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## Compliance with ISDS Awards: Empirical Perspectives and Reform Implications

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# Compliance with ISDS Awards: Empirical Perspectives and Reform Implications

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## Executive summary

**Background.** It is commonly assumed that States generally comply with damages awards in investor-state dispute settlement (ISDS). Otherwise, they would risk reputational consequences (such as less foreign investment) or enforcement actions in domestic courts. However, several new studies suggest that non-compliance and delayed compliance might be widespread.

**Relevance to UNCITRAL WG III.** Concerns about compliance have consequences for the ISDS reform process in UNCITRAL WG III. This is for three reasons:

- If non-compliance is common, then there is a risk that the enforcement mechanism for the proposed multilateral investment court and appeals mechanism through the New York Convention may not be available.
- The compliance process touches on many core concerns of WG III. This includes excessive legal costs and duration due to delayed compliance, the presence of third-party funding (with a secondary market for purchasing awards), and questions concerning legal consistency, prevention of disputes, and transparency.
- Non-compliance may be not only a cause of additional challenges with ISDS, but also a sign of its alleged *illegitimacy*.

**Focus on degree of compliance.** This Academic Forum paper does not deal with all the concerns that non-compliance might have for the UNCITRAL WG III, but seeks to provide an initial empirical perspective and analyse whether States comply with ISDS awards. It draws on existing literature and a novel study of unexamined awards as part of the broader COPIID project.

**Methodology.** The data was collected from all available public and online sources. However, it was challenging as most States and investors do not publish direct information about compliance actions and processes. In the analysis, we do not adopt *one* definition of compliance but analyse whether States have complied with obligations arising out of awards (1) *immediately*, (2) *following* setting aside/annulment proceedings and/or enforcement proceedings or (3) *not at all*; as well as whether States entered into any post-award settlement agreements.

**Findings.** The following patterns were clear from the data analysed in this report:

- Compliance with ISDS awards is not automatic. Instead, partial, delayed, and non-compliance are common.
- Follow-on proceedings in the form of setting aside/annulment and enforcement are frequent. Compliance with awards in the absence of the initiation of these follow-on proceedings is rare.
- On some occasions, States and investors enter into post-award settlement agreements. They range from payment plans and agreements on reduced amounts to alternatives to compliance, such as policy change.

**Implications.** The empirical picture of compliance challenges assumptions about the effectiveness and legitimacy of ISDS, and the consequences of the proposed reforms. The presence of diverse post-award settlement agreements raise questions about the finality of ISDS as a dispute resolution system. Moreover, the information deficit about compliance inflates existing transparency and legitimacy concerns about ISDS.

## I. Introductory observations

1. Until recently, it was commonly assumed that States generally abide by adverse decisions emanating from investor-state dispute settlement (ISDS).<sup>1</sup> Otherwise, States would risk

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\* Empirical work for this paper was done in the framework of the broader research project, *Compliance Politics and the International Investment Disputes (COPIID)*, funded by the Research Council of Norway for the period 2022-2025. This interdisciplinary and multimethod project examines the state of compliance with ISDS awards and legal cost orders, why States and investors comply, compares the results with other international courts and tribunals, and examines the implications for reform behaviour and investor/arbitrator behaviour. See: <https://www.jus.uio.no/pluricourts/english/projects/copiid/index.html>. We would like to thank Taylor St John, Lara Marie Nicole Eguia, Isabella Cuervos-Lorens, Nicola Clair Strain, Prevy Parekh and Faadhil Adams for their assistance in gathering information on compliance with ISDS awards.

<sup>1</sup> Alan S. Alexandroff and Ian A. Laird, 'Compliance and Enforcement', in Peter T Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1173, fn6.

reputational consequences, such as less foreign investment,<sup>2</sup> or enforcement actions.<sup>3</sup> However, several newer studies suggest that non-compliance or partial compliance might be widespread.<sup>4</sup>

2. In the initial discussions, the ISDS reform process in Working Group III of the UN Commission on International Trade Law (UNCITRAL WG III), which commenced in 2017, *compliance* did not feature.<sup>5</sup> However, it was raised in the January 2020 session during the debate over the enforcement of decisions of the EU's proposed multilateral investment court (MIC). As there is currently legal uncertainty over whether such decisions (including also under a new appeals mechanism) are enforceable in domestic courts through the New York Convention, States were interested to learn whether compliance is a *real issue*. If it was a problem, the question over the enforceability of MIC/appellate mechanism decisions would be particularly important. In this report, we therefore examine the extent to which compliance is a concern in practice. The separate doctrinal question of enforcement under the New York Convention is being addressed by another ISDS Academic Forum working group.<sup>6</sup>
3. Moreover, in our view, compliance raises a broader range of issues that are central to the *key concerns* of UNCITRAL WG III. This is not surprising given that compliance is a central element of dispute resolution, and no dispute can be considered as being finally resolved until the violated rights and undermined interests are effectively restored as

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<sup>2</sup> Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment', (2011) 65(3) *International Organization* 401, 429-430 (suggesting that '*Investment treaties may provide the benefits that signatory governments seek, but these benefits are not automatic. Instead, they are contingent upon upholding the terms of the treaties and avoiding being called out to a global audience before an international arbitration body.*'); Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review* 1, 9; Beth A. Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment', (2014) 66(1) *World Politics* 12, 37-39 (naming annulment and non-compliance as means of resistance to the regime, but investigating annulment only).

<sup>3</sup> Alexandroff and Laird, 'Compliance and Enforcement' (n. 1).

<sup>4</sup> Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with Investment Awards' (2020) 35 *ICSID Review* 540; Daniel Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance' (2022) 13 *Journal of International Dispute Settlement* 179.

<sup>5</sup> For the background of this process, see Anthea Roberts, 'Incremental Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) *American Journal of International Law* 410; Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler and Daniel Behn, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions' (2020) 21(2-3) *Journal of World Investment & Trade* 167.

<sup>6</sup> The working group 'Enforcement of Decisions by Permanent Adjudicatory Bodies (Legal Dimensions)' convened by Michele Potestà.

ordered by an adjudicative body<sup>7</sup> or the parties are satisfied with the outcome.<sup>8</sup> Key concerns to be addressed by the WG III reform process are: (1) lack of consistency, coherence, predictability and correctness of arbitral decisions; (2) lack of independence, impartiality, and diversity amongst arbitrators and (3) the cost and duration of ISDS<sup>9</sup> as well as several additional concerns including non-transparency, third-party funding, failure to prevent investment disputes, and the methodology for the calculation of damages.<sup>10</sup> Limited and delayed compliance together with instigation of enforcement processes touch on many of these concerns. We can name excessive legal costs, the duration of proceedings, legal consistency, the prevention of disputes, third-party funding, and transparency.

