Title: Sovereign Immunity in Flux: How Recent Supreme Court and Circuit Developments Are Reshaping FSIA's Boundaries for International Disputes with Foreign States

This is the first installment in "International Arbitration and Litigation," a series from AGG's International Dispute Resolution practice covering developments in international arbitration, as well as recognition and enforcement of arbitral awards before U.S. courts involving the FSIA, the New York Convention, and the ICSID Convention.

Key Takeaways

- Sovereign immunity under the U.S. Foreign Sovereign Immunities Act ("FSIA") has two branches — immunity from jurisdiction and immunity from execution. This installment covers the jurisdictional branch as it applies to arbitral awards against foreign states; a forthcoming installment will address execution.
- Following the Supreme Court's denial of Spain's petition for certiorari in NextEra v. Spain, award-enforcement strategy now turns on where and how the arbitration exception to sovereign immunity in cases involving intra-EU claims is invoked. The Supreme Court left in place the D.C. Circuit's relatively investor-friendly view that intra-EU disputes go to the merits rather than jurisdiction, preserving Washington, D.C. as the leading forum for award creditors under FSIA's arbitration exception; other circuits treat consent as a threshold jurisdictional issue in the determination of whether an arbitration agreement exists.
- The FSIA's treatment of the expropriation exception has been narrowed at the Supreme Court level. In Republic of Hungary v. Simon, the Supreme Court unanimously rejected "commingling" theories and required plaintiffs to trace expropriated property or its proceeds directly into the United States to invoke the expropriation exception, reinforcing sovereign immunity in cases involving fungible assets and historic takings.
- For investors and sovereign states alike, these shifts change litigation strategy at the threshold — from how to plead an expropriation claim to where and how to enforce, or resist, an arbitral award. Investors pursuing expropriation or award-enforcement claims against states now need a sophisticated asset-tracing plan that ties specific assets or proceeds to the dispute and anticipates execution immunity, attachment limits, and defer and stay procedures.

Recent FSIA Developments Impacting Sovereign Immunity

FSIA is the exclusive framework for obtaining jurisdiction over a foreign state in U.S. courts, and foreign sovereigns remain presumptively immune unless a statutory exception applies. See, e.g., Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); 28 U.S.C. § 1604. Among the most consequential exceptions for modern cross-border disputes are the expropriation exception and the arbitration exception, as they sit at the intersection of sovereign acts, treaty obligations, and enforcement risk.

FSIA functions as the threshold gatekeeper in cases involving enforcement of international arbitral awards: it determines whether a sovereign can be brought before a U.S. court at all, while the New York Convention, applicable in the U.S. through Chapter 2 of the Federal Arbitration Act, and ICSID Convention, integrated in the U.S. through 22 U.S.C. § 1650a, govern how qualifying awards are recognized and enforced once that jurisdictional hurdle is cleared. As a result, in cases involving awards against sovereigns, whether under the New York or ICSID Conventions, the initial and often decisive question is which FSIA exception, if any, removes immunity and opens the door to applying those arbitral enforcement frameworks.

This series tracks developments across all three legal frameworks. This first installment focuses on two recent developments relating to the scope of FSIA immunity: first, the Supreme Court's June 29, 2026, denial of Spain's petition for certiorari in the NextEra/9Ren/Blasket line of cases, which leaves undisturbed the Washington, D.C. Circuit's treatment of the intra-EU objection under the arbitration exception; and second, the Supreme Court's 2025 decision in Republic of Hungary v. Simon, which narrowed the expropriation exception by demanding more rigorous tracing.

The Arbitration Exception: What the Court's Denial in *NextEra v. Spain* Means

The FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), withdraws sovereign immunity from a suit to "confirm an award made pursuant to" an "agreement made by the foreign state with or for the benefit of a private party to submit to arbitration ... differences ... between the parties."

