State prevailed** = Tribunal declined jurisdiction, dismissed the case or otherwise discontinued the arbitration proceedings.
- **Unpaid by State** = covers all the situations in which Respondent refuses to pay a final and binding adverse award by initiating annulment, setting aside procedures or using other procedures which lead to delay of payment or even non-payment of the award.
- **Pending** = covers the situations of arbitral procedures which are still pending at the international level as well as enforcement procedures at the domestic level.

- **Otherwise resolved** = covers settlement agreements and similar situations which have led to the termination of the arbitral procedure prior to rendering a final award.

Compared to the [2022 results](#), the Report reveals the following notable developments.

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

First, the Report underscores again 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 and continue to face multiple IIA and ECT disputes in the past years.

Second, both the number of unpaid awards as well as the outstanding amount of compensation have almost doubled from the previous year. Accordingly, the number of Spain's unpaid awards has risen from 8 to 15, while the outstanding amount of compensation has doubled from at least USD 700 million to at least USD 1.3 billion. In addition, Spain has incurred interest rates and legal fees totalling USD 270 million. The Report reveals that Spain has been facing more than 50 intra-EU ECT claims resulting in damages claims totalling more than USD 10 billion so far.

In terms of adverse ECT awards, Spain tops the ranking followed by Italy and Romania, which have 14 and 8 unpaid adverse awards outstanding, respectively.

Indeed, adverse ECT awards continue to be rendered against Spain, such as *Sevilla Beheer B.V. and others v. Spain* (ICSID Case No. ARB/16/27) award issued on 22 May 2023, *INFRACAPITAL v. Spain* (ICSID Case No. ARB/16/18) award issued on 2 May 2023, *Triodos v. Spain* (SCC Case No. 2017-194) award issued on 24 October 2022. Moreover, annulment decisions have been issued which confirmed adverse awards against Spain, for example, *OperaFund v. Spain* (ICSID Case No. ARB/15/36) Decision on Annulment of 2 March 2023, *Watkins v. Spain* (ICSID Case No. ARB/15/44) Decision of Annulment of 21 February 2023.

Third, the Report confirms again the fact that the overwhelming majority of intra-EU IIA/ECT disputes in fact concern renewable energy sources. This finding thus debunks the often-heard argument that the [ECT is actually protecting fossil fuels](#).

Fourth, the Report reveals a new emerging trend, namely, that enforcement of intra-EU ECT awards is increasingly sought outside the EU. Indeed, Australia and the [UK have emerged as new preferred investor-friendly jurisdictions](#) for the successful recognition and enforcement of intra-EU IIA/ECT awards – next to the US which has traditionally been a preferred jurisdiction. For example, in April 2023, the High Court of Australia in *Spain v. Infrastructure Services Luxembourg SÀRL* held that Spain had waived its foreign State immunity in Australia by ratifying the ICSID Convention. Consequently, Spain lost its foreign State immunity. Accordingly, the High Court confirmed that courts were able to 'recognise' and 'enforce', but not 'execute', the EUR 101 million ICSID award against Spain.

Previously, in 2020, the Federal Court of Australia also enforced the *Eiser Infrastructure Ltd v. Spain* intra-EU ECT award of EUR 128 million. In May 2023, in a similar case before the UK High Court, his Honour Justice Fraser supported the conclusion reached by the Australian High Court. Most recently, the [UK High Court has ruled that the \*Antin v. Spain\* award holders are](#)

entitled to seize Spanish property in London in order to enforce their EUR 120 million ICSID ECT award against Spain.

Similarly, in 2020, the UK Supreme Court enforced the USD 250 million intra-EU IIA *Micula v. Romania* award.

Given the recent decisions by the German Federal Supreme Court in *RWE/UNIPER* and *Mainstream*, which deprived claimants of their right to compensation when it ruled that EU member states are allowed to use “upstream national legal protection” to effectively stop intra-EU ECT ICSID proceedings due to a lack of an effective arbitration agreement, recognition and enforcement of intra-EU IIA/ECT awards will increasingly be sought outside the EU.

## 2023 International Law Compliance Index

Based on the results of the Report, the 2023 [International law Compliance Index](#) has been updated. The Index ranks the countries by the number of unpaid awards and the outstanding amount of compensation.

Accordingly, Venezuela ranks number 1 in the world as the most non-compliant State, followed by Spain, Russia, Ukraine and Argentina. In addition, it is worth noting that within the top 20 non-compliant countries, Italy, Czech Republic, Croatia and Poland feature as well.

From the perspective of upholding the rule of law, it is rather disturbing to see that EU member states are non-compliant with their international law obligations, thereby undermining the respect and effectiveness of international treaties such as the ECT but also more generally the ICSID Convention.

This is setting a bad example, which could easily be followed by other countries in the world.

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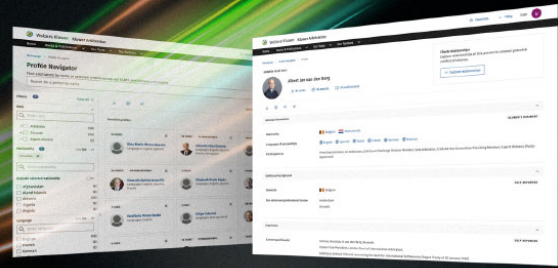
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