4. Furthermore, it can be argued that non-compliance is not only a cause of problems with the system, but also a sign of its alleged *illegitimacy*. If non-compliance is based on principled opposition to the reasoning in a particular award or the entire regime, and not only dissatisfaction with the result of the award, it can be understood as a signal of broader State discontent.<sup>11</sup> Indeed, in seeking to ensure an *effective* and *legitimate* dispute resolution mechanism, UNCITRAL WG III could benefit from a broader and deeper understanding of the state of compliance with ISDS awards.
5. This paper seeks therefore to provide an empirical perspective on ISDS compliance and analyse *whether* States comply with ISDS awards.<sup>12</sup> In so doing, we draw on existing literature – particularly an empirical study by Emmanuel Gaillard and Ilija Mitrev Penusliski, entitled ‘State Compliance with Investment Awards’<sup>13</sup> – and a novel study of

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<sup>7</sup> Diana Kapiszewski and Matthew M. Taylor, ‘Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings’ (2013) 38(4) Law & Social Inquiry 803.

<sup>8</sup> See, e.g., Malcolm Langford, Taylor St. John, Øyvind Stiansen, Yuliya Chernykh, Tarald Berge, and Sergio Puig, ‘Compliance Bargaining: The Case of International Investment Arbitration’, PluriCourts Working Paper, 2022.

<sup>9</sup> UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UN doc. A/CN.9/WG.III/WP.149 (5 September 2018); UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Vienna, 29 October–2 November 2018, UN doc. A/CN.9/964.

<sup>10</sup> UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session*, New York, 1–5 April 2019, United Nations Commission on International Trade Law fifty-second session Vienna, 8–26 July 2019, UN doc A/CN.9/970. For a discussion on the background to these concerns, see Langford, Potestà, Kaufmann-Kohler and Behn, ‘UNCITRAL and Investment Arbitration Reform’ (n.5).

<sup>11</sup> Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford, ‘The International Investment Regime and Its Discontents’ in Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022) 39, at 74-75.

<sup>12</sup> For a discussion on why States comply with awards, see Peat, ‘Perception and Process’ (n.4); and Langford, St. John, Stiansen, Chernykh, Berge and Puig, ‘Compliance Bargaining: The Case of International Investment Arbitration’ (n.8) section V.

<sup>13</sup> Gaillard and Penusliski, ‘State Compliance with Investment Awards’ (n.4).

unexamined awards as part of the broader COPIID project. Specifically, we will address the following four questions:

**First**, at the aggregate level, do States comply with ISDS awards by paying compensation and relevant interest?

**Secondly**, is such compliance immediate or delayed, for example by States exhausting all possible recourses against the awards or investors turning to legal enforcement mechanisms due to non-payment?

**Thirdly**, what is the role of post-award settlement agreements in compliance? In other words, do States primarily comply with the original arbitral award or do they often comply, contractually, with post-award settlements after further negotiations with the claimant investor?

**Finally**, is information on compliance accessible and complete – in particular, do States provide information on compliance or the lack thereof? We are particularly interested in the consequences of the lack of transparency for dispute prevention and system legitimacy. These four questions do not exhaust all the relevant empirical aspects of compliance for WG III,<sup>14</sup> but they provide a first insight into the manner in which compliance is relevant for ISDS reform.

## II. Nature of awards and terminology

6. The number of ISDS cases has steadily risen, with 1148 estimated cases as 1 November 2022.<sup>15</sup> In these cases, the arbitration tribunal decides whether investor rights have been violated by the respondent state. If they find a violation, the tribunal will ordinarily order the payment of compensation, the purpose of which is to undo the harm, but not the wrongful act.<sup>16</sup> Other forms of reparation, such as the restitution of property and specific performance also exist, but in practice tribunals have preferred to order compensation, due

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<sup>14</sup> See discussion in paragraphs 3 and 4 above.

<sup>15</sup> Investor-State Law Guide, <<https://new.investorstatelawguide.com>> (accessed on 7 November 2022)

<sup>16</sup> Andrés Jana, 'Reparation in Investment Treaty Arbitration' (2016) 110 ASIL Annual Proceedings 288.

to practical and legal hurdles.<sup>17</sup> In this report, we will focus on compliance in the form of the payment of compensation.

7. The damages awarded in ISDS cases tend to be large comparing to other international courts and tribunals, and have been growing over time.<sup>18</sup> In 2021, the 10-year moving average for an award was 482 million USD, or 218 million USD (if we exclude the three Yukos cases which together totalled \$50 billion alone).<sup>19</sup>
8. If one adopts an expansive and flexible concept of *compliance*, it covers the voluntary or involuntary performance of the legal obligations arising under ISDS awards. Performance with an ISDS award may involve *immediate payment* after a tribunal issues a binding award or following *setting aside/annulment proceedings*.<sup>20</sup> Compliance may also take place after and through a special legal procedure – *enforcement*<sup>21</sup> – that equates an arbitral award with a domestic court judgment, and thus triggers the same domestic execution mechanisms. Performance may also take place when parties agree on and comply with *post-award* settlement agreements that either retain, amend or otherwise transform obligations under an award into new contractual undertakings. Some might even argue that *unwritten quid pro quo* arrangements (e.g., a new licence or a contract for the investor in lieu of full payment) might constitute compliance.

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<sup>17</sup> Ibid, at 290.

<sup>18</sup> Figures as of May 2021, averages calculated from 263 known damage awards (in addition to 182 pre-award settlements), and adjusted for inflation. Extracted from Jonathan Bonnitcha, Malcolm Langford, Jose M. Alvarez-Zarate and Daniel Behn, 'Damages and ISDS Reform: Between Procedure and Substance', (2021) 12 Journal of International Dispute Settlement 10.

<sup>19</sup> Ibid.

<sup>20</sup> Pursuant to Article 52(1) ICSID Convention, annulment proceedings enable parties to challenge ICSID awards before *ad hoc* committees because of the improper constitution of the Tribunal; manifest excess of powers by the Tribunal; corruption on the part of a Tribunal member; a serious departure from a fundamental rule of procedure; and failure to state reasons. Setting aside proceedings enable parties to challenge non-ICSID awards and awards rendered under the ICSD Additional Facility rules before national courts on limited and mostly procedural grounds that may somewhat vary depending on the jurisdiction. Article 34 of the UNCITRAL Model Arbitration Law provides an example of typical grounds for setting aside for the 85 countries which have based their national arbitration acts on the UNCITRAL model.

