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State Compliance with Investment Awards

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Abstract—When the ICSID system was being set up, the matter of compliance with investment awards rendered against States was considered "academic". ICSID’s architects believed that as long as States would remain under an international obligation to comply with awards they would generally do so. Writing in the 2000s and early 2010s, commentators observed that States have generally complied with adverse investment awards. In the last two decades, the number of investor-State arbitrations has soared, and more and more damages awards have been rendered against States. This analysis seeks to contribute to a fact-based debate on the future of international investment law by addressing an under-examined but essential aspect of that regime, namely, compliance with investment awards. It assesses empirically the experience with investment arbitration of the thirty-two most sued States, covering approximately 70% of all cases initiated through to the end of 2019. The data examined indicates that the ICSID founders’ prognosis that compliance with investment awards would be a non-issue—framed as it was in such sweeping terms—has not held true. Whereas the majority of States have complied with adverse awards (usually after seeking annulment), the instances of non-compliance or significantly delayed compliance are important. A significant proportion of the cases where States have been ordered to pay damages have required enforcement proceedings. Instances of home State’s intervention—and inevitably re-politicization of the dispute—have resurfaced. There is thus a gap between the regime’s authority and effectiveness that needs to be addressed. Still, and regardless of its imperfections, it could be said that the modern investment dispute resolution system continues to be revolutionary, in particular when compared to the antecedent regime, which rested almost entirely on the inclination of the home State to espouse its nationals’ claims.

I. INTRODUCTION

The enforceability of arbitral awards has been considered the most attractive feature of international commercial arbitration.³ The instrument ensuring that such awards are enforceable is the 1958 New York Convention on the Recognition and

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³ Queen Mary University of London and White & Case, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (2018) <www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 11 June 2020.
Enforcement of Foreign Arbitral Awards. The ability of users to enforce commercial awards against private entities with relative ease underlies the success of international commercial arbitration.

The main accomplishment of international investment arbitration is said to be the removal of investor–State disputes from the domain of politics—away from the host State courts that are often perceived by investors as extensions of the executive and away from the foreign policy levers (or ‘gunboats’) of the home State that is determined to protect its nationals abroad. The rule-based adjudication by neutral international bodies established under international investment agreements would instill confidence in investors and host States alike and promote the cross-border flow of investments. The network of bilateral investment treaties (BITs) and the International Centre for the Settlement of Investment Disputes (ICSID) under the auspices of the World Bank are the key building blocks of the politics-to-rules transition of the resolution of disputes between States and foreign investors.

When the ICSID system was being set up, the issue of compliance with—and enforcement of—awards rendered against States in international investment arbitration was considered, but did not lead to extensive debate. It was believed that, as long as States were under an international obligation to comply with awards, they would generally do so. As the main architect of the ICSID system, Aron Broches, reported in 1968: ‘Since any State against which an award was granted would have undertaken in advance a solemn international obligation to comply with the award, the question of enforcement against a State was somewhat academic.’ In the first issue of the ICSID Review in 1986, Ibrahim Shihata, ICSID’s Secretary General at the time, observed that enforcement against States was ‘unlikely to arise’, given States’ obligations under the ICSID Convention and their reputational motivations. The modern international investment protection regime came into operation in the second half of the 20th century, and the first treaty award was rendered in 1990. Commentators writing in the 2000s and early 2010s have observed—on the

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4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) (New York Convention). On the New York Convention, see UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958 (Emmanuel Gaillard and George A Bermann eds, Brill Nijhoff 2017) (UNCITRAL Guide on the New York Convention).

5 The New York Convention also applies to investment awards, where these are not rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

6 See eg ICSID, ‘History of the ICSID Convention: Document Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (ICSID Publication 1968) vol 2-1, 464 (‘The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy’). See also Ibrahim FI Shihata, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 ICSID Rev—FILJ 1; O Thomas Johnson Jr and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in Karl P Sauvant (ed), Yearbook on International Investment Law & Policy 2010-2011 (OUP 2012) 692.