Overview

Spain's certiorari petition arose from a series of renewable-energy arbitrations against Spain, in which European investors challenged under the Energy Charter Treaty ("ECT") Spain's rollback of solar subsidies, obtained favorable arbitral awards, and then sought to have those awards confirmed in U.S. courts. Spain opposed enforcement in the U.S. by raising the so-called "intra-EU objection:" relying on the two landmark decisions of the Court of Justice of the European Union ("CJEU") — the Achmea and Komstroy rulings — it argued that EU law bars investor-state arbitration between EU investors and EU member states under intra-EU bilateral investment treaties and the ECT, so that Spain could not validly consent to arbitration with EU investors and thus no arbitration agreement ever existed.

That put a threshold question squarely in play, whether the intra-EU objection defeats jurisdiction under FSIA § 1605(a)(6) or instead presents a non-jurisdictional "scope" question.

Judges within the District of Columbia were divided on the question. Judge Chutkan held in the NextEra and 9Ren (ECT, ICSID) cases that the arbitration exception applied despite the intra-EU nature of the disputes. NextEra Energy Global Holdings B.V. v. Kingdom of Spain, 656 F. Supp. 3d 201 (D.D.C. 2023); 9REN Holding S.à r.l. v. Kingdom of Spain, No. 19-cv-01871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023). But Judge Leon in the Blasket (ECT, New York Convention) case agreed with Spain that the exception did not apply because no arbitration agreement had ever been formed. Blasket Renewable Invs., LLC v. Kingdom of Spain, 665 F. Supp. 3d 1, 21 (D.D.C. 2023).

The D.C. Circuit resolved that divide in August 2024, treating consent as a matter of scope rather than existence, reversing Blasket and affirming NextEra and the others. See NextEra Energy Global Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088 (D.C. Cir. 2024). Spain then petitioned the

Supreme Court for certiorari, raising two issues of significant importance. Petition for a Writ of Certiorari, Spain v. Blasket Renewable Invs. LLC, No. 24-1130 (U.S. May 1, 2025). On June 29, 2026, the Court denied Spain's petition, leaving the D.C. Circuit's framework undisturbed. Spain v. Blasket Renewable Invs. LLC, No. 24-1130 (U.S. June 29, 2026) (cert. denied).[1]

Spain's certiorari petition to the Supreme Court raised two issues of significant importance. First, whether U.S. courts may assert jurisdiction under § 1605(a)(6) without first determining whether the sovereign consented to arbitrate differences between itself and the plaintiff. Second, whether forum non conveniens is categorically unavailable in suits to confirm foreign arbitral awards.

The Circuit Split on Consent

Spain submitted that the Court should resolve the circuit split over the FSIA's arbitration exception. It argued that in the Second and Fifth Circuits, whether the sovereign consented to arbitrate with the specific plaintiff is a threshold jurisdictional question. Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993); Al-Qarqani v. Saudi Arabian Oil Co., 19 F.4th 794 (5th Cir. 2021). The D.C. Circuit, however, stands alone in treating consent as a merits question, holding that jurisdiction attaches because the ECT contains an arbitration agreement, arguably signed for the benefit of at least some investors. Pet. at 24. Spain argued that it never consented to arbitrate with EU investors under the ECT's arbitration provision, explaining that the Court of Justice of the European Union, the EU's highest court, has held that the ECT's arbitration provision is "incompatible with EU Law," and as a result, that provision "is not (and never was) an offer to arbitrate disputes between EU Member States like Spain and EU nationals like respondents." Pet. at 6, 13 (internal citations omitted).

Spain's petition also raised a second, independently significant question: whether a district court may dismiss an award-confirmation suit on forum non conveniens grounds. The petition discussed that the courts of appeals are split multiple ways. For example, the Second Circuit treats it as an ordinary, discretionary defense, asking whether a sovereign defendant has some attachable assets in the alternative forum rather than whether the specific U.S. asset can be reached there. Pet. at 24 – 29. The D.C. Circuit bars the defense categorically, reasoning that because only a U.S. court can attach assets located in the United States, no foreign forum is ever adequate. NextEra, 112 F.4th at 1105.

Why the United States Opposed Supreme Court Review

Rather than rule on Spain's petition in the fall of 2025, the Supreme Court invited the views of the United States. In its May 26, 2026, brief, the U.S. government took a middle position. See Brief for the United States as Amicus Curiae at 16, Spain v. Blasket Renewable Invs. LLC, No. 24-1130 (U.S. May 26, 2026).