<sup>21</sup> Enforcement proceedings are the domestic procedure before national courts that effectively equates awards with national court judgments and enables effective recovery that is indistinguishable from recovery under court judgments. Often enforcement is distinguished from execution in that execution relates to the actual performance of awards, while enforcement relates to a technical domestic procedure which enables execution. See, for instance, Glossary of ISDS Terms and Concepts prepared by the Academic Forum members which defines enforcement as '*the legal process in a municipal court by which an arbitral award is reduced to a judgment that is then capable of execution*' and execution as '*the legal process by which the relief granted in a judgment is obtained through measures ordered by or under the auspices of a court*' – Glossary of ISDS Terms and Concepts <[https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/glossaries/eng-\\_final.pdf](https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/glossaries/eng-_final.pdf)>(accessed on 22 August 2022).

9. However, many scholars and states may disagree that all of these actions constitute compliance. Fundamentally, we can distinguish between two general approaches in defining compliance: (1) compliance as a strict *execution* of original awards (full or partial; immediate or delayed) and (2) compliance as a *satisfaction* of the claimant's interests whatever form such satisfaction takes including through post-award contractual arrangements or other benefits granted to the investor (post-award settlement agreements; quid pro quo arrangements). Disagreement may also persist within these two general categories: for example, some may consider delayed and partial payment not to be compliance, even if the claimant tacitly accepts such payment.
10. In this paper, we do not adopt a single definition of compliance, or take a position on its meaning. Instead, we aim to provide an empirical picture based on these differing definitions, in both aggregated and disaggregated forms. In other words, we use analytically the term *compliance* in its broader meaning to encompass the various descriptive possibilities that lead to implementation of an award in its original or transformed form.

### **III. State of the art: Existing empirical literature on compliance**

11. For a long time, academic scholarship neglected the empirical study of compliance with ISDS awards, instead focusing on the analysis of the legal mechanisms available to investors under the ICSID and New York Conventions that support compliance with arbitral awards.<sup>22</sup> This is not surprising given the unique compliance architecture for ISDS in public international law, in addition to the reputational risks of non-compliance. This architecture allows claimant investors direct access to domestic courts to obtain execution orders against state assets, with minimal forms of judicial review of the original award.
12. However, recent research has begun to explore whether compliance occurred in a particular case (or jurisdiction) and which factors influenced a State's decision to comply. In the first large-scale study of compliance with ISDS awards, Gaillard and Penusliski look for

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<sup>22</sup> For instance, Leonardo Borlini and Stefano Siligardi, 'Enforcement of Investment Arbitration Awards' in Julien Chaisse et al. (eds.), *Handbook of International Investment Law and Policy* (Springer 2021) 1475-1498; Alexandroff and Laird, 'Compliance and Enforcement' (n.1); Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2022, 3rd Edition) 446-450.

evidence of compliance with 170 ISDS awards against the 32 most sued states.<sup>23</sup> Their principal finding is that full and immediate compliance is not the most common response of States. Using information from the databases and media reports, they find that States paid in 85 out of the 170 awards, annulment is pending in 34 cases, and payment is not known in 51 awards.<sup>24</sup> Moreover, payment was often delayed. Investors turn to enforcement actions in 40 per cent of their surveyed cases.<sup>25</sup>

13. In another study, Peat focuses on Argentina's partial and delayed compliance with five adverse ISDS awards rendered between 2005 and 2008.<sup>26</sup> His research underscores how the enforcement architecture played only a minimal role in the calculus of Argentina's decision-making. According to Peat, Argentina's initial resistance – and later decision to partially comply – was influenced by the sentiment within the Argentine legislature and public, availability of multilateral development bank loans, access to bond markets, and preferential trade status (which the US government suspended after initial non-compliance).
14. Nonetheless, these studies remain limited in scope (whether number of cases and jurisdictions) and hence do not provide any complete picture of compliance within the ISDS regime.<sup>27</sup>
15. This scarcity of empirical studies is striking. It pales when compared with the longer tradition of empirical studies of compliance with judgments of international courts.<sup>28</sup>

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<sup>23</sup> Gaillard and Penusliski, 'State Compliance with Investment Awards' (n.4).

<sup>24</sup> Ibid, 47.

<sup>25</sup> Ibid, 51.

<sup>26</sup> Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance' (n. 4). See also Moshe Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016) 19 JIEL 681.

<sup>27</sup> For instance, an edited volume *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* contains a general section analytically addressing various aspects of enforcement and a country-specific section addressing compliance with ISDS awards in not less than 26 analysed jurisdictions – Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Globe Law and Business 2021, Second Edition). See also Daniel Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance' (n.4).

<sup>28</sup> See: Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2014) 98 (3) *The American Journal of International Law* 434-461 with further references; Øyvind Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' (2021) 51 *British Journal of Political Science* 899; Tom Ginsberg and Richard H. McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', (2004) 45(4) *William and Mary Law Review* 1229; Gary Horlick and Judith Coleman, 'The Compliance Problems of the WTO', (2007) 24(1) *Arizona Journal of International and Comparative Law* 141; Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights'(2010) 6 *Journal of International Law & International Relations* 35; Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human

However, the lack of transparency of States and investors on compliance processes (see section 5 below) and the multilingual documentation of domestic enforcement actions may partly explain it. The new COPIID project is thus seeking to partly overcome this by developing a team of 20+ researchers with multi-lingual competence to track compliance in all ISDS cases.<sup>29</sup>

16. Whatever the reasons, the scant research has implications for the field. As observed at the beginning of this paper, the absence of a comprehensive empirical overview of the status of compliance with ISDS awards leads to a misunderstanding that compliance with ISDS awards is a *non-issue*, *i.e.*, that States normally comply.

#### IV. Methodology

17. Our study takes an *interim step* methodologically. It presents a new independent empirical investigation of the *least sued* States (46 cases) and compares them with the findings of Gaillard and Penusliski regarding the *most-sued* States up to 2020 (170 cases).
18. Our own dataset consists of the cases listed in Annex 1. They were all selected<sup>30</sup> with the use of two databases, PITAD<sup>31</sup> and the UNCTAD Investment Dispute Settlement Navigator,<sup>32</sup> respectively. The least sued States are defined as States with nine or less known investment treaty arbitration proceedings initiated before 31 December 2019

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Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', (2014) 25(1) European Journal of International Law 205; Erik Voeten, 'Domestic Implementation of European Court of Human Rights Judgments: Legal Infrastructure and Government Effectiveness Matter: A Reply to Dia Anagnostou and Alina Mungiu-Pippidi', (2014) 25(1) European Journal of International Law 229; Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017); Başak Çalı and Alica Wyss, (2011) 'Why Do Democracies Comply with Human Rights Judgments? A Comparative Analysis of the UK, Ireland and Germany', SSRN Working Paper 8/2009 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462281](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462281)> accessed 31 August 2022; Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', (2008) 19(4) European Journal of International Law 725; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014); Open Society Justice Initiative, 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions' (Open Society Foundations 2010).

