ANTI-ENFORCEMENT LOOPS OF RENEWABLE ENERGY AWARDS AGAINST SPAIN: RISKS AND ANTI-ABUSE

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ABSTRACT

Legal reforms and policy adjustments relating to energy transition have triggered mass claims of investment arbitration. During long-standing disputes, the anti-enforcement actions taken by Spain against renewable energy awards seem to be infinite loops, backed by the European Union (hereinafter "EU") on intra-EU and state aid grounds. To assess their legality and impacts from the perspectives of interim measures under international law, Spain's anti-enforcement injunction procedures are less likely to meet legal conditions. They can cause judicial diseconomy and a risk of discrediting the investment arbitration system. Spain's argument on the application of EU law further carried a risk of violating international law by extraterritorial application, retroactive application and confusing compensation for investment damages with subsidy under World Trade Organization (WTO) law. In order to solve the enforcement dilemma of renewable energy awards, this article recommends settlement negotiations between Spain and the affected investors. To prevent the occurrence of similar "loops" in the long term, policy makers of investment

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arbitration rules may consider incorporating anti-abuse rules on anti-enforcement injunction by setting up strict prerequisites and minimizing the possibility of granting it on the presumption of bad faith and additional conditions.

KEYWORDS: *investment arbitration, anti-suit injunction, anti-enforcement injunction, renewable energy award, energy transition, IIA, EU law, intra-EU, state aid, subsidy, MFN, anti-abuse, interim measure*

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I. INTRODUCTION

While energy transition is very urgent for many countries and regions,[1] legal reforms and policy measures dedicated to this goal can affect legally protected rights and interests of private parties. A number of countries have been involved in investor-state dispute settlement (hereinafter "ISDS") cases for such practices and attracted much attention.[2] Focusing on the potential function and practice of investment tribunals in climate and energy governance, the existing literatures disclosed the conflicts between the stability of renewable energy policies and regulatory flexibility of host state governments in response to climate change and environmental problems. Accordingly, their reflections were mostly related to the reform of the substantive aspects of international investment law (hereinafter

[1] It is especially urgent for the developing countries that set targets for energy transition in nationally determined contributions. *See* U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2023, at xiii, U.N. Doc. UNCTAD/WIR/2023 (2023) [hereinafter WIR 2023].

[2] For a summary of the latest related cases, see Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26(2) J. INT'L ECON. L. 285, 285-88 (2023).

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"IIL").[3] As the first batch of renewable energy awards is coming to the enforcement stage, more severe problems have surfaced. In particular, Spain, as one of those liable states, has gained a worldwide reputation in recent years for its incompliance with investment awards.[4] Some commentators have already criticized Spain's default by assessing its arguments pursuant to the laws of the European Union (hereinafter "EU") and its member states.[5] The others attributed Spain's dilemma to the legal conflicts between IIL and the EU legal system.[6] However, Spain's failure of compliance with international investment awards goes far beyond the reach of the EU law as the successful investors and other creditors of the awards have been seeking for enforcement outside Europa. In addition to negative non-compliance, the Spanish government has also been taking positive anti-enforcement actions in foreign jurisdictions, which remains outside the scope of the existing literature. Of greater concern is the legality of those actions under international law and their impacts on international rule of law. More specifically, as interim measures, are there legal conditions for Spain's applications for anti-enforcement injunctions? Do they pose risks to the investment arbitration system and international law, such as the compatibility of Spain's state-aid objection with the subsidy rules under the World Trade Organization (hereinafter "WTO") law? What can be done to solve the enforcement dilemma of the related awards and avoid the misuse of anti-enforcement injunctions to investment awards? This article focuses on the procedural problems of the anti-enforcement actions taken by Spain against renewable energy awards. The following parts will summarize the existing anti-enforcement procedures and analyze their purported legal basis. After identifying the risks of Spain's anti-enforcement procedures in part III, the author would finally explore solutions both to the current enforcement dilemma and to the prevention of potential anti-enforcement "loops" in the future.

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[3] *See* Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals*, 48(5) VAND. J. TRANSNAT'L L. 1285, 1320-49 (2015); Fernando Dias Simoes, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, 45(2) DENV. J. INT'L L. & POL'Y 251, 258-85 (2017); Yulia S. Selivanova, *Changes in Renewables Support Policy and Investment Protection Under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases*, 33(2) ICSID REV. 433, 435-52 (2018).

[4] Nikos Lavranos, *Report on Compliance with Investment Treaty Arbitration Awards 2023 (2nd Updated Edition)*, 2 INT'L L. COMPLIANCE 1, 2 (2023), https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf.

[5] *See, e.g.*, Iuliana Iacob & Anca Negulescu, *Intra-EU Investment Arbitration Disputes – Recent Case-Law Developments*, 17(3) ROM. ARB. J. 68, 71-75 (2023).

[6] *See, e.g.*, Begona Perez Bernabeu, *Taxation, State Aid Rules and Arbitral Courts: A BIT of a Mess in the Micula Saga*, 19(3) EUR. ST. AID L.Q. 329, 333 (2020).

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II. SPAIN'S ANTI-ENFORCEMENT ACTIONS: INFINITE LOOPS?

Since the end of last century, many governments have adopted policies friendly to renewable energy production, such as feed-in-tariff.[7] While promoting local energy transition successfully, they caused an economic burden on the governments.[8] As some countries adjusted to such policies,[9] ISDS claims broke out in a mass. Among relevant respondents, Spain has been claimed most frequently, for nearly eight billion euro in fifty-one cases.[10] The government has been resisting to the tribunals' jurisdictions and decisions, even until the enforcement stage.

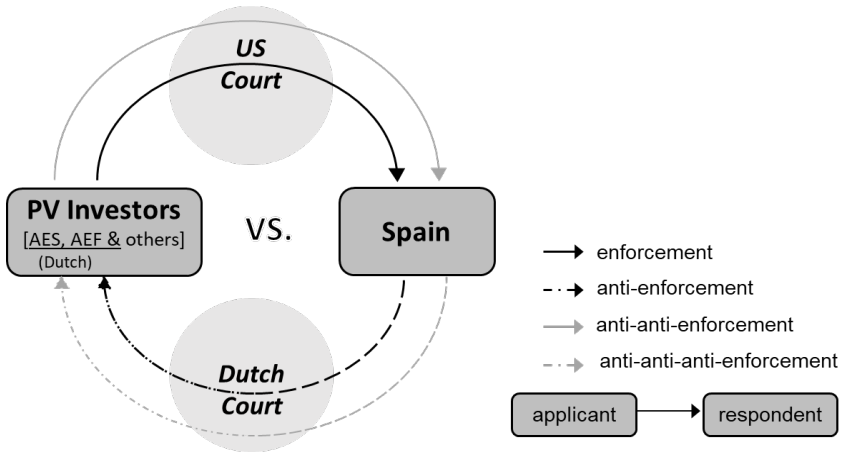
A. Spain's Anti-Enforcement Loops: A Typical Example

Up to now, Spain has seriously delayed in enforcing the awards issued by the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") and other investment tribunals. With the support of EU intervention into almost every disputed proceeding and submissions on issues of EU law, Spanish anti-enforcement actions seem to become infinite loops. Below, the first case filed, *PV Investors v. Spain*, is graphed for illustration.

[7] *See* WIR 2023, *supra* note 1, at xvi.
[8] *See* Gerard Marata et al., *Renewable Energy Incentives in the United States and Spain: Different Paths - Same Destination?*, 28(4) J. ENERGY & NAT. RES. L. 481, 482 (2010).
[9] *See* Vadi, *supra* note 3, at 1320; Selivanova, *supra* note 3, at 435.
[10] *See* Aloke Prabhu & Junior Staffer, *Spain's Renewable Energy Disputes: Renewable Energy Needs Reliable Arbitration*, THE ARB. BRIEF (Feb. 15, 2023), https://thearbitrationbrief.com/2023/02/15/spains-renewable-energy-disputes-renewable-energy-needs-reliable-arbitration/. The list of the cases can be referred to in *Investment Dispute Settlement Navigator*, U.N. CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain/respondent (last visited Sept. 17, 2024).