7 See n 5.

8 ICSID, (n 6) vol 2-1, 304.

9 Shihata (n 6) 9. See also Christoph H Schreuer and others, The ICSID Convention: A Commentary (2nd edn, CUP 2009) 1107–8, 1119 (observing that the drafters of the ICSID Convention considered that ‘voluntary compliance’ would be the ‘natural consequence’ of States’ international obligation to abide by ICSID awards. Non-compliance was unlikely because it ‘would affect the standing of the State concerned with the international business community’, and entail ‘the revival of the right to diplomatic protection’).

10 Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3, Final Award (27 June 1990).
basis of limited information—that States have generally complied with adverse investment awards.\textsuperscript{11}

By the end of 2019, more than 1,000 investor–State arbitrations had been initiated, almost two-thirds of which have been commenced in the past decade. Many damages awards have been rendered, some of them in billions of US dollars. In that context, the international investment protection regime—and, in particular, the resolution of investor–State disputes via arbitration—has come under heavy scrutiny. In recent years, States, international organizations and other stakeholders have been closely assessing the system.\textsuperscript{12} In 2018, the highest court of the European Union held that investor–State arbitration under intra-EU BITs is (and has been) incompatible with core EU law rules.\textsuperscript{13} Some States have set out to renegotiate their investment and trade agreements to provide for investor–State arbitration.\textsuperscript{14} Others have substantially reformed their model BITs.\textsuperscript{15} The ICSID Arbitration Rules are currently undergoing significant amendments that seek to respond to criticism of investment arbitration.\textsuperscript{16} Last but not least, States and stakeholders have convened, under the auspices of the United Nations Conference for International Trade Law (UNCITRAL), to discuss and pave the way for substantial reforms of the international investor–State dispute resolution system.\textsuperscript{17}

\textsuperscript{11} See eg Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits of Enforcement of ICSID Awards’ (2006) 23(1) J Intl Arbitration 1 (observing an absence of compliance issues at the time of writing, but noting that this may change as States are increasingly sued); Alan S Alexandreff and Ian A Laird, ‘Compliance and Enforcement’ in Peter T Muchlinski and others (eds), The Oxford Handbook of International Investment Law (OUP 2008) 1173, 1185; Lucy Reed and Lucy Martinez, ‘Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection’ in R Doak Bishop (ed), Enforcement of Arbitral Awards Against Sovereigns (Juris Publishing 2009) 13–14; Stanimir A Alexandrov, ‘Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention’ in Christina Binder and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009); Antonio R Parra, ‘The Enforcement of ICSID Arbitral Awards’ in Doak Bishop (ed), (above); Andrea K Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes’ (2010) 21 Am Rev Intl Arbitration 211, 241; Luke Eric Peterson, ‘How Many States Are not Paying Awards Under Investment Treaties?’ (LA Reporter, 7 May 2010) <www.iareporter.com/articles/how-many-states-are-not-paying-awards-under-investment-treaties/> accessed 11 June 2020; Sylvia Tonova, ‘Compliance and Enforcement of Awards: Is there a Practical Difference between ICSID and Non-ICSID Awards’ in Ian A Laird and Todd J Weiler (eds), Investment Treaty Arbitration and International Law, vol 5 (Juris Publishing 2012) 235 (noting the general view that non-compliance was rare and identifying exceptions); Jorge E Vinueas and Dolores Bentolila, ‘The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States’ in Laurence Boisson Chazournes and others (eds), Diplomatic and Judicial Means of Dispute Settlement (Brill Nijhoff 2012); Charles B Rosenberg, ‘The Intersection of International Trade and International Arbitration: The Use of Trade Arbitration to Secure Compliance with Arbitral Awards’ (2013) 44 Georgetown J Intl L 503, 507. For more recent analyses, see Jacob A Kuipers, ‘Too Big to Nail: Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards’ (2016) 39(2) Boston Coll Intl and Comp L Rev 417, 420 (noting that issues with enforcing investment awards against States ‘have only rarely surfaced because states by and large comply with awards rendered against them’); Anna Joubin-Bret, ‘The Effectiveness of the ICSID mechanism regarding the enforcement of arbitral awards’ in Julien Pouret (ed), Enforcement of Investment Treaty Arbitration Awards (Globe Law and Business 2015) (offering an agnostic view as to whether States generally comply with investment awards).