<sup>29</sup> Strain et. al., 'Compliance Politics and International Investment Disputes: A New Dataset', PluriCourts Working Paper 2022.

<sup>30</sup> The selection of cases was double-checked on 30 June 2022.

<sup>31</sup> PITAD is accessible here <<https://pitad.org/index#welcome>>.

<sup>32</sup> UNCTAD Investment Dispute Settlement Navigator <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>.

regardless of their result being in favour of an investor, a State or neither party.<sup>33</sup> The dataset includes only those cases that resulted in a final award by 15 April 2021 and where States were found liable and damages were awarded (even if some of these awards were successfully set aside or annulled at a later stage). We thus do not include cases where investors lost or where liability was found but no remedies were awarded.

19. We explain our choice of preparing our own – comparatively small – dataset of 46 cases by (1) temporal constraints and necessity to verify data and (2) desire to help fill quickly the existing empirical gap in knowledge as requested by WG III. The results from our broader and comprehensive data gathering in the larger COPIID research project will only be made public later in the year.<sup>34</sup> Focusing on the least sued States<sup>35</sup> also enabled us to neatly fill one gap in empirical knowledge of State compliance with ISDS awards by contributing the converse of the empirical data collected by Gaillard and Penusliski, who focused on most sued states.
20. Similar to the study of Gaillard and Penusliski, we used both official and unofficial sources of information for coding, including press releases by state authorities and foreign investors, publicly available court materials and other documents, as well as different analytical sources, such as GAR, IAREporter, and various academic and practical publications. Our understanding of compliance, for the purposes of measurement in this paper is also largely in line with Gaillard and Penusliski. It covers only those expected actions according to the award or settlement agreements but is disaggregated according to whether States had paid out or otherwise fulfilled the award (either in full or partially; immediately, or met the terms of a post-award settlement where it was made public).
21. In the absence of centralised reliable registers of compliance, we coded as ‘complied’ or ‘non-complied’ when we came across primary or secondary evidence that explicitly indicated that there respectively was or was not a fulfilment. A finding of compliance was therefore based on an affirmation of fulfilment by states or investors or from other actors

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<sup>33</sup> We note that the categories ‘most sued’ and ‘least sued’ are not permanent labels and depend on a time factor. Other than to describe our dataset we do not have any intention to attribute to these categories any other meaning, positive or negative.

<sup>34</sup> The emerging COPIID database will include information on compliance in more than 300 cases.

<sup>35</sup> Albania, Bangladesh, Belize, Burundi, Chile, Democratic Republic of the Congo, Estonia, Gabon, Greece, Guatemala, Jordan, Korea, Latvia, Lebanon, Macedonia, Madagascar, Mongolia, Pakistan, Panama, Paraguay, Philippines, Senegal, Sri Lanka, Syria, Tanzania, Thailand, Uzbekistan, Vietnam, Yemen, and Zimbabwe.

in reliable secondary sources. A finding of non-compliance was based also on direct confirmations from States or investors on non-compliance, as well as successful proceedings by states challenging the award or ongoing enforcement proceedings initiated by the investor. In the absence of positive evidence of either compliance or non-compliance, we chose to categorise the status of compliance as ‘unknown’. Inevitably, for each three categories we engaged in an overall assessment to contextualise and interpret the available evidence – and readers should be mindful that the missing data can create a selection bias.

22. The table below summarises the approaches to forming a dataset in our Academic Forum concept paper and Gaillard and Penusliski’s paper.

**Table 1. Methodology in Gaillard & Penusliski and the AF paper**

	<b>Gaillard and Penusliski’s paper</b>	<b>AF concept paper</b>
<b>Scope</b>	most sued States (with ten or more proceedings) [ <i>NB! Not most losing States</i> ]	least sued States (with nine or less proceedings) [ <i>NB! Not most winning States</i> ]
<b>Timing</b>	All proceedings were commenced before 31 December 2019.	All proceedings were commenced before 31 December 2019.
<b>Data sources</b>	<ul style="list-style-type: none"> <li>• Websites of State agencies and European Union</li> <li>• Arbitral institutions</li> <li>• Databases and similar resources</li> <li>- Kluwer,</li> <li>- ITALaw,</li> <li>- UNCTAD Investment Dispute Settlement Navigator,</li> <li>- Investment Arbitration Reporter,</li> <li>- Investor-State Law Guide,</li> <li>- Global Arbitration Review,</li> <li>- Law 360,</li> <li>- etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Websites of State agencies and European Union</li> <li>• Arbitral institutions</li> <li>• Databases and similar resources</li> <li>- PITAD,</li> <li>- Jus Mundi,</li> <li>- Kluwer,</li> <li>- ITALaw,</li> <li>- UNCTAD Investment Dispute Settlement Navigator,</li> <li>- Investment Arbitration Reporter,</li> <li>- Investor-State Law Guide,</li> <li>- Global Arbitration Review,</li> <li>- Law 360.</li> </ul>

	<ul style="list-style-type: none"> <li>• Press releases from investors and States</li> <li>• ‘<i>Media publications in leading international and regional newspapers</i>’</li> </ul>	<ul style="list-style-type: none"> <li>• Press releases from investors and States</li> <li>• Academic and media publications, publications of law firms.</li> </ul>
<b>States</b>	32 States	30 States
<b>Cases</b>	170 cases	46 cases

23. However, it is important to note three caveats. First, the combination of these two datasets only accounts for 216 cases – which is only 80% of the estimated 300 cases with awarded remedies. Second, we cannot vouch for the reliability of Gaillard and Penusliski’s data. We will only be able to do that when COPIID database is complete. Third, while the two datasets are largely comparable in terms of their definitions of compliance and sources used, it is important to note that they had different objectives. Gaillard and Penusliski sought to problematise compliance as a non-issue in ISDS and, therefore, lay out extensive descriptive materials to combat the presumption that States normally comply with ISDS awards. The Academic Forum paper aims to inform the pending UNCITRAL efforts on ISDS reforms and therefore concentrates on issues that might be relevant for this, such as (non)accessibility of information on compliance, recourse to follow-on proceedings, and post-award settlements as compliance, etc. Accordingly, as will be seen below, some observations in our own dataset were not possible to compare with Gaillard and Penusliski’s findings, because the results were structured and presented somewhat differently, and were not focused on parameters that we found relevant for the Academic Forum paper.

