

# European Commission Decision at Odds with International Arbitration Practice

## Publications

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Many readers will be familiar with the Spanish renewables saga which centers on changes made by Spain to a renewable energy support scheme in 2007, which led to over 50 investment treaty arbitrations, including a number brought by Japanese investors. The European Commission has now invoked state aid to justify the non-payment of the resulting awards against Spain.

The EU courts have long refused the enforcement of these Spanish awards where they are held by EU investors on the basis that arbitration provision in intra-EU investment treaties (i.e., treaties between EU member states) are incompatible with EU law. Essentially, the European Court of Justice (CJEU) has found that it was for the EU courts to decide questions of EU law that might arise in an investment treaty dispute between an EU state and an EU investor, which should not be left to arbitrators acting under investment treaties and outside the EU legal system. Hence, in the seminal *Achmea* case, they have found that arbitration agreements in intra-EU investment treaties, and any awards rendered thereon, are invalid.

Consistent with that approach, the European Commission has now determined that payment of an arbitration award requiring Spain to pay €101 million to two European entities in the Antin Infrastructure Group (incorporated in the Netherlands and Luxembourg respectively) would constitute unlawful state aid under EU rules. Following the principle established by the CJEU in *Achmea* and subsequently in *Komstroy*, under EU law the Antin arbitral award contravenes EU law, accordingly the European Commission has further concluded that payment of the award by Spain would improperly favor Antin and therefore distort competition in the European Union.

This puts EU law further at odds with international arbitration law and practice. Courts in Australia, the United Kingdom, and the United States have shown themselves ready to enforce such awards notwithstanding the *Achmea* line of cases. Essentially these courts have concluded that Spain should be held to its agreement to arbitrate disputes with EU investors given in intra-EU investment treaties even though the European courts have subsequently found that such consent to arbitrate violates EU law. These courts have therefore ignored *Achmea*, leading to a number of high profile and novel enforcement battles, which are likely to continue for some time.

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