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FIGURE 1: The Anti-Enforcement Loop Around the *PV Investors v. Spain* Award



In 2011, fifteen companies from Germany, Luxemburg and the Netherlands submitted this arbitration to the Permanent Court of Arbitration (hereinafter "PCA"). After the PCA tribunal issued the award in 2020,[11] Spain applied for annulment but was dismissed by the Swiss Federal Court.[12] Later, most claimants waived their rights of the award. Two Dutch companies, namely, AES and AEF, sought enforcement before the United States (hereinafter "US") District Court of Columbia for the District of Columbia, wishing to obtain compensation from Spanish bank assets located in the US. As a response, Spain did not just move to dismiss the enforcement application before the US court, but also turned to the Amsterdam court for an anti-suit injunction. Moreover, in order to hinder the investors from obtaining a corresponding anti-anti-suit order from the US court, Spain initiated a summary procedure before the preliminary relief judge of the Dutch court, applying for a preliminary restrictive order for anti-anti-anti suit purposes.

B. EU Contribution to the Anti-Enforcement Loops

In addition to Spain's own actions, the EU also contributed to the anti-enforcement looping of the renewable energy awards against Spain. On one side, the European Commission (hereinafter "EC") frequently sought participation by submitting *amicus curiae* or non-disputing party opinions.

[11] *See* The PV Investors v. The Kingdom of Spain, PCA Case No. 2012-14, Final Award, at 284 (Feb. 28, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw170719.pdf.
[12] *See* Bundesgericht [BGer] [Federal Supreme Court] Feb. 23, 2021, 4A_187/2020, §7 (Switz.).

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For instance, responding to the enforcement applications of the *Antin v. Spain* award before British, American and Australian courts, the EC initiated first an investigation into whether the payment of the award constitutes an illegal state aid under EU law and then sought for participation in the enforcement proceedings. On January 27, 2023, the high court of England and Wales dismissed its application because of the additional cost.[13] On the other side, the EU attempted to provide the EU law basis for Spain's anti-enforcement proceedings in the name of protecting EU legal order.[14]

The EU law basis for Spain's anti-enforcement actions consists of two prongs: invalidation of intra-EU arbitration and subsidization of compensation for investment damages. The former argument always starts with the Lisbon Treaty.[15] It is purported to have established an exclusive jurisdiction over foreign investment matters, including an exclusive power of negotiating and concluding an international investment agreement (hereinafter "IIA"), executed by the EC in the form of common action.[16] According to this power, any investor-state arbitration provision between two or more member states is invalidated because they lack the capacity of entering into a bilateral or multilateral IIA with each other. This position was said to be confirmed by several decisions of the Court of Justice of the EU (hereinafter "CJEU") relating to the compatibility of intra-EU investment arbitration with EU law. In its 2018 decision on *Achmea v. Slovakia*, the CJEU considered that the applicable bilateral investment treaty (hereinafter "BIT") was inconsistent with some provisions of EU law. It explained that Articles 267 and 344 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") do not only provide its exclusive power of making a preliminary judgement on an issue about the interpretation of EU Treaties but also prevent a member state from submitting such issue to other dispute settlement mechanisms than those provided by the Treaty. With the concern that submitting a dispute involving the interpretation of EU law to an investment tribunal might

[13] *See* Infrastructure Services Luxembourg S.à.r.l. (formerly Antin Infrastructure Services Luxembourg S.à.r.l.) & Energia Termosolar B.V. (formerly Antin Energia Termosolar B.V.) v. Kingdom of Spain, [2023] EWHC 234 (Comm), [23] (Eng.).

[14] *See*, *e.g.*, Brief for the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of the Kingdom of Spain and Reversal, Nextera Energy Global Holdings B.V. & Nextera Energy Spain Holdings B.V., v. Kingdom of Spain, No. 1:19-cv-1618 (D.C. Cir. filed June 6, 2023).

[15] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C306) 1 [hereinafter Lisbon Treaty].

[16] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 207, May. 9, 2008, 2008 O.J. (C115) 47. According to the Lisbon Treaty 2007, the TFEU succeeded to the Treaty establishing the European Community, as amended, and together with the Treaty on European Union became the founding agreements of the EU. *See* Lisbon Treaty, art. 1.

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deprive its chance of making a preliminary judgement,[17] the CJEU found that an arbitration agreement of a BIT between EU member states is invalid.[18] Later, in its 2021 judgement relating to *Komstroy v. Moldova*, the CJEU expanded the conclusion drawn for *Achmea v. Slovakia* to other multilateral treaties that include consent to arbitration, particularly the Energy Charter Treaty (hereinafter "ECT").[19] The subsidization method is based on EU state aid rules. According to Article 107(1) of TFEU,[20] an investment award that orders a member state to compensate for eliminating investment incentives might constitute state aid.[21] In this respect, the most frequently cited example is the ICSID award of *Micula v. Romania*, a case arising from Romania's cancellation of investment incentives for the purpose of acceding to the EU. The EC participated in the arbitral proceedings as *amicus curiae*, but Romania was still awarded compensation for damages to the claimant.[22] Upon Romania's accession, the EC declared that the award constituted illegal state aid and ordered Romania to retrieve compensation.[23] For the same reason, the EC declared that Spain's scheme to replace and supersede the previous premium economic scheme between 2007 and 2008 did not constitute a state aid, but "any compensation which an Arbitration Tribunal was 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."[24] Spain used this argument to defend its anti-enforcement actions. In

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[17] *See* Tasnim Ahmed, *The CJEU and the Introduction of International Dispute Settlement Mechanisms Within the EU: Is Alternative Dispute Resolution in the EU in Safe Hands?*, 22(2) PEPP. DISP. RESOL. L.J. 491, 493 (2022).

[18] *See* Case C-284/16, The Slovak Republic v. Achmea B.V., ECLI:EU:C:2018:158, ¶¶ 56-60 (Mar. 6, 2018).

[19] *See* Case C-741/19, République de Moldavie v. Komstroy LLC, ECLI:EU:C:2021:655, ¶¶ 64-66 (Sept. 2, 2021).

[20] TFEU, art. 107(1):

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

[21] *See* Ana M. LoÂpez-RodrõÂguez & Pilar Navarro, *Investment Arbitration and EU Law in the Aftermath of Renewable Energy Cuts in Spain*, 25 EUR. ENERGY & ENV'T L. REV. 2, 4 (2016).

[22] *See* Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award, ¶¶ 36, 1329 (Dec. 11, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

[23] *See* Commission Decision (EU) 2015/1470 of 30 March 2015, on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral Award Micula v Romania of 11 December 2013, 2015 O.J. (L 232) 43, 69-70.

[24] European Commission, State Aid SA.40348 (2015/NN) — Spain, Support for Electricity Generation from Renewable Energy Sources, Cogeneration and Waste, 2017 O.J. (C 442)1, ¶¶ 162-65.

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applying for injunctive relief to stay enforcement of the *NextEra v. Spain* award, for instance, the government submitted to the Amsterdam court that the 2007 premium economic scheme constituted an unlawful state aid as it provided for favorable financial conditions but had not been notified to the EC in advance.[25] Spain argued that it required the court's intervention because a national court of a Member State is obliged to take necessary measures to ensure compliance with TFEU.[26]

Supported by the EU's intervention, the looping of Spain's anti-suit injunction procedures against a series of renewable energy awards could hinder their normal enforcement. It is quite valuable to discuss whether they can fulfill legal conditions in terms of the application of interim measures.

III. LEGAL CONDITIONS AND ELIGIBILITY REVIEW OF SPANISH ANTI-ENFORCEMENT INJUNCTION PROCEDURES

During the process of confirming the renewable energy awards against Spain, not merely anti-enforcement injunction applications, but also derived legal procedures for anti-anti suit orders and anti-anti-anti suit orders were frequently invoked by the disputing parties. In normal cases, they are very rare in the enforcement of investment awards, though. Thus, it is worth tracing the origin of the anti-enforcement injunction as well as its application in the context of international dispute settlement.