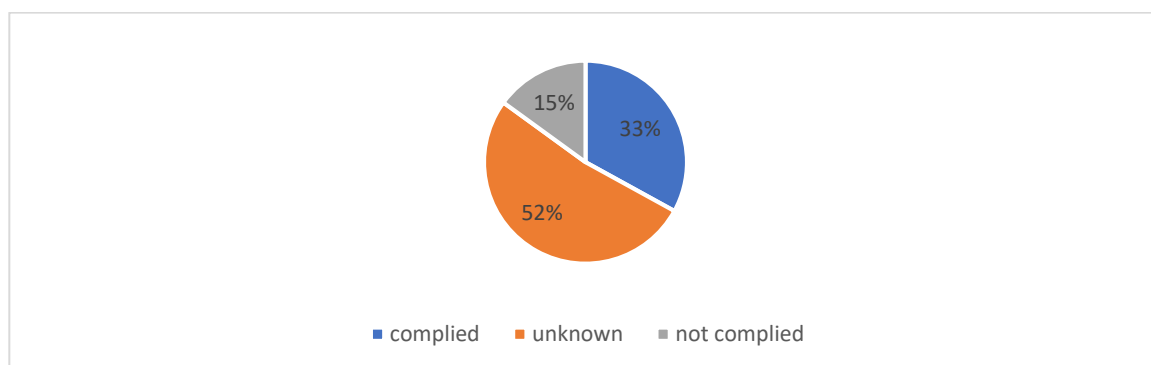
**V. Compliance trends and implications for Investment Arbitration Reform**

*A. Status of compliance*

24. We begin by asking what is the status of compliance with ISDS awards? At the aggregate level, do States comply with ISDS awards by paying compensation and relevant interest?

25. We found evidence of compliance with ISDS awards in 10 cases<sup>36</sup> out of the 46 cases, i.e., **22%** of the sample. If we add to this evidence of compliance with post-award settlement agreements in five cases,<sup>37</sup> then states appeared to pay or otherwise comply in a total of 15 cases, or **33%** of all 46 cases in the sample. To complete the findings, clear evidence of non-compliance was found in seven cases (**15%** of 46 cases)<sup>38</sup> and no information was available on compliance in 24 cases (**52%** of 46 cases). See Figure 1.

*Figure 1. Compliance by least sued States*



26. The results of our survey differ somewhat from those of Gaillard and Penusliski’s study. They find a higher rate of evidence of compliance: 85 of 170 cases, or 50%<sup>39</sup> comparable to 33% in our sample. The unknown category is higher in our sample than in Gaillard and Penusliski’s dataset: 52% against 30.5% (however, we observe that Gaillard and Penusliski distinguished ‘pending annulments’ in a separate category that together with unknown’ payment would amount to 85 cases, or 50% of their 170-cases dataset, i.e. in a share comparable with our findings).

<sup>36</sup> Saipem v Bangladesh; Dunkeld v Belize (I); Pey Casado v Chile (A); MTD v Chile; Pankki Oyj v Estonia; RDC v Guatemala; TECO v Guatemala (A); Swembalt v Latvia; Sunlodges v Tanzania; Trinh v Vietnam (II).

<sup>37</sup> Khan Resources v Mongolia; Karkey v Pakistan; Tethyan Copper v Pakistan; SGS v Paraguay; Deutsche Bank v Sri Lanka. See also section VC below.

<sup>38</sup> We note, however, that in some of these cases setting aside/annulment proceedings was still pending (Cyprus Popular Bank v. Greece, Dominion v. Panama) or have been finalised in successful setting aside or annulment of awards (Mitchell v. Congo, De Sutter and others v. Madagascar (I)).

<sup>39</sup> It appears that Gaillard and Penusliski do not distinguish between compliance with ISDS awards in the strict sense and compliance with post-award settlement agreements – Gaillard and Penusliski, ‘State Compliance with ISDS Awards’ (n.4) at 587.

27. It is difficult, at this stage, to explain the deviation in the compliance rate. There may be many reasons for such deviation. It may be the categories of cases with the most sued states, and that some of these states establish clearer or more transparent mechanisms for payment or non-payment, as well as reporting on their compliance. It may also relate to the character of the individual cases and their differing distributions in the two datasets: e.g., amounts awarded, reliance on foreign investment, domestic political tensions, the geopolitical situation, and participation of third-party funders. The ongoing COPIID will assemble and analyse more information on compliance to explain various patterns of State behaviour in regard to compliance, especially in its second phase of interviews and contact with actors.
28. What matters for the reform discussions is that our survey gives support<sup>40</sup> to the general conclusion that Gaillard and Penusliski reached, namely that ‘*non-payment can no longer be considered a theoretical possibility*’.<sup>41</sup> Occasions of non-payment (15%) and unknown payment (52%) are sufficient to warrant a separate discussion as part of compliance with ISDS awards by UNCITRAL Working Group III as a part of the design efforts for the MIC or appeal mechanism.

#### *B. Role of follow-up proceedings in prompting compliance*

29. In this section we ask whether compliance happens in the absence of follow-on proceedings. In other words, if states comply with ISDS awards, is such compliance immediate or delayed, for example by States exhausting all possible recourses against the awards and/or investors turning to legal enforcement mechanisms due to non-payment?
30. In our survey, we found that for the 10 awards for which we had evidence of compliance,<sup>42</sup> setting aside/annulment proceedings were initiated on four occasions,<sup>43</sup> or 40% of the time, and enforcement proceedings were initiated on six occasions,<sup>44</sup> or 60% of the time. If we

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<sup>40</sup> In the absence of accessible reliable official sources and similar to Gaillard and Penusliski’s survey, our study relies a lot on secondary sources. The same reservations about the accuracy of data are accordingly maintained.

<sup>41</sup> Gaillard and Penusliski, ‘State Compliance with ISDS Awards’ (n.4) at 587.

<sup>42</sup> Saipem v. Bangladesh; Dunkeld v. Belize (Dunkeld I); Pankki Oyj v. Estonia; RDC v. Guatemala; TECO v. Guatemala (TECO A); Trinh v. Vietnam (Trinh II); Pey Casado and Allende Foundation v. Chile (A); MTD v. Chile; Swembalt v. Latvia; Sunlodges v. Tanzania.

<sup>43</sup> TECO v. Guatemala (TECO A); Pey Casado and Allende Foundation v. Chile (A); MTD v. Chile; Swembalt v. Latvia.

