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Enforcing Intra-EU Investment Arbitration Awards in the U.S.: Jurisdiction Affirmed, But Final Decision Deferred to District Courts

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In a pivotal ruling on August 16, 2024, the U.S. Court of Appeals for the D.C. Circuit ("Appellate Court") addressed whether intra-EU arbitration awards issued under the Energy Charter Treaty ("ECT") are enforceable in U.S. federal courts. With Spain facing over $390 million in awards, the Appellate Court confirmed that U.S. courts have jurisdiction to enforce such awards but left the question of enforceability in each particular case to lower courts to decide—a significant yet cautious move in the enforcement of international arbitration awards. This case is among many where Spain is facing more than $1.3 billion in investor-State arbitration awards, and the investors may be looking to recognize and enforce these awards in the United States. This post summarizes and comments on the decision of the Appellate Court, including the background, proceedings leading up to the decision, and the rationale for the Appellate Court's holding.

Background

In a prior post, the authors reported on the oral argument in this case, pending the Appellate Court's panel's decision. For convenience, key pertinent facts are set forth below.

This case stems from Spain's withdrawal of energy incentives and the ensuing investor disputes under the ECT.

In the early 2000s, Spain introduced incentives to attract investments in renewable energy. Relying on these assurances, investors, including those from the EU, invested significantly in Spanish solar projects.

However, after the 2008 financial crisis, Spain retracted its subsidy programs, leading to substantial investor losses. Many investors sought relief through investment arbitration under the ECT and successfully won multi-million-euro awards against Spain.

During this time, the Court of Justice of the European Union issued rulings in *Slovak Republic v. Achmea* ("*Achmea*") and *Republic of Moldova v. Komstroy LLC* ("*Komstroy*") cases, effectively invalidating the ECT's investor-State dispute settlement ("ISDS") provision for disputes between nationals of one EU Member State and another EU Member State (so-called intra-EU objection).

This added a layer of complexity to the enforcement of the awards against Spain, an EU Member State, by investors from EU Member States.

After Spain refused to pay the awards, citing invalidity of the ECT's ISDS provision, a group of investors from the Netherlands and Luxemburg commenced actions in the United States District Court for the District of Columbia ("District Court") to recognize and enforce their awards. However, Spain moved to dismiss, arguing that it enjoys immunity under the Foreign Sovereign Immunities Act ("FSIA"), a law that establishes the default principle of immunity of foreign states. Spain also filed actions in Dutch and Luxemburgish courts seeking anti-suit injunctions to prevent the investors from pursuing their U.S. claims. In response, the investors asserted that the FSIA's arbitration and waiver exceptions to immunity apply and asked the District Court to issue *anti*-anti-suit injunctions forbidding Spain to seek anti-suit injunctions in foreign courts.

The District Court resolved these motions in opposing ways. In *NextEra Energy Global Holdings B.V. v. Kingdom of Spain* and *9REN Holding S.À.R.L. v. Kingdom of Spain*, Judge Chutkan found that the court has jurisdiction under the FSIA's arbitration exception and granted investors' *anti*-anti-suit injunctions. In contrast, in *Blasket Renewable Invs. v. The Kingdom of Spain*, Judge Leon found that Spain is immune under the FSIA and granted Spain's motion to dismiss the case. Judge Leon also denied the investors' *anti*-anti-suit injunction request.

The Appellate Court's Decision

The Appellate Court, in the opinion written by Judge Pillard, addressed Spain's challenges to the District Court's rulings, focusing on jurisdictional grounds under the FSIA and the propriety of *anti*-anti-suit injunctions. Judge Pan dissented in the *anti*-anti-suit injunction portion of the decision.

FSIA Jurisdictional Grounds

On appeal, Spain contested the District Court's jurisdictional rulings in *NextEra* and *9Ren*, while investors sought to overturn the dismissal in *Blasket*. The primary question was whether the District Court has jurisdiction to enforce the awards at issue under the FSIA's arbitration exception. The FSIA's arbitration exception removes foreign state's jurisdictional immunity in cases involving, *inter alia*, enforcement of arbitration awards that are based on "agreement made by the foreign state with or for the benefit of a private party."