A. Anti-Enforcement Injunction: Origin and International Application

As a kind of injunctive relief derived from the anti-suit injunction, the anti-enforcement injunction is created to prohibit a party from seeking for the enforcement of an award, judgment or other judicial or arbitral decision against the requesting party. Some recalled that an anti-suit injunction was invented by English courts in the 15th century, traditionally absent in the civil law system, but it is applied worldwide now under different names and in nuanced forms.[27] Generally, an anti-suit injunction is rendered to ensure the effective fulfillment of an arbitration agreement or choice of court agreement, and to avoid any threat to the exclusive jurisdiction of a court or

[25] It is a procedural requirement for lawful state aid. *See* TFEU, art. 108(3).
[26] *See* Writ of Summons Also Containing an Incidental Claim Pursuant to ART. 223 Dutch Code of Civil Procedure (certified English version), Kingdom of Spain v. Nextera Energy Global Holdings B.V. & Nextera Energy Spain Holdings B.V., No. 1:19-cv-01618-TSC, ¶¶ 1.1, 8.1 (D.C. filed Jan. 12, 2023), https://www.italaw.com/sites/default/files/case-documents/italaw170884.pdf.
[27] *See* Greta Niehaus, *First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration*, KLUWER ARB. BLOG (Feb. 28, 2021), https://arbitrationblog.kluwerarbitration.com/2021/02/28/first-anti-anti-suit-injunction-in-germany-the-costs-for-international-arbitration/.

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tribunal by parallel proceedings.[28] Theoretically, it is companied with the possibility of anti-anti suit injunction and anti-anti-anti suit injunction applications because the counterparty can make a request for a corresponding order to an original injunction application. All of them could be termed as anti-suit injunctions. Besides, if an injunction is sought to combat an arbitral proceeding, it may be called an anti-arbitration injunction.[29]

On international occasions, an anti-suit injunction has a risk of interfering with the judicial jurisdiction of a sovereign country. By considering international comity, both domestic courts and international dispute settlement bodies are very prudent in determining whether to issue such an injunction. In the context of international commercial arbitration, there are considerable controversies about it. Particularly under the EU legal system, the CJEU has opposed to it in several cases. For instance, in *West Tankers*, the Court opined that the use of an anti-suit injunction would deprive the court of the member state of its *Kompetenz-Kompetenz* (competence-competence) under the Brussels Regulation I.[30] That could not only interfere with the mutual trust between the member states but also undermine the effectiveness of EU law.[31] Later, in *Gazprom*, the CJEU confirmed that any injunction to prevent a disputing party from access to a member state court would be inconsistent with the Brussels Regulation I.[32]

In investment arbitration practice, there were several anti-arbitration injunctions against arbitral procedures themselves. A typical case was the one ordered by the Court of Belize to protect the government from international arbitration after nationalizing a telecommunication company.[33] As a foreign stakeholder and creditor of the company, Dunkeld company and British Caribbean Bank, submitted arbitration claims to PCA respectively. Because of the anti-arbitration injunction of the Belize court,

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[28] *See* Ahmed, *supra* note 17, at 498-99.

[29] For example, the Netherlands had initiated such procedure before a German court in order to deny the admissibility of *RWE v. The Netherlands* to the ICSID tribunal. *See Kamerbrief over start anti-arbitrageprocedures bij Duitse rechter door Staat tegen RWE en Uniper* [*Letter About the initiation of anti-arbitration procedures by the State against RWE and Uniper in the German court*], MINISTERIE VAN ECONOMISCHE ZAKEN EN KLIMAAT [MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE POLICY] 1-2 (May 17, 2021), https://open.overheid.nl/documenten/ronl-a1f3212d-d60b-4305-a39c-b4be883551b2/pdf.

[30] Council Regulation (EC) No 44/2001 of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 2, 2001 O.J. (L12) 1.

[31] *See* Case C-185/07, Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Case C-185/07, Judgment of the Court (Grand Chamber), ¶ 19 (Feb. 10, 2009), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0185.

[32] *See* Case C-536/13, Gazprom OAO v. Lietuvos Respublika, ECLI:EU:C:2015:316, ¶¶ 32-34 (May 13, 2015).

[33] *See* S. I. Strong, *Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: British Caribbean Bank Ltd. v. the Government of Belize*, 15 J. WORLD INV. & TRADE 324, 327 (2014).

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the arbitration procedures had been suspended but soon resumed as the injunction was lifted on appeal. The Court of Appeal of Belize held the position that anti-arbitration injunctions "must be exercised with caution and such injunctions will only be granted if the arbitral proceedings are vexatious or oppressive or . . . an abuse of the legal arbitral process."[34] The Caribbean Court of Justice expressed a similar view that "the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and only granted if the arbitral proceedings are vexatious or oppressive." [35] Eventually, both courts considered the circumstances in their cases as normal and thus found the injunction an error.[36]

Anti-enforcement injunctions against investment awards have raised more objections. A well-known incident of oil pollution in that Chevron was found liable by Ecuadorian courts to compensate local residents was not just followed by an anti-enforcement injunction from the District Court of Southern New York,[37] but also incurred an investment arbitration. In a partial award of 2018, the PCA tribunal of *Chevron v. Ecuador* determined that Ecuadorian judgements constituted a denial of justice, undermined Chevron's right, and violated fair and equitable treatment standards and customary international law.[38] Some thought this award may function as an anti-enforcement injunction issued by the US court which "imposes obligations not only on the executive acting as litigant, but-as Chevron makes explicit-on the state's judiciary."[39] Considering that "the issuance of international anti-enforcement injunctions poses a challenge to the doctrines of national sovereignty and international comity", some even doubted that "the tribunal acted outside its jurisdiction and beyond the scope of the investment treaty arbitration."[40]

In a word, due to its potential risks of intervening in sovereignty and undermining a tribunal's competence-competence, the anti-suit injunction

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[34] Dunkeld International Investment Limited v. The Government of Belize (I), In the Court of Appeal of Belize AD 2013, Civil Appeal No.24 of 2011, Judgment, ¶ 135 (Nov. 1, 2013) [hereinafter Dunkeld International Investment Limited v. The Government of Belize].

[35] British Caribbean Bank Limited v. The Attorney General of Belize (I), [2013] CCJ 4 (AJ), Judgment, ¶ 41 (June 25, 2013) [hereinafter British Caribbean Bank Limited v. The Attorney General of Belize].

[36] British Caribbean Bank Limited v. The Attorney General of Belize, ¶¶ 14-23; Dunkeld International Investment Limited v. The Government of Belize, ¶¶ 135-146.

[37] *See* Jason MacLean, *Chevron Corp. v. Yaiguaje: Canadian Law and the New Global Economic and Environmental Realities*, 57(3) CAN. BUS. L.J. 367, 369 (2016). The injunction was overturned by the Second Circuit Court of Appeals. *See* Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011); Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012).

[38] *See* Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, ¶¶ 8.34, 8.59-.77 (Aug. 30, 2018).

[39] Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1(2) STAN. J. COMPLEX LITIG. 373, 375 (2013).

[40] *See* Lorena Guzman-Diaz, *NOTE: To Domestic Courts Worldwide: Here Is Why You Can Disregard the August 2018 Partial Award from the Hague, Netherlands in the Chevron-Ecuador Litigation*, 2(1) ITA REV. 54, 73-76 (2020).

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has raised controversies for long in international commercial and investment arbitration, which implies a very prudent basis for its application.

B. Legal Conditions of Application

Given its impact of interfering with normal legal proceedings, the issuance of an anti-enforcement injunction has to meet certain criteria.[41] Above all, it should fulfill the basic conditions of interim measures, which are provided by the applicable arbitration agreement, *lex arbitri* (law of the place of arbitration) or arbitration rules to a certain dispute. In investment arbitration, there are generally four requirements, including prima facie jurisdiction, necessity, urgency and proportionality.[42] Sometimes, the requesting party should further demonstrate a reasonable prospect of success on the merits.[43]

Based on the conditions of general interim measures, a higher standard is required to produce an anti-suit or anti-enforcement injunction because there are more complex factors involved.[44] For example, during the enforcement proceedings of the *9Ren v. Spain*[45] and *NextEra v. Spain*[46] awards before the US court, at the request of the investors for anti-suit injunctions,[47] judge Chutkan emphasized that a preliminary injunction is an extraordinary and drastic remedy which should be based on a series of conditions, including "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent injunctive relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest."[48] Besides, the issuance of an anti-suit injunction may only be

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[41] *See* Lawrence Boo & Christine Artero, *Arbitration*, 20 SAL ANN REV. 59, 65 (2019).