<sup>44</sup> Dunkeld v. Belize (Dunkeld I); RDC v. Guatemala; TECO v. Guatemala (TECO A); Pey Casado and Allende Foundation v. Chile (A); Swembalt v. Latvia; Sunlodges v. Tanzania.

additionally look at five occasions of compliance with post-award settlement agreements,<sup>45</sup> we see that setting aside/annulment proceedings were sought for all of these five cases whereas enforcement was sought for four of them.<sup>46</sup> Altogether in all 15 cases evidencing compliance,<sup>47</sup> setting aside/annulment proceedings were sought in nine cases (60% of the 15 compliance cases), and enforcement proceedings were initiated in 10 (66.6% of the compliance cases).<sup>48</sup> Of these 15 awards, 10 were rendered under the ICSID Convention and five under the UNCITRAL rules, of which six and four were subject to enforcement proceedings respectively (i.e. 60% and 80%).

31. Overall, we observe that compliance rarely occurred in the absence of follow-on proceedings. In our survey, only in three cases, or 6.5% of 46 cases, do we find evidence of uncontested compliance.<sup>49</sup> To be sure, this share might be somewhat larger if there has been compliance in the cases in the ‘unknown compliance’ category and where there is no clear evidence of follow-up proceedings. Here, there are eight cases.<sup>50</sup> Yet, even if there was compliance in such cases, it would mean that compliance in the absence of any follow-on proceedings would not reach even one third of the 46 case sample. In other words, both States and investors frequently opt for follow-on proceedings, and compliance is accordingly not immediate.
32. As Gaillard and Penusliski’s survey does not single out aggregated data on compliance in the absence of follow-on proceedings<sup>51</sup> or distinctly in relation to ICSID- and non-ICSID awards, we are unable to fully compare our findings on this point. Nevertheless, their survey contains aggregate information on the overall frequency of setting aside/annulment

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<sup>45</sup> Khan Resources v. Mongolia; Karkey v. Pakistan; Tethyan Copper v. Pakistan; SGS v. Paraguay; Deutsche Bank v. Sri Lanka.

<sup>46</sup> Khan Resources v. Mongolia; Karkey v. Pakistan; Tethyan Copper v. Pakistan; SGS v. Paraguay.

<sup>47</sup> Saipem v. Bangladesh; Dunkeld v. Belize (Dunkeld I); Pankki Oyj v. Estonia; RDC v. Guatemala; TECO v. Guatemala (TECO A); Khan Resources v. Mongolia; Karkey v. Pakistan; Tethyan Copper v. Pakistan; SGS v. Paraguay; Deutsche Bank v. Sri Lanka; Trinh v. Vietnam (Trinh II); Pey Casado and Allende Foundation v. Chile (A); MTD v. Chile; Swembalt v. Latvia; Sunlodes v. Tanzania.

<sup>48</sup> Dunkeld v. Belize (Dunkeld I); RDC v. Guatemala; TECO v. Guatemala (TECO A); Khan Resources v. Mongolia; Karkey v. Pakistan; Tethyan Copper v. Pakistan; SGS v. Paraguay; Pey Casado and Allende Foundation v. Chile (A); Swembalt v. Latvia; Sunlodes v. Tanzania.

<sup>49</sup> Saipem v. Bangladesh; Pankki Oyj v. Estonia; Trinh v. Vietnam (II).

<sup>50</sup> British Caribbean Bank v. Belize; Swisslion v. Macedonia; Baggerwerken v. Philippines; AAPL v. Sri Lanka; Desert Line v. Yemen; Goetz v. Burundi (II); Houbin v. Burundi and AMT v. Zair (DR Congo).

<sup>51</sup> Gaillard and Penusliski, however, note that ‘*The remaining 26 awards were mostly complied with voluntarily (or, in some cases, it is not known whether the payment was made)*’. Occasionally, Gaillard and Penusliski also name cases with voluntary performance in the absence of enforcement proceedings, for instance in PSEG v. Turkey Gaillard and Penusliski, ‘State Compliance with ISDS Awards’ (n.4) at 581 and 586.

and enforcement proceedings. While of limited importance for establishing any correlations between compliance and the existence of follow-on proceedings, these data are nonetheless informative about behavioural patterns of investors and States. As will be seen below, these numbers are largely comparable with our results.

33. If we begin with our entire dataset of 46 cases, setting aside/annulment proceedings were commenced in 29 of the 46 cases, or **63%** of cases.<sup>52</sup> These proceedings related to awards rendered against 21 States.<sup>53</sup> Interestingly, for States with multiple cases against them, their behaviour was not consistent - i.e., they chose to initiate annulment or setting aside proceedings in some cases, but not others.<sup>54</sup> This suggests that at least some states might choose whether to challenge an award on the basis of the perceived strength of their case or the monetary burden if it is large relative to the size of their economy, rather than just as a blanket litigation strategy. The overall proportion of setting aside/annulment proceedings in our survey (**63%**) is broadly in line with the findings of Gaillard and Penusliski, who found that setting aside/annulment proceedings had been brought in 141 cases of their 170-case sample (**83%**).<sup>55</sup>
34. Turning to enforcement proceedings, in our dataset, enforcement proceedings were initiated in 18 of the 46 cases, or in **39%** of cases.<sup>56</sup> Enforcement action in these 18 cases related to awards rendered against 15 states.<sup>57</sup> We note that of the 15 States against which enforcement proceedings were brought, seven were also subjected to adverse ISDS awards

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<sup>52</sup> These cases are: Pankki Oyj v. Estonia, TECO v. Guatemala (TECO A), TECO v. Guatemala (TECO B), Khan Resources v. Mongolia, Karkey v. Pakistan, Tethyan Copper v. Pakistan, Parienti v. Panama, Dominion v Panama, SGS v. Paraguay, Dayyani v. South Korea, Deutsche Bank v. Sri Lanka, Hydro and others v. Albania, Pey Casado and Allende Foundation v. Chile, MTD v. Chile, Mitchell v. Congo, KCI v. Gabon, ATA Construction v. Jordan, Swembalt v. Latvia, France Telecom v. Lebanon, De Sutter and others v. Madagascar (I), De Sutter and others v. Madagascar (II), Aboukhalil v. Senegal, Güris and Yamantürk v. Syria, Walter Bau v. Thailand, Oxus Gold v. Uzbekistan, Günes Tekstil and others v. Uzbekistan, Border Timbers and others v. Zimbabwe, and von Pezold and others v. Zimbabwe. On all these cases, except one (Güris and Yamantürk v. Syria), States commenced setting aside/annulment proceedings.

<sup>53</sup> These States are: Greece, Guatemala, Mongolia, Pakistan, Panama, Paraguay, South Korea, Sri Lanka, Albania, Chile, Democratic Republic of Congo, Gabon, Jordan, Latvia, Lebanon, Madagascar, Senegal, Syria, Thailand, Uzbekistan, and Zimbabwe.

<sup>54</sup> These States are Guatemala, Sri Lanka, Democratic Republic of Congo, Latvia, and Zimbabwe.