On the arbitration exception, it disagreed with the D.C. Circuit's reasoning, arguing that the intra-EU objection goes to the existence of an arbitration agreement, not merely its scope, and therefore should be reviewed by U.S. courts as part of the FSIA analysis. Even so, it recommended that certiorari be denied, reasoning that U.S. courts would likely reject the intra-EU objection in any event. Id. 8-9. The government argued that the ECT's text provides Spain's "unconditional consent" to arbitrate with investors from signatory states, and the Vienna Convention on the Law of Treaties forbids a state from invoking “internal law” — including EU law — to escape a treaty obligation. The U.S. government thus concluded that, on de novo review, courts would find that valid arbitration agreements exist regardless of the existence-versus-scope framing. Id. at 17. On forum non conveniens, the government acknowledged a genuine circuit split but concluded this case was not a suitable vehicle to resolve it.

Practical Impact of the Supreme Court’s Denial for Award Enforcement

The Supreme Court’s June 29, 2026, denial followed the U.S. government’s recommendation, leaving the circuit split described above in place. However, the denial does not signify endorsement of the D.C. Circuit’s reasoning. Instead, it leaves the D.C. Circuit’s decision intact as binding precedent for federal courts in the District of Columbia, where many sovereign award-enforcement cases are brought.

If U.S. courts confirm the awards against Spain, the nation will face a direct conflict between U.S. judgment-enforcement obligations and EU law. With the Supreme Court declining to resolve the issue, that tension will now play out in the lower courts and in parallel enforcement and execution proceedings, rather than being settled by a single authoritative ruling.

What is Next: Enforcing Judgments Against Foreign State Assets

Establishing jurisdiction is only the first step. Even after an award holder clears the FSIA’s jurisdictional hurdle, it faces the separate and often more difficult fight in executing against sovereign assets, a branch of immunity that is stricter still and demands its own express-waiver analysis. This is where many enforcement efforts ultimately stall: a favorable jurisdictional ruling secures the right to sue, but collecting against a non-compliant state is a distinct contest that plays out asset by asset.

The Expropriation Exception After *Hungary v. Simon*

The FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), withdraws sovereign immunity for claims concerning “rights in property taken in violation of international law” where the property, or property “exchanged for” such property, is “present in the United States in connection with a commercial activity carried on in the United States by the foreign state.”

Overview

Republic of Hungary v. Simon arose from claims by Jewish survivors of the Hungarian Holocaust, and their heirs, seeking compensation for property that Hungary and its state-owned railway, Magyar Államvasutak Zrt., systematically expropriated. Republic of Hungary v. Simon, 604 U.S. 115 (2025). The plaintiffs sued in U.S. court under the FSIA’s expropriation exception, which requires a commercial nexus to the United States. Because Hungary had long since liquidated the seized property and commingled the proceeds with other government funds, the case turned on a recurring, unsettled question: how directly must a plaintiff connect the specific expropriated property or its traceable proceeds to the United States? The D.C. District Court and the D.C. Circuit had accepted that commingling plus later U.S. spending was enough, reasoning that a stricter rule would render the exception a “nullity” for liquidated property; the Supreme Court granted review to decide whether that theory satisfies the exception.

The Supreme Court Narrows the FSIA Expropriation Exception

In a unanimous decision issued on February 21, 2025, and authored by Justice Sotomayor, the Supreme Court held that a plaintiff cannot establish the commercial nexus required by the expropriation exception merely by alleging that a foreign state expropriated property, liquidated it, commingled the proceeds with other government funds, and later spent some of those commingled funds in the United States. Instead, where a plaintiff relies on the theory that funds present in the United States were "exchanged for" the expropriated property, the plaintiff must trace those funds back to the expropriated property. Commingling alone does not suffice. The Supreme Court reversed, vacated, and remanded the case.