[42] *See* Régis Bismuth, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, 26(6) J. INT'L ARB. 773, 812 (2009); Anthony C. Sinclair & Odysseas G. Repousis, *An Overview of Provisional Measures in ICSID Proceedings*, 32(2) ICSID REV. 431, 435 (2017); Thomas Obersteiner, *Provisional Measures Under ICSID Rules: The Power of Tribunals to Interfere with Domestic Criminal Proceedings*, 37(5) J. INT'L ARB. 607, 622-27 (2020).

[43] *See*, *e.g.*, U.N. Comm. on Int'l Trade L., UNCITRAL Arbitration Rules (2010), art. 26, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf.

[44] *See* Rodolfo Donatelli, *A Multi-Factor Test for Anti-Suit Injunctions in ICSID Arbitration*, 30(3) AM. REV. INT'L ARB. 303, 313 (2019).

[45] 9REN Holding S.À.R.L. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award (May 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf.

[46] NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Award (May 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10568.pdf.

[47] *See* Iacob & Negulescu, *supra* note 5, at 74.

[48] NextEra Energy Global Holdings B.V. v. Kingdom of Spain, Memorandum Opinion, 656 F. Supp. 3d 201, at *209 (Feb. 15, 2023) [hereinafter NextEra v. Spain]; 9REN Holding S.À.R.L. V. Kingdom of Spain, Memorandum Opinion, 2023 U.S. Dist. LEXIS 25860, at *8 (Feb. 15, 2023) [hereinafter 9REN v. Spain].

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necessary "where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions".[49]

Although there is no specific provision on this issue under IIAs or investment arbitration rules, the conditions of issuing an anti-enforcement injunction against investment awards are supposed to be strict. The key factor is that investment awards are made by international tribunals with mandates from sovereign states. They are enforceable pursuant to the binding treaties, especially ICSID awards that are automatically enforceable under the ICSID Convention.[50]

C. Eligibility Review

With regard to the renewable energy awards against Spain, approximately 84% of the existing awards decided in favor of investors shall be enforced according to the ICSID Convention. In other words, it is quite questionable to restrict the enforcement of the majority of the discussed awards against Spain.

FIGURE 2: Status and Outcomes of the Renewable Energy Cases against Spain (as of September 17, 2024)

Status	Pending	Discontinued	Decided		
			In favor of Spain	In favor of Investors	
No.	9	4	7	31	
				Non-ICSID	ICSID
			No.	5	26
			%	16%	**84%**

Indeed, Spain's applications for anti-enforcement injunctions against renewable energy awards do not seem to be eligible for issuance. Although most of the main claims for anti-enforcement injunctions have not been decided, the competent courts tend to discourage Spain's anti-enforcement actions. This can be seen in a recent decision by a German court that

[49] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 930 (D.C. Cir. 1984); NextEra v. Spain, 656 F. Supp. 3d 201, at *215; 9REN v. Spain, 2023 U.S. Dist. LEXIS 25860, at *21.

[50] It is widely accepted that there are differences between ICSID and non-ICSID awards. While public policy consideration might be taken as a non-ICSID annulment ground, research on post-award remedies showed that "most countries national legal systems provide few remedies to challenge an arbitral award." Silviu Constantin, *Surviving and ICSID Award. Post-Award Remedies in ICSID Arbitration: A Perspective of Contracting State's Interest*, 1(1) INT'L INV. L.J. 67, 75 (2021).

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declined Spain's application for an anti-enforcement injunction against the *RWE v. Spain* award.[51] In most pending cases, other investors' home state courts and foreign courts hearing such requests have upheld negative and defensive injunctions. For instance, Judge Chutkan granted anti-anti enforcement injunctions requested by the investors, ordering Spain to refrain from seeking for anti-enforcement injunctions in Luxembourg and the Netherlands.[52] Meanwhile, as regards to an anti-anti-anti-enforcement injunction application relating to the *PV investors v. Spain* award, the preliminary relief judge of Amsterdam court dismissed Spain's request. These decisions can show that the rights to be protected by anti-enforcement injunctions may neither exist at all nor face a risk of substantial or irreparable injury. In other words, it is doubtful that the applications for anti-enforcement injunctions against renewable energy awards can fulfill the basic conditions of interim measures.

Moreover, while an award is subject to recognition and enforcement before a foreign court, a further test should be applied to the issuance of an anti-enforcement injunction. Otherwise, there is a risk of infringing foreign jurisdiction and ignoring international comity.[53] As judge Chutkan observed in the decisions relating to the *9Ren v. Spain* and *NextEra v. Spain* awards, the anti-enforcement orders that Spain had sought from the courts of Luxembourg and the Netherlands were purely offensive, aimed at depriving the US court of jurisdiction over the disputes. As a response to Spain's attempt to invoke the principle of international comity, the judge held that in the Dutch and Luxembourg actions, "Spain is zealously pursuing the very same kind of anti-suit injunction that it now asks this court to refrain from issuing. Consequently, Spain's 'claims of comity now asserted in United States courts come burdened with the failure of [Spain] to recognize comity."[54] This is another evidence that Spain's anti-enforcement injunction applications are unlikely to meet legal conditions.

IV. RISKS OF SPANISH ANTI-ENFORCEMENT INJUNCTION PROCEDURES

In view of their ineligibility, Spain's anti-enforcement actions would

[51] *See generally* Kingdom of Spain v. RWE Renewables GmbH & RWE Renewables Iberia S.A.U., Case 2 O 447/22, Essen Regional Court Judgment (Apr. 12, 2024) (certified translation from German to English), https://ersp.lib.whu.edu.cn/s/com/iareporter/www/G.https/wp-content/uploads/2024/04/R WE-v.-Spain-German-Court-Decision-April-12-2024.pdf.

[52] NextEra v. Spain, 656 F. Supp. 3d 201, at *222; 9REN v. Spain, 2023 U.S. Dist. LEXIS 25860, at *36.

[53] *See* Daniel Kalderimis, *The Authority of Investment Treaty Tribunals to Issue Orders Restraining Domestic Court Proceedings*, 31(3) ICSID REV. 549, 565-69 (2016); Donatelli, *supra* note 44, at 310.

[54] NextEra v. Spain, *supra* note 46, at 20; 9REN v. Spain, *supra* note 45, at 18.

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unduly affect the interests of the investors that won the renewable energy disputes. Furthermore, since the government could continue to initiate more such procedures, they carry other risks to the investment arbitration system and the rule of international law.

A. Risk of Judicial Diseconomy

While Spain has become famous for unpaying renewable energy awards,[55] it is less known how Spain has delayed the fulfillment of those awards. Hitherto, Spain has been making use of anti-enforcement procedures against a series of awards, involving various legal proceedings in several jurisdictions. It means a lot of judicial resources. The first concern lies in that they might be wasted if those applications and procedures are bound to fail.

There are actually signs that an anti-enforcement injunction may not play a real function in preventing an award from being enforced. Firstly, conflicting decisions on similar anti-enforcement injunction applications could discredit themselves.[56] Without a final determination on Spain's anti-enforcement actions, there are already inconsistencies in the existing decisions on preliminary applications. A noteworthy example involves two cases brought by Dutch investors. As mentioned above, Judge Chutkan granted NextEra's requests for a preliminary anti-anti-enforcement order. Surprisingly, her colleague Judge Richard J. Leon rejected a similar order applied by the creditor of the *PV investors v. Spain* award.[57] Likewise, investors' home state courts have showed different attitudes towards Spain's anti-anti-anti enforcement applications concerning the *PV investors v. Spain* and *RWE v. Spain* awards.[58] In the latter case, a German court considered it necessary to hold a hearing on Spain's application and thus issued a preliminary restrictive order to prevent RWE from initiating or continuing anti-anti enforcement proceedings before the US court pending its own determination.[59] The inconsistencies between the existing decisions on preliminary orders may incur doubts about the credibility and

[55] Lavranos, *supra* note 4, at 2.

[56] Consistency of decisions is particularly desired in the context of investment arbitration where inconsistency has exposed many problems. *See* KATHARINA DIEL-GLIGOR, TOWARDS CONSISTENCY IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A PRELIMINARY RULING SYSTEM FOR ICSID ARBITRATION 101 (2017).

[57] *See* Blasket Renewable Investments, LLC v. The Kingdom of Spain, Memorandum Opinion, Civil Action No.21-3249-RJL, 2023 U.S. Dist LEXIS 54052, at *20 (Mar. 29, 2023).

[58] *See* generally RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award (Dec. 18, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw16136.pdf.