<sup>55</sup> Gaillard and Penusliski, 'State Compliance with ISDS Awards' (n.4) at 586.

<sup>56</sup> These cases are Dunkeld v. Belize (I), RDC v. Guatemala, TECO v. Guatemala (TECO A), Khan Resources v. Mongolia, Karkey v. Pakistan, Tethyan Copper v. Pakistan, Parienti v. Panama, SGS v. Paraguay, Dayyani v. South Korea, Hydro and others v. Albania, Pey Casado and Allende Foundation v. Chile, Swembalt v. Latvia, Sunlodge v. Tanzania, Walter Bau v. Thailand, Oxus Gold v. Uzbekistan, Funnekotter v. Zimbabwe, Border Timbers and others v. Zimbabwe, Gamesa v. Syria.

<sup>57</sup> These States are Albania, Belize, Chile, Guatemala, Latvia, Mongolia, Pakistan, Panama, Paraguay, South Korea, Syria, Tanzania, Thailand, Uzbekistan, and Zimbabwe.

in which enforcement proceedings did not occur.<sup>58</sup> This suggests that either those States voluntarily complied with only some awards or that the investors chose not to pursue enforcement proceedings in certain cases. These findings on the frequency of enforcement proceedings are almost exactly the same as those of Gaillard and Penusliski. They found that enforcement proceedings had been brought in 67 cases of their 170-case sample (i.e., 40% of cases).<sup>59</sup>

35. Our general observation is that compliance often happens in circumstances when both setting aside/annulment and enforcement proceedings have been tried. We note, however, that more comparative and empirical studies are necessary that would clarify the roles that the New York Convention, the ICSID Convention play in facilitating compliance. Among other important sub-themes, such studies have to address the scope of State immunity from execution and its actual role as an obstacle to compliance. Some of these studies will be conducted within the COPIID project.

### *C. Role of post-award settlements*

36. A related question is the role of post-award settlement agreements in compliance. We ask whether states primarily comply with the original arbitral award or do they rather tend to comply contractually with post-award settlement that was the subject of further negotiations with the claimant investor?
37. In our survey, post-award settlement agreements were concluded in eight cases<sup>60</sup> out of the 46 cases, or in 17%. Most settlement agreements (six out of eight) were concluded in the context of follow-on proceedings.<sup>61</sup> We found confirmation of compliance with post-award settlement agreements in five<sup>62</sup> out of eight cases.

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<sup>58</sup> These States are Chile, Guatemala, Latvia, Syria, Panama, Uzbekistan, and Zimbabwe.

<sup>59</sup> Gaillard and Penusliski, 'State Compliance with ISDS Awards' (n.4) at 591.

<sup>60</sup> British Caribbean Bank v. Belize; AMT v. Zaire (DR Congo); Khan Resources v. Mongolia; Karkey v. Pakistan; Deutsche Bank v. Sri Lanka; Tethyan Copper v. Pakistan; France Telecom v. Lebanon; SGS v. Paraguay.

<sup>61</sup> Khan Resources v. Mongolia; Karkey v. Pakistan; Deutsche Bank v. Sri Lanka; Tethyan Copper v. Pakistan; France Telecom v. Lebanon; SGS v. Paraguay.

<sup>62</sup> Khan Resources v. Mongolia; Karkey v. Pakistan; Deutsche Bank v. Sri Lanka; Tethyan Copper v. Pakistan; SGS v. Paraguay.

38. As Gaillard and Penusliski's study does not single out post-award settlement as a separate category,<sup>63</sup> we cannot meaningfully make a comparison. We note, however, that Gaillard and Penusliski mention no less than 20 cases with post-award settlements,<sup>64</sup> and that the precise number of post-award settlement agreements in their 170 cases might be larger.<sup>65</sup>
39. The number of post-award settlement agreements in our dataset of 46 cases is not negligible. Settlement agreements are frequently concluded *after* various follow-on proceedings have been pursued or *in the course* of them, such agreements inevitably raise many questions that are still relevant for the discussion on the MIC and appeal mechanism within the framework of Working Group III.<sup>66</sup> The central question relates to the finality of dispute resolution. Post-award settlement agreements may establish contractual arrangements that substantially (monetarily or otherwise) differ from the dispositive part of the respective awards<sup>67</sup> and may raise issues of concern to public or third party interests affected by the award and/or the settlement agreement. This also underscores that the effect of ISDS may not always concern facilitation of monetary payment, but also policy changes. While the latter may support compliance with the underlying treaty, others may view this as interference with the regulatory autonomy of states.

#### *D. Accessibility of information on compliance*

40. Finally, we ask if information on compliance is accessible and complete.

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<sup>63</sup> The Gaillard and Penusliski study provides empirical data for pre-award settlement, while post-award settlements are spread among various other categories including payment/recovery post-award. Post-award settlements might also fall into the category of 'payment not known', particularly if they are not public and compliance with them remains unknown.

<sup>64</sup> *Azurix Corp v. Argentina*; *BG Group plc. v. Argentina*; *CMS Gas Transmission Company v. Argentina*; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*; *Continental Casualty Company v. Argentina*; *El Paso Energy International Company v. Argentina*; *National Grid plc. v. Argentina*; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi v. Argentina*; *Total S.A. v. Argentina*; *Quiborax S.A., Non-Metalic Minerals S.A. and Allan Fosk Kaplún v Bolivia*; *Guaracachi America, Inc. and Rurelec Plc v. The Plurinational State of Bolivia*; *South American Silver Limited v. Bolivia*; *Unión Fenosa Gas S.A. v. Egypt* (noting ongoing settlements by the time that the article was completed); *Ron Fuchs v. Georgia*; *AIG Capital Partners v. Kazakhstan*; *Petrobart Limited v. Kyrgyz Republic*; *Cargill Inc. v. Mexico*; *Crystallex International Corporation v. Venezuela* (the settlement agreement was subsequently invalidated); *Gold Reserve Inc. v. Venezuela*; *Rusoro Mining Ltd. v Venezuela* (the settlement agreement was subsequently invalidated).

<sup>65</sup> Our opinion is informed by the growing COPIID database.

<sup>66</sup> Mavluda Sattorova and Yuliya Chernykh explore these implications in their forthcoming paper 'Post-award Settlement Agreements as Compliance', PluriCourts Working Paper.

<sup>67</sup> For instance, in *Khan Resources v. Mongolia* the settlement agreement envisaged payment of USD10 mln less than what the award stipulated. In *Karkey v. Pakistan*, the settlement agreement reportedly resulted in non-monetary settlement of the dispute whereas the original award ordered Pakistan to pay more than USD400 mln.