New Asset-Tracing Requirements for Expropriation Claims

The Court acknowledged that tracing is more difficult when expropriated property is sold for money or other fungible assets, but it declined to treat fungible property differently under the statute. A plaintiff must show that the specific funds, and not just any funds from the state's treasury, are present in the United States in connection with commercial activity. The Court noted that the requirement can still be satisfied in some circumstances involving commingling; for example, where a sovereign deposits the proceeds of expropriated property into an account and then spends all the money in that account in the United States, or in cases where there may be temporal proximity between the comingling and U.S. expenditure. Simon, 604 U.S. at 128-129.

Policy Rationale

The decision reflects the Court's concern that an expansive reading of the exception would make the United States an even greater outlier: it is the only country that recognizes an expropriation exception to sovereign immunity. This would create reciprocity risks, potentially subjecting the U.S. government to suit in foreign courts. The Court emphasized that Congress did not intend the expropriation exception to "operate as a radical departure from basic principles of the restrictive theory" of sovereign immunity. Simon, 604 U.S. at 132.

Additional 2026 Developments Affecting Foreign Sovereign Immunity

Beyond the two marquee cases, several developments this period reinforce that sovereign-immunity questions are unsettled and recurring:

- On the same day that the Supreme Court denied Spain's petition, it also denied Russia's parallel petitions in Stabil v. Russia and DTEK Krymenergo v. Russia. These cases sought to enforce awards arising from Crimean investments under the Russia-Ukraine BIT. Russia argued that whether it consented to arbitrate goes to the existence of an arbitration agreement and must be fully reviewed, presenting the same consent theory Spain pressed, and asking to be heard together with Spain's petition. The District Court of the District of Columbia had applied the arbitration exception in both cases, and the D.C. Circuit confirmed those in February 2026. The simultaneous denials in Spain's and Russia's petitions highlight the Court's disinclination to take up the arbitration-exception question now.

- The wave of parallel intra-EU suits continues. Similar ECT award-enforcement actions remain pending in the District Court of the District of Columbia against Italy, Croatia, Poland, and Bulgaria, each raising the same intra-EU objection now governed by the D.C. Circuit's framework.
- Enforcement is already advancing. Even while Spain's cert petition was pending, district courts pressed ahead with enforcement and post-judgment discovery against Spain. For example, subpoenas concerning entities tied to Spain's national football team and federation, and restrictions on post-enforcement discovery of Spanish defense contractors in Watkins v. Spain.
- The Simon case returns to the lower courts. Having vacated and remanded, the Supreme Court left the lower courts to apply the new tracing standard, likely to produce the first guidance on how demanding it is in practice.

What Investors, Foreign States, and Multinational Businesses Should Know

The Supreme Court is sending a clear signal of caution on expanding FSIA exceptions, as its decision in Simon illustrates. Investors bringing expropriation-based claims now need a disciplined, front-loaded asset-tracing strategy; by contrast, states have a stronger immunity argument wherever proceeds have been mixed into broader asset pools.

With the Court's refusal to hear Spain's cert petition, the D.C. Circuit remains the pivotal forum for award-enforcement cases and, for now, offers a relatively claimant-friendly route through the arbitration exception in matters involving intra-EU claims.

Yet none of this is settled nationwide. Because the Supreme Court declined to reach the merits, future litigants can continue to test the issue in other circuits, and respondent states will likely keep arguing that intra-EU objections go to the very existence of consent to arbitrate, and must be addressed before a U.S. court may exercise jurisdiction under FSIA.

For now, the District of Columbia is the gravitational center of these disputes — both because § 1391(f)(4) allows any suit against a foreign state to be filed there and because the D.C. Circuit reads the arbitration exception in a comparatively claimant-friendly way.

How AGG Assists Clients With FSIA Litigation and International Arbitration

Anyone with questions about the FSIA, disputes involving foreign sovereigns or their agencies or instrumentalities, or related topics should reach out to AGG International Dispute Resolution practice chair Diana Tsutieva.

[1] The cert petition was docketed as Spain v. Blasket Renewable Investments LLC, No. 24-1130, arising from the D.C. Circuit's consolidated opinion in NextEra Energy Global Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088 (D.C. Cir. 2024).