[59] *See* Kingdom of Spain v. RWE Renewables GmbH & RWE Renewables Iberia S.A.U., Higher Regional Court Hamm Order, ¶ 2 (Apr. 6, 2023), https://www.italaw.com/sites/default/files/case-documents/italaw171351.pdf.

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effectiveness of final injunctions, if granted. In that case, it is infeasible to expect that a foreign enforcement court would comply with such an injunction, just as Judge Richard J. Leon refused to refer to Judge Chutkan's precedent order and neither did him even discuss another relevant decision by the Amsterdam court.[60]

In case that an anti-enforcement injunction cannot play a real function, all the related procedures could cause remarkable waste of judicial resources and unnecessary costs of litigation. Noteworthily, the basic facts upon which Spain applied for anti-enforcement injunctions or anti-anti-anti enforcement orders were almost the same. Without substantial difference or change of circumstances, Spain's arguments and reasons for opposing enforcement had been heard and reviewed repeatedly before arbitral tribunals, domestic courts of the place of arbitration or annulment committees. Even if it is difficult to argue for res judicata, whose application to investment arbitration is disputed,[61] a lot of judicial resources have been consumed. For example, the *NextEra v. Spain* and *9Ren v. Spain* awards were issued in 2019, involving ICSID annulment proceedings, anti-suit actions and procedures about preliminary restrictive orders before Amsterdam and Luxembourg court as well as anti-anti enforcement applications before the District Court of Columbia. These procedures seem to cause harmless delays. Nonetheless, to some investors, it may hinder their access to justice. Some affected investors did waive their claims during the arbitration proceedings or even after the awards were issued.[62] Except for the reasons of exchanging interests behind the waiver, prospective burden of litigation costs and increased uncertainty arising from anti-enforcement actions were apparent factors in their choice.

In the context of investment arbitration itself, it has been demonstrated that procedural diseconomy could affect the substantive outcomes of disputes and the legitimacy of IIL.[63] The risk of judicial diseconomy has to be taken into account when assessing the anti-enforcement injunction procedures initiated by Spain. The truth is, they are repeated in more and more energy transition cases. Most of them, if not the entire, are bound to fail from the outset but continue to consume judicial resources. Only

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[60] *Blasket Renewable Investments*, 2023 U.S. Dist LEXIS 54052, at *9.

[61] *See, e.g.*, Jose Magnaye & August Reinisch, *Revisiting* Res Judicata *and* Lis Pendens *in Investor-State Arbitration*, 15(2) LAW & PRAC. INT'L CTS. & TRIBUNALS 264, 266-70 (2016); Saloni Bung, *Problem with Parallel Proceedings and Need for Embodying the Principles of* Lis Pendens *and* Res Judicata *in International Investment Arbitration*, 5(1) INT'L J.L. MGMT. & HUMAN. 2296, 2305 (2022).

[62] *See* Lisa Bohmer, *Group of Renewables Investors Waive Their Arbitration Rights in Order to Benefit from Spain's New Incentives Scheme*, INV. ARB. REP. (Oct. 5, 2020), https://ersp.lib.whu.edu.cn/s/com/iareporter/www/G.https/articles/first-group-of-renewables-investors-waive-their-arbitration-rights-to-benefit-from-spains-new-incentives-scheme/.

[63] *See* Leslie Johns et al., *Judicial Economy and Moving Bars in International Investment Arbitration*, 15(4) REV. INT'L ORG. 923, 925-29 (2020).

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recently, did a court finally observe this problem. In the enforcement proceedings of the *Watkins Holding v. Spain* award, the District Court of Columbia decided to stay the claimants' application for an anti-anti enforcement injunction, waiting for the D.C. Circuit to rule on the same issue in the appeal proceedings regarding the *NextEra v. Spain* and *9Ren v. Spain* awards. One of the reasons he gave was that it "will save judicial resources, as well as time and effort for the litigants and counsel."[64] However, in more cases involving anti-enforcement injunction applications, this factor has been ignored.

B. Risk of Discrediting the Investment Arbitration System

Once anti-enforcement injunctions are rampant, the legitimacy crisis of the investment arbitration system is likely to re-emerge. From the standpoints of most foreign investors, whether the system is credible ultimately depends on the actual execution of their successful awards. However, anti-enforcement actions could push it in the opposite direction. The majority of renewable energy awards against Spain have not been enforced. Years of enforcement delay, as it continues in some cases, may impress prospective investors and interested parties that it is uncertain whether the compensation of damages can be realized even if an investor wins an arbitration. What is worse, unlike some independent cases, renewable energy awards involve dozens of claims. They are not just interrelated to each other, but relevant to the entire system of investment arbitration with their huge number and influence. The constant anti-enforcement procedures against those awards could cast doubts on the finality of arbitral awards as they, even surviving an ICSID annulment or a national review, might be subject to further challenges.[65] Along with it is the loss of public confidence on the investment arbitration system, including the authority of investment arbitration institutions as well as related treaties and rules, such as IIAs and the ICSID Convention.

The ICSID, as a pilot of international investment dispute settlement, has been aware of the risk. On January 25, 2023, the Deputy General sent a letter to Spain, inviting the government to comply with the ICSID award of *Antin v. Spain*.[66] More recently, the ICSID tribunal in *WOC Photovoltaik and others v. Spain* ordered Spain, through an anti-suit injunction, not to

[64] Watkins Holdings S.À R.L. et al. v. Kingdom of Spain, Civil Action No. 1:20-CV-01081-BAHJoint Submission in Response to the Court's June 2, 2023 Minute Order, at 6 (July 6, 2023).
[65] There are related concerns about potential harm to the finality of arbitration by dynamics in the EU. *See*, *e.g.*, Alexis Mourre, *Is Commercial Arbitration Entering in Dangerous Waters in the European Union?*, 19(1) AIAJ 1, 6 (2023).
[66] *See* Lisa Bohmer, *ICSID Invites Spain to Comply with Renewable Energy Award*, INV. ARB. REP. (Feb. 15, 2023), https://www.iareporter.com/articles/icsid-invites-spain-to-comply-with-renewable-energy-award/ (last visited Sept. 17, 2024).

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initiate any further applications or legal proceedings "that have as their purpose preventing the Claimants or related entities, or any of them, from continuing the present ICSID arbitration, including requests for any kind of injunctive relief, or recognition or exequatur proceedings."[67] This forward-looking injunction was obviously inspired by Spain's anti-enforcement actions. In assessing whether the requested interim measures were urgent, necessary and proportionate, the tribunal took Spain's previous behaviors into account.[68] Having anticipated the possibility that Spain might take similar actions against the assumed award of the present arbitration, the tribunal tried to prevent it by granting the requested measures. It is not too sensitive. Spain's continuing refusal and delay of enforcing the mass renewable energy awards do pose a threat to the viability of the whole investment arbitration system. That is supposed to raise more concerns.

C. Risk of Violating International Law Through Improper Application of EU Law

Firstly, Spain's intra-EU objection may involve extraterritorial application of EU law because some intra-EU arbitrations are based on multilateral treaties with non-EU contracting parties. As some have suggested, the *Achmea v. Slovakia* judgement could only be applied to intra-EU contexts, without extending to the ICSID Convention, ECT or other multilateral agreements with non-EU parties.[69] However, what Spain insisted on was that intra-EU investment arbitrations are completely invalid, no matter they are based on pure intra-EU IIAs or not. This article sides with some tribunals and courts that refused to apply the *Achmea* judgement to ECT or other multilateral agreements that involve non-EU parties.[70] For example, the High Court of the United Kingdom found in the enforcement proceedings of the *Antin v. Spain* award that "by reason of the terms of the EU Treaties, and by reason of the rulings of the CJEU and its supremacy over EU law matters, the EU and the CJEU would have unilaterally changed—if not removed—all the existing treaty obligations of all the Contracting Parties to the ICSID Convention."[71] In substance, it is a

[67] WOC Photovoltaik Portfolio GmbH et al. v. Kingdom of Spain, ICSID Case No. ARB/22/12, Decision on the Claimants' Application for Provisional Measures, ¶ 116 (May 3, 2023), https://www.italaw.com/sites/default/files/case-documents/italaw18000.pdf.
[68] *Id*. at 98, 102.
[69] *See* Ana Mercedes López-Rodríguez, *The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU*, 8(2) TRANSNAT'L ENV'T L. 279, 289 (2019).
[70] *See*, *e.g.*, Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 679 (May 16, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf.
[71] Infrastructure Services Luxembourg SARL & Energia Termosolar B.V. v. Spain, Judgment [hereinafter Antin v. Spain], ¶ 123 [2023] EWHC 1226 (Comm).