Spain did not contest the existence of the arbitration award or the treaty itself but argued that it never made a valid offer to arbitrate. It contended that the standing offer to arbitrate in the ISDS provision of the ECT did not extend to EU companies, because under *Komstroy*, ECT does not permit intra-EU arbitration. As such, Spain argued the investors' request for arbitration did not constitute a valid acceptance of such non-existing offer, and no arbitration agreement was concluded.

The Appellate Court sidestepped Spain's objection. Instead, the Appellate Court focused on the wording of the statute that refers to an agreement to arbitrate made "for the benefit of a private party." The Appellate Court explained that based on that wording, the ISDS provision of the ECT *itself* constitutes an agreement to arbitrate disputes with at least some private parties. That agreement, the Appellate Court stated "is 'for the benefit' of the signatory's investors, and

therefore satisfies the FSIA's arbitration exception."

The Appellate Court then addressed Spain's argument that the ECT was not made "for the benefit" of EU investors, such as investors in the cases at issue, explaining that whether the ISDS provision of the ECT covers non-EU investors is a matter of scope, not jurisdiction, which is a matter for a lower, District Court, to decide.

Anti-Anti-Suit Injunction and Comity Concerns

The Appellate Court next addressed *anti*-anti-suit injunctions in *NextEra* and *9Ren*. It concluded that the District Court failed to adequately weigh the principle of international comity, as these injunctions interfered with Spain's litigation rights in Dutch and Luxembourg courts. The Appellate Court also found a lack of domestic interest in the matter that not only infringed on Spain's right to litigate but also challenged the authority of Dutch and Luxembourg courts on matters deemed significant under European Union law.

The Appellate Court further disagreed with the notion that Spain's actions threaten the integrity of the International Center for Settlement of Investment Disputes ("ICSID") Convention, noting that the convention provides alternative mechanisms for signatory countries to address perceived interference, for example, through recourse to the International Court of Justice. Finally, it emphasized that the anti-suit injunctions, though potentially helpful for confirming arbitration awards, would not prevent Spain from seeking relief in foreign courts.

The Dissent

Judge Pan dissented in part and focused on the District Court's imposition of an "*anti*-anti-suit injunction." She concluded that the District Court's decision was reasonable because it balanced the U.S. interest in protecting its jurisdiction with the ICSID framework, rightly recognizing the irreparable harm to investors if the injunction were not granted. Judge Pan emphasized that Spain's claims were intended to block enforcement of the arbitral award and deny U.S. jurisdiction. In simple terms, Spain was "forum-shopping," she stated. Judge Pan further noted that while the majority correctly defined important factor to be "respecting the sovereignty of the nations," they overlooked the significance of protecting investors and upholding the rule of law, which are equally important. Concluding, Judge Pan was convinced that the majority opinion in part of *anti*-anti-suit injunction made the U.S. an "inhospitable forum for enforcing ICSID awards."

Commentary

The Appellate Court's decision marks an important legal development, providing investors with a precedent for a broader reading of the FSIA's arbitration exception. However, by refraining from upholding *anti*-anti-suit injunctions, the Court may have left investors vulnerable to foreign judicial interference.

This decision appears to be a decision of first impression where a U.S. appellate court upheld FSIA jurisdiction in an investment award enforcement case based on the premise that the underlying agreement to arbitrate was made not "with" an investor but "for the benefit" of an investor.

Although the Appellate Court emphasized that not every investment treaty would provide for such treatment, the holding provides additional jurisdictional grounds for investors to seek enforcement of investment arbitration awards in the United States.

The Appellate Court trod carefully between the need to maintain the balance between the existing arbitral enforcement framework of the ICSID and the New York Convention and the considerations of international comity. Some may say the Court was too careful in declining to affirm the *anti*-anti-suit injunction, which, in all practical respects, is likely to leave investors without recourse. In any case, the ultimate enforcement of the awards is now in the hands of the District Court and is likely to come back to the Appellate Court in the second round of appeals.

Ultimately, the Appellate Court's decision underscores the ever-evolving U.S. stance on enforcing investment arbitration awards. As the District Court now takes on the question of enforceability, this ruling may encourage other investors from EU Member States to pursue similar claims in the U.S. courts, hoping to recover their financial losses.

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