41. Our study, as well as that of Gaillard and Penusliski, shows that access to information regarding compliance is generally poor. Of the 46 awards in our sample, we could find information on compliance or non-compliance in only 22 cases, or 47.8% of cases. Gaillard and Penusliski found what they considered to be reliable data on compliance for 69.5% of the cases in their sample.<sup>68</sup>
42. Whilst enforcement proceedings before domestic courts do bring to light information on awards that are initially not complied with, it is still difficult to find out what actions the State subsequently takes in respect of that award in the State of its execution. Accordingly, it is hard to gain a relatively complete picture of whether – and in what circumstances – States comply with ISDS awards and if it is fully or partially, immediately or belatedly. On some occasions, for instance, we came across press releases about the compliance published by States<sup>69</sup> and private investors,<sup>70</sup> or to information on setting aside or annulment of awards.<sup>71</sup> Other sources of information could include, withdrawal from enforcement proceedings because of payment,<sup>72</sup> and even disputes between investors and their own lawyers.<sup>73</sup> However, for some of the cases in our sample, even the texts of arbitral awards could remain entirely unavailable.<sup>74</sup> Overall, the information is scattered and one often needs to rely on newspaper reports, analytical materials that do not disclose primary sources, or on other secondary sources.
43. This lack of transparency concerning compliance raises multiple issues for WG III. It does not only complicate attempts to understand the extent and nature of compliance as a phenomenon but also how compliance processes impact WG III other key concerns. For instance, we do not know how follow-on proceedings affect the duration and costs of cases, or the effects of the involvement of third-party funders. We would therefore encourage WG III to consider how compliance processes can be made more transparent so that there is a reliable empirical basis for reform deliberations. Additional protocols to existing treaties,

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<sup>68</sup> Gaillard and Penusliski indicate 30.5% of occasions of unknown payment that brings to 69.5% the occasions where payment is known – Gaillard and Penusliski, ‘State Compliance with ISDS Awards’ (n.4) at 587.

<sup>69</sup> For instance, in *TECO (A) v Guatemala* (the press release though does not disclose the sum paid).

<sup>70</sup> For instance, in *MTD v. Chile* (the press release for the stock exchange).

<sup>71</sup> For instance, in *Mitchell v. Congo, De Sutter and others v. Madagascar* (I).

<sup>72</sup> For instance, in *RDC v. Guatemala*.

<sup>73</sup> For instance, in *Trinh v. Vietnam* (Trinh II)

<sup>74</sup> For instance, in *France Telecom v. Lebanon* and in *Gamesa v. Syria*.

such as, for instance, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration enabling the UNCITRAL Secretariat to act as a depositor of this information might also be worth considering.

44. Going forward, we would encourage States to engage with COPIID research project by providing what information they may be able to disclose regarding compliance. We will use such an opportunity to contribute to the ability of UNCITRAL WG III to discuss reform of the ISDS system on an empirically informed basis.

## VI. Conclusions

45. Data on compliance with ISDS awards looks like a *perforated plate* - there is as much substance as holes. Information is not always accessible and, when accessible, it is not always complete or reliable. Such information deficit raises transparency and legitimacy concerns about ISDS as it makes it hard to verify with more precision the actual status of compliance and, therefore, the efficiency and finality of ISDS as a dispute settlement mechanism. Accordingly, ensuring access to information about compliance (through a central register or other relevant monitoring mechanisms) is important for pending design efforts in relation to the MIC or appeal mechanism and other concerns of WG III.
46. With this caveat about the accessibility and reliability of data, our survey together with the findings of Gaillard and Penusliski enable us to reach some conclusions that may be indicative and relevant for ISDS reform.
47. **First**, the available data demonstrate that compliance with ISDS awards is *not automatic* and partial, delayed and non-compliance are common.
48. **Second**, follow-on proceedings in the form of setting aside/annulment and enforcement are *frequent*. Whilst such proceedings do not always or necessarily lead to improved compliance, it is notable that compliance with awards in the absence of follow-on proceedings being initiated is rare.
49. **Third**, on some (non-negligible) occasions, States and investors enter into *post-award settlement agreements*. Such post-award settlement agreements may differ from the

dispositive part of awards and effectively substitute compliance with an award by contractual compliance. For those states at WG III concerned with ISDS awards representing the finality of dispute resolution, this finding underlines the importance of ensuring efficient dispute prevention and dispute management mechanisms, including those under discussion.

***Annex I. List of analysed 46 cases***

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|-------------------------------------|--|
| 1. Saipem v. Bangladesh             | 24. Houben v. Burundi                              |
| 2. British Caribbean Bank v. Belize | 25. Pey Casado and Allende Foundation v. Chile (A) |
| 3. Dunkeld v. Belize (Dunkeld I)    | 26. MTD v. Chile                                   |
| 4. Pankki Oyj v. Estonia            | 27. AMT v. Zaire (DR Congo)                        |
| 5. Cyprus Popular Bank v. Greece    | 28. Mitchell v. DR Congo                           |
| 6. RDC v. Guatemala                 | 29. KCI v. Gabon                                   |
| 7. TECO v. Guatemala (TECO A)       | 30. ATA Construction v. Jordan                     |
| 8. TECO v. Guatemala (TECO B)       | 31. Swembalt v. Latvia                             |
| 9. Swisslion v. Macedonia           | 32. Nykomb v. Latvia                               |
| 10. Khan Resources v. Mongolia      | 33. UAB Energija v. Latvia                         |
| 11. Karkey v. Pakistan              | 34. France Telecom v. Lebanon                      |
| 12. Tethyan Copper v. Pakistan      | 35. De Sutter and others v. Madagascar (I)         |
| 13. Parienti v. Panama              | 36. De Sutter and others v. Madagascar (II)        |
| 14. Dominion v. Panama              | 37. Aboukhalil v. Senegal                          |
| 15. SGS v. Paraguay                 | 38. Gamesa v. Syria                                |
| 16. Baggerwerken v. Philippines     | 39. Güris and Yamantürk v. Syria                   |
| 17. Dayyani v. Korea                | 40. Sunlodges v. Tanzania                          |
| 18. AAPL v. Sri Lanka               | 41. Walter Bau v. Thailand                         |
| 19. Deutsche Bank v. Sri Lanka      | 42. Oxus Gold v. Uzbekistan                        |
| 20. Trinh v. Vietnam (Trinh II)     | 43. Günes Tekstil and others v. Uzbekistan         |
| 21. Desert Line v. Yemen            | 44. Funnekotter v. Zimbabwe                        |
| 22. Hydro and others v. Albania     | 45. Border Timbers and others v. Zimbabwe          |
| 23. Goetz v. Burundi (II)           | 46. von Pezold and others v. Zimbabwe              |