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treaty modification to invalidate treaty provisions between a part of the contracting parties as "two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone".[72] However, a treaty modification has to meet several requirements, including that the modification is specifically allowed or not prohibited by the treaty and does not affect the relationship between other parties. After all, a treaty cannot be taken apart like a machine because it embodies the political consensus of all the contracting parties and reflects their multiple interrelations. Any change to the relation between a part of them could influence the total balance among all the parties. Therefore, the EU's approach to invalidate all intra-EU arbitrations arbitrarily constitutes a unilateral modification. That would affect non-EU third parties to multilateral treaties and result in the extraterritorial application of EU law.

Secondly, both the intra-EU objection and state aid argument appear to be contrary to the principle of non-retroactivity because they were applied to the preexisting investments. As constituent parts of international treaties, both EU treaties and IIAs are subject to the non-retroactivity principle under the Vienna Convention on the Law of Treaties (hereinafter "VCLT"), [73] which is applicable to international investment dispute settlement.[74] Before the EU established its exclusive jurisdiction over the union's investment matters, EU member states had concluded a number of IIAs between each other.[75] According to their original purposes, those treaties would have been effective for ten years in general and longer for those with automatic extension clauses or sunset clauses. By the time the Lisbon Treaty entered into force, some intra-EU investment agreements were still in force. It would be inconsistent with the principle of non-retrospectivity if the invalidation of intra-EU arbitrations extends to the investments that had been made according to effective IIAs between EU member states because they had been bound to undertake the IIA obligations. Therefore, even if EU member states were capable of making a joint decision on invalidating intra-EU investment arbitrations, a later established law or decision cannot apply retrospectively to the investments that are protected by the preexisting IIAs.

Finally, subsidization of investment awards based on EU state aid rules is likely to cause confusion on subsidy under WTO law for lack of beneficialness and selectivity. On one hand, paying compensation for

[72] Vienna Convention on the Law of Treaties [hereinafter VCLT] art. 41, May 23, 1969, 1155 U.N.T.S. 331.
[73] *Id.* art. 28.
[74] *See*, *e.g.*, Ping An Life Insurance Company of China, Limited & Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29, Award, ¶ 144 (Apr. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf.
[75] *See* Kai Struckmann et al., *Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-Existence?*, 15(2) EUR. ST. AID L. Q. 258, 259 (2016).

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investment damages cannot create any economic advantage in law because it is reparatory.[76] Very similar to the subsidy controversy over financial compensation in the context of WTO remedy,[77] investment compensation under renewable energy awards was taken by the EU as potential state aids that confer advantages to the claiming investors. However, some have observed that paying compensation cannot necessarily create an economic advantage.[78] Marco Bronckers and Naboth van den Broek noted long ago that "[m]onetary damages are paid as compensation for and (thus) only up to the level of the damages actually incurred by those private parties."[79] Ideally, the amount of damages in investment arbitration is equal to the investment loss based on fair market value.[80] Either "full compensation", or "adequate", "appropriate", "fair" and "reasonable" compensation can, at best, fill up the loss,[81] as opposed to moral damage in civil damages.[82] There is no possibility for a payment of compensation in renewable energy cases to create a competitive advantage that is sufficient to distort EU market. On the other hand, unlike unlawful state aid or prohibited subsidy, compensation for damages awarded by investment tribunals is neither selective nor specific. Except for the subsidy dispute itself, the application of monetary compensation to the WTO remedy had also raised concerns about its compatibility with the most-favored-nation (hereinafter "MFN") principle.[83] Superficially, it would discriminate against residual members if financial compensation is only granted to certain members that win the WTO disputes. However, given that WTO law itself does not make clear whether and how can financial compensation be made to conform with the non-discrimination principle, it is meaningless to conduct MFN review of

[76] For example, under the customary international law on state responsibility, "the compensation shall cover any financially assessable damage including loss of profits insofar as it is established". *See Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, 2001 Y.B. Int'l L. Comm'n, at 99, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

[77] *See* Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8(1) J. INT'L ECON. L. 101, 119 (2005); Bryan Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding*, 8(1) WORLD TRADE REV. 315, 333 (2009).

[78] *See* Mercedes López-Rodríguez, *supra* note 69, at 287-88.

[79] Bronckers & van den Broek, *supra* note 77, at 119.

[80] *Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, *supra* note 76, at 102-03; Marcos D. Garcia Dominguez, *Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account*, 34(1) ARIZ. J. INT'L & COMPAR. L. 95, 115 (2017).

[81] *See* CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 567, 573 (2008); Elizabeth Whitsitt & Nigel Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 ALTA. L. REV. 207, 241 (2013).

[82] *See* Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30(1) BERKELEY J. INT'L L. 196, 197 (2012).

[83] *See* Bernard O'Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation: The US-Copyright Case*, 8(1) J. INT'L ECON. L. 127, 131-33 (2005); Mercurio, *supra* note 77, at 331-34.

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financial compensation pursuant to the existing rules of WTO. Furthermore, due to the inherent differences between WTO dispute settlement and ISDS, the discrimination concern about financial compensation in the former context, even if it makes sense, does not apply to the latter by analogy. One thing is that foreign investors bring claims and seek enforcement after winning the disputes all by themselves, free from the risk of transforming compensation into government revenue. Another thing is that ISDS remedies purely compensate the loss of certain parties in the form of monetary damages, with no intention of correcting the unlawfulness of the host governments.

To summarize this section, the anti-enforcement injunction procedures commenced by Spain to resist the enforcement of renewable energy awards pose risks to the judicial economy and the credibility of the investment arbitration system. Even though such actions have been supported by the EU, the application of EU law is contrary to international law in several aspects.

V. SOLUTIONS TO THE ANTI-ENFORCEMENT LOOPS OF RENEWABLE ENERGY AWARDS

Massive claims arising from Spain's renewable energy measures have raised enough concerns about the problems of the old generation of IIL. Apart from the existing discussions on reforms oriented towards greater and more resilient regulatory power for energy transition, climate change mitigation and adaptation,[84] a more urgent task is to fix up the anti-enforcement loops against existing awards.

A. A Solution to the Dilemma at Hand: Settlement Negotiations

The EU argued that foreign investors would benefit from state aids if Spain paid compensation according to the renewable energy awards. A fact is that the Spanish government has already been the beneficiary of the initial renewable energy incentives.[85] By virtue of its failure to address investment loss resulted from subsequent regulatory changes, Spain should have undertaken the consequences of violating IIL obligations. If the government continues to delay or refuse enforcement on the grounds of EU law compliance, it is likely to incur a more serious execution crisis concerning its overseas properties. For the government to treat the unpaid

[84] *See* Paine & Sheargold, *supra* note 2, at 289-94; Vadi, *supra* note 3, at 1343-45; Simoes, *supra* note 3, at 282-85; Selivanova, *supra* note 3, at 446.

[85] *See* Marata et al., *supra* note 8, at 495; Anthony E. Chavez, *Lessons from Renewable Energy Diffusion for Carbon Dioxide Removal Development*, 32(1) FORDHAM ENVT'L. L. REV. 46, 73 (2020).

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awards more positively and responsibly, an option is that Spain seeks a settlement by negotiations with the award creditors.

There are unique advantages of breaking through the enforcement dilemma by settlement. For one thing, it can make up for the lack of coordination between EU law and international law, resolving their conflicts without retreat of EU law. The enforcement dilemma of the massive renewables awards against Spain has to be attributed to all EU countries in large part. It was their joint negligence in harmonizing EU law with IIL more effectively that caused the conflicts between Spain's obligations under the two legal systems. While attempting to modify the obligations of the member states under the ICSID Convention and other IIAs, the EU failed to obtain the consent of non-EU contracting parties to those treaties or at least notify them in advance. Spain further neglected to talk with the targeted investors before conducting the disputed measures for the purported purpose of complying with EU law. In any case, it is not practical to suggest abolishing the EU law that is contrary to IIL. That may even spark new conflicts. Nonetheless, there are chances to make up for the initial lack of consensus between Spain and the affected investors through settlement negotiations.[86] During such a process, the creditors of the renewables awards can ask Spain to make compensations for the actual violation of IIL obligations, without challenging the legality and validity of the existing EU law. To the affected investors, the potential benefits of seeking a settlement are more apparent. It cannot only help them save cost of time, fees and human resources required by legal procedures for enforcement but also reduce the risk of enforcement uncertainty. Moreover, an amicable settlement by negotiations means a win-win result for both parties which would keep a friendly relationship for potential future transactions.[87]

Apart from the advantages, seeking a settlement does not appear to go against the wishes of the interested parties. In the early stage of renewable energy disputes, Spain had persuaded some investors to quit claims by enacting new investment incentives. For instance, after the issuance of the *Masdar v. Spain* award, Spain applied for annulment of the award but the proceeding was discontinued soon because the state adopted new incentives by RDL 17/2019 royal decree. It provided that renewable energy producers entitled to feed-in tariffs before the regulatory changes of 2013/2014 took place would receive a fixed return of 7.398%, but only if they pledge not to

[86] *See* Romesh Weeramantry et al., *Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis*, 38(1) ICSID REV. 201, 202 (2023).
[87] *See*, *e.g.*, Songling Yang, *Investment Dispute Settlement Mechanism in the Context of the Belt and Road Initiative*, 126 J.L. POL'Y & GLOBALIZATION 29, 32-33 (2022); Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward*, 37(2) BERKELEY J. INT'L L. 215, 224 (2019).

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pursue arbitral claims, withdraw from ongoing arbitrations, and waive their rights to collect on any arbitral awards rendered in their favor. In order to benefit from this more favorable regime than those offered to other investors, the claimants, already successful in arbitration, waived their rights in the award.[88] Besides this case, some claimants of *Stadtwerke München v. Spain*, *RREEF v. Spain* and *PV Investors v. Spain* also waived the claims or the rights of awards for the same reason.[89] These facts can demonstrate the willingness of Spain and the affected investors to negotiate for a settlement, regardless of what Spain's real motive for offering that conditional compromise was,[90] or whether the offer was reasonable. What matters is the effect it had on the investors who can decide whether to initiate or continue a dispute settlement proceeding. The mentioned claimants' choice of taking that offer indicated that this approach would work. It implies that the government could eliminate the impacts of amending energy investment policies and mitigate legal disputes with positive alternatives.

Additionally, recent developments suggest that the pressure of enforcing renewable energy awards is still mounting in Spain. Some investors that won the arbitrations not only asked the International Monetary Fund (hereinafter "IMF") and other similar international organizations to give Spain a negative credit rating,[91] but also tended to assign the awards to a third party. Hitherto, the claimants of *PV Investors v. Spain*, *InfraRed v. Spain* and *RREEF v. Spain*, wholly or partially, have assigned their rights of the awards to an American company, Blasket Renewable Investments (hereinafter "Blasket"), which would substitute them for enforcement applications in subsequent procedures. According to a report by EURACTIV which has seen the provisional attachment order issued by the High Court of the UK, Spanish sovereign assets in London may be seized for enforcement.[92] If more renewable energy investors win

[88] *See* Lisa Bohmer, *Group of Renewables Investors Waive Their Arbitration Rights in Order to Benefit from Spain's New Incentives Scheme*, INV. ARB. REP. (Oct. 5, 2020), https://ersp.lib.whu.edu.cn/s/com/iareporter/www/G.https/articles/first-group-of-renewables-investors-waive-their-arbitration-rights-to-benefit-from-spains-new-incentives-scheme/.

[89] *See* Lisa Bohmer, *RREEF and Stadtwerke Are Said to Renounce their Arbitration Claims Against Spain*, INV. ARB. REP. (Oct. 22, 2020), https://www.iareporter.com/articles/rreef-and-stadtwerke-are-said-to-renounce-their-arbitration-claims-against-spain/.

[90] There is a possibility that a settlement attempt might just be a tactic to delay the investment arbitration process. *See* Julien Chaisse, *Delays Expected but Duration of Delays Unpredictable: Causes, Types, and Symptoms of Procedural Applications in Investment Arbitration*, 37(4) ARB. INT'L 863, 865 (2021).

[91] Remarkably, the claimant of *Antin v. Spain* had "asked the IMF and international rating agencies to take into account Spain's failure to comply with its renewable energy awards when determining the state's credit rating". *See* Bohmer, *supra* note 66.

[92] *See* Max Griera, *UK Court May Seize Spanish Sovereign Assets Amid International Arbitration Quagmire*, EURACTIC (Apr. 6, 2023), https://www.euractiv.com/section/politics/news/uk-court-may-seize-spanish-sovereign-assets-amid-international-arbitration-quagmire/.

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arbitrations against Spain and transfer their award interests to foreign third parties, things could get out of hands of Spain and the EU. Spain really needs to negotiate more positively with relevant investors to avoid further international disputes and potential financial crises. In this case, seeking a settlement, truly for this purpose, is more and more in the interests of the Spanish government.

Due to the great flexibility of settlement negotiations, this article can only sketch out a framework for them: Firstly, considering the multitude of the claimants and the similarity of the massive claims, a negotiation might be held on the basis that all the relevant awards are evaluated together. To conduct a holistic assessment as the first step would help the investors and Spain understand better the practical difficulty and potential legal conflicts of enforcing the awards as normal. It can thus lower both parties' expectations of the settlement before a negotiation. In the meantime, massive and scattered cases, after being consolidated and assessed in a joint way, can better reflect some justifications for Spain to adopt and amend the disputed energy policies, as well as public interest purposes behind those measures, such as environmental protection and energy safety relating to climate change. That would be conducive to a settlement. Notwithstanding the similarity, the enforcement of a certain award is special due to the particularity of some facts, the progress of the case, the time of issuing the award, etc. Therefore, following a comprehensive assessment, the next step could be to categorize the collected awards according to their relevance or commonality, leading to more effective negotiations within groups. Negotiations can even be conducted in batches. For instance, the renewable energy disputes against Spain actually stemmed from a long period of energy reform that can be roughly divided into two phases, including the 2007-2010 period and the period between 2013 and 2014.[93] Accordingly, the negotiations for settling the awards might be grouped in two periods of the regulatory changes. Finally, although there is no fixed way to conduct settlement negotiations, previous experiences of settling economic disputes between sovereign states and foreign private parties can be referenced. A key aspect is the appointment and selection of conciliators. By recalling two successful settlements reached in 1958 at the conciliation of the President and Vice President of the International Bank for Reconstruction and Development (IBRD),[94] it might be helpful to invite at least one authoritative representative of a relative international organization to be the conciliator for settling the enforcement of the renewable energy awards against Spain. Considering the multinationality of the affected investors

[93] *See* Simoes, *supra* note 3, at 258.
[94] One of the disputes was between the City of Tokyo and French bondholders. The other referred to the dispute between Egypt and shareholders of the Suez Canal Company. *See* Weeramantry et al., *supra* note 86, at 202.

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and the places of enforcement in Spain's cases, as well as the special nature of the disputes, the conciliator to be invited could come from multilateral economic organizations, such as IMF and ICSID. However, it would depend on the joint decision of Spain and the affected investors by taking into account other potential factors if this proposal is adopted.

Overall, either to enforce the renewable energy awards as requested by the winning investors or not to enforce them as Spain argued will encounter practical obstacles and legal conflicts. Based on their previous behaviors, seeking a settlement by negotiations seems like a practical and feasible solution. Besides, the anti-enforcement loops also exposed the problems with the procedures of applying for anti-enforcement injunctions against investment awards. They need to be regulated, and only allowed for good faith purposes and in an efficient way.

B. A Long-Term Reflection: Anti-Abuse of Anti-Enforcement Injunctions

Before the burst of renewable energy disputes, procedures for anti-enforcement injunctions are very rare in the enforcement of investment awards. Since the situation might have changed, policymakers of investment arbitration rules need to consider how to restrict the application of anti-enforcement injunctions to investment awards and prevent it from being misused. Although none of the existing arbitration rules on interim measures addresses this special category, the anti-abuse rules relating to investment arbitration procedure may be borrowed for reference.[95]

First of all, anti-enforcement injunction applications should be submitted to and decided by the home state courts of the successful investors. In terms of subjects and actors, there has been no controversy yet over the eligible applicants of anti-enforcement injunctions against renewable energy awards since all of them were filed by the losing state. In this aspect, it seems that no lesson can be learned from anti-abuse rules.[96] On the contrary, the party competent to decide the issuance of an anti-enforcement injunction is arguable. On one side, currently, the courts of the investors' host states, home states, and even a third state are likely to accept

[95] Anti-abuse rules of investment arbitration address various abuses of process in ISDS cases. *See, e.g.*, Eric de Brabandere, *"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims*, 3(3) JIDS 609, 612-35 (2012); Javier Garcia Olmedo, *Recalibrating the International Investment Regime Through Narrowed Jurisdiction*, 69(2) I.C.L.Q. 301, 307-20 (2020).

[96] Especially, denial of benefit clauses in IIAs specify investors and investments unentitled to treaty benefits by precluding domestic investors and investments owned or controlled by investors from the third countries with no substantial economic activities in the territories of the contracting parties. *See* YANNICK RADI, RULES AND PRACTICES OF INTERNATIONAL INVESTMENT LAW AND ARBITRATION 416 (2020).

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such applications, because the assets to be enforced might be located in other jurisdictions than the territories of the investment's host state. Given that the host state is both the responding party to an enforcement application and the applicant of an anti-enforcement injunction, a host state court may be biased in ruling the issuance of an injunction. On the other side, an anti-enforcement injunction procedure concerns the acts of the successful investor, namely, the acts of applying for enforcement. The final decision would also bind the investor. It is thus reasonable for such an application to be decided by the home state court. The latter can exercise a national jurisdiction over the investor, no matter where the property to be executed is located.

Secondly, applications for anti-enforcement injunctions need to be screened by strict prerequisites based on the anti-abuse mechanism of investment arbitration. In addition to denial of benefit clauses, abusive claims of investment arbitration can further be filtered out by two branches of submission preconditions. One is the requirement of waiving other dispute settlement procedures.[97] The other branch includes negativity conditions of treaty benefits and claims, such that the disputed investment is made by corruption, misrepresentation, fraud, or other means amounting to an abuse of process.[98] In the same vein, applications for anti-enforcement injunctions can be limited by certain prerequisites. Most importantly, an award that may be subject to an anti-enforcement injunction should have survived the challenges for review. If an award had not entered into force, with the possibility of being reviewed, appealed or annulled, any procedure of or decision on an anti-enforcement injunction against such award could possibly overlap or conflict with the latter procedure. Further, any objection to enforcement should be submitted to the court with jurisdiction over enforcement first because it is directly relevant to the recognition and enforcement of an award. Moreover, when it is not the first time that an anti-enforcement injunction is requested against a certain award, there should be additional conditions. Repeated applications of an injunction, if not limited, could delay the enforcement proceedings indefinitely. In order to protect the judicial economy and foreign investors' trust in the investment arbitration system, an application of anti-enforcement injunction shall be subject to expedited review and shall be rejected unless new circumstances warrant a new application.

Thirdly, an anti-enforcement injunction may only be granted in

[97] *See*, *e.g.*, North American Free Trade Agreement art. 1121, Dec. 17, 1992, 32 I.L.M. 289. The waiver requirement targets multiple proceedings that may result in double remedies. *See* Olmedo, *supra* note 95, at 333.

[98] *See*, *e.g.*, Free Trade Agreement between Canada and the Republic of Honduras, Can.-Hond., art. 10.1(k), Nov. 5, 2013, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/10.aspx?lang=eng.

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extremely limited and exceptional circumstances. In principle, an application for an anti-enforcement injunction against an investment award should be dismissed because there has been ample opportunity to challenge the arbitral procedures and the award. Even if reserving the possibility that it might be necessary to prevent the enforcement of an award in extreme circumstances, there must be powerful reasons for such an exception. Some circumstances might be taken as exceptional on additional conditions. In substance, they must relate to the statutory annulment grounds, for example, that the counterparty in the dispute exercised a fraud or bribery, without which the results of the award would be different, or the tribunal would not exercise the jurisdiction over the dispute or the claims would not be admissible from the beginning. The scope of such circumstances depends on the applicable law to the dispute.[99] The key condition attached to a possible circumstance is that it is known or ought to be known for the first time by the requesting party after the award has been upheld on appeal or by review. Here, the analysis of Justice Fraser in the enforcement proceeding of *Antin v. Spain* is worth recalling. He recommended two conditions for possible defenses against enforcement of an investment award.[100] I agree with him on one point that defenses against enforcement, which are equal to anti-enforcement arguments, cannot overlap with those which have been or should have been assessed by the tribunal, the annulment committee or court. It is in factual terms that the arguments cannot be repeatedly heard. However, the legal grounds of such an anti-enforcement argument or defense could and must be consistent with those specifically provided in the applicable law to a certain dispute, which is under Article 52 of the ICSID Convention if they deal with the enforcement of an ICSID award.

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[99] For instance, if an award is made by an ICSID tribunal, the party to be enforced could request annulment of the award on the grounds, including:

> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based.

See The Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 52(1), Mar. 18, 1995, 575 U.N.T.S. 159.

[100] The original text of the judgement is as follows:

> Firstly, the law of this jurisdiction must recognise them in respect of final judgments of the English courts; and secondly, they must not overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the ICSID Convention.

See Antin v. Spain, [2023] EWHC 1226 (Comm), ¶ 108.

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To highlight the point, in principle, international investment awards cannot be challenged anymore after being confirmed by annulment committees, national courts or appellate tribunals. Applying for an anti-enforcement injunction against a valid award should be presumed to be malicious, and subject to extremely strict prerequisites. Hence, it shall not be granted unless a new circumstance is found to exist after the related award has been confirmed and it constitutes a legal cause for annulling the award under the applicable law.

VI. CONCLUSION

Energy transition has been underway for many years in some countries. Now, it is spreading around the world. Interactive with international investment areas, policy measures and changes to energy sectors, especially renewables, are very likely to incur investor-state disputes. The conflicts between foreign investors and host governments could last until the enforcement of arbitral awards before national courts, even in third countries. Notably, Spain's anti-enforcement actions against renewable energy awards seem to be infinite loops.

Problems with the application of anti-enforcement injunctions against renewable energy awards have not entered the vision of existing research. Thus, the second section examined Spain's anti-enforcement actions from the perspectives of interim measures. The main finding is that those anti-enforcement procedures can hardly meet the legal conditions of interim measures. What is worse, without playing a real anti-enforcement role, they could result in unnecessary consumption of judicial resources and impairment of public trust in the investment arbitration system. Meanwhile, the EU's support for such actions exposed fundamental conflicts between EU law and international law.

Different from the existing critiques based on the EU legal system, this article revisited Spain's objection arguments according to the rules and principles of public international law and international economic law. The analysis showed that the way Spain applied EU law to oppose the enforcement of renewable energy awards is contrary to international law. In addition to the extra-EU and pre-existence nature of the related IIL, such as the ECT and the ICSID Convention, it was further discovered that Spain's intra-EU objection and state-aid argument are incompatible with the international rules of treaty application and interpretation, as well as the WTO theories and practice on subsidy and remedies.

The final section considered both solutions to the instant enforcement crisis faced by Spain and other potential anti-enforcement loops around investment awards in the context of energy transition. With regard to the enforcement dilemma of renewable energy awards, seeking for a settlement

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by negotiations might be a feasible solution. The feasibility consists in not only the advantages of settlement itself but also the mounting pressure on Spain that came from the assignment of the awards rights to a third party and potential negative credit rating, as well as previous negotiation history between Spain and some affected investors. Besides, in the global context of reforming energy law and policy, there might be more cases with problems similar to Spain's anti-enforcement loops. In the long term, policy makers of investment arbitration rules need to establish an anti-abuse mechanism against anti-enforcement injunction procedures. The finality of investment awards cannot be circumvented by means of unrestricted injunction applications. By learning from the anti-abuse mechanism of investment arbitration, the prerequisites of submitting an anti-enforcement injunction application are required to be specified. An anti-enforcement injunction can make sense only if the related award has been upheld by review or on appeal and the enforcement court has denied the anti-enforcement objection of the enforced party. Moreover, the possibility of granting it has to be minimized in serious conditions. Otherwise, anti-enforcement injunction applications might be used by the losing party as additional tools to object and defend.

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