\textsuperscript{12} See eg United Nations Conference on Trade and Development (UNCTAD), ‘UNCTAD’s Reform Package for the International Investment Regime’ (2018).

\textsuperscript{13} Case C-284/16, Slovak Republic v Achmea [2018] ECR 158.

\textsuperscript{14} See eg Agreement between the United States of America, the United Mexican States and Canada (USMCA) (signed 30 November 2018).

\textsuperscript{15} The Netherlands, where many claimant investors have been incorporated, amended its Model Bilateral Investment Treaty in 2018 and again in 2019. See Agreement on Reciprocal Promotion and Protection and of Investments between the United Kingdom of the Netherlands (22 March 2019) <www.rijksoverheid.nl/ministeries/ministerie-van-buitenlands-en-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden/> accessed 18 June 2020. ICSID, ‘ICSID Rules and Regulations Amendment Process’ <https://icsid.worldbank.org/en/amendments/> accessed 11 June 2020.

\textsuperscript{16} UNCITRAL Working Group III, ‘Investor-State Dispute Settlement Reform’ <https://uncitral.un.org/en/work ing_groups/3/investor-state> accessed 18 June 2020. For a critical discussion of the reform of the investment treaty regime, see David Caron and Esme Shirlock, ‘Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences’ in Andreas Follesdal and Gierulf Ulfstein (eds), The Judicialization of International Law: A Mixed Blessing? (OUP 2018).
The debate on the future of international investment law by addressing an under-examined but essential aspect of that regime: State compliance with investment awards. Scholars of international law and relations have long debated why a State may choose to act in line with its international legal obligations. As a former judge of the International Court of Justice observed almost four decades ago, ‘compliance might be described as the “bottom line” in the accounting of international law.’ The study of compliance, both empirical and theoretical, is essential for understanding international law: to investigate compliance is to measure the gap between authority and effectiveness.

In the international investment law sphere, States may comply with damages awards for a number of reasons, including: from adherence to an international rule-based system; because they seek to attract investment; out of reputational considerations; due to pressure or fear of retribution from the investor’s home State or from other international actors; to avoid penalties in the sovereign bond arena; or to appease domestic political structures. This study does not establish a theory of the causes of State compliance or non-compliance with international investment law. Rather, it seeks to identify pertinent inferences from a unique compliance data set.

In Section II, we recall the international legal framework imposing obligations on States to respect investment treaty awards. Section III examines early instances of non-compliance that are often presented as the ‘exception to the rule’ of compliance. In Section IV, we present data on how the 32 most sued States have fared, including whether

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18 See eg Roberto Echandi, ‘The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications’ (2019) 34(1) ICSID Rev—FILJ 32; Sergio Puig and Anton Strehnev, ‘The David Effect and ISDS’ (2017) 28(3) EJIL 731; Rachel L Wellhausen, ‘Recent Trends in Investor-State Dispute Settlement’ (2016) 7(1) JIDS 117; Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study’ (2015) 25(4) EJIL 1147, 1157–60; Roberto Echandi and Priyanka Kher, ‘Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration’ (2014) 29(1) ICSID Rev—FILJ 41; Susan D Frank, ‘Empirically Evaluating Claims about Investment Treaty Arbitration’ (2007) 86 NC L Rev 1 58–64.

19 See eg Hans J Morgenthau, Politics Among Nations: The Struggle for Power and Peace (6th edn, Knopf 1985) introducing the concept of political realism, arguing that struggles for power, rather than law, govern behavior in the international realm); Louis Henkin, How Nations Behave (2nd edn, Columbia University Press 1979) (refuting the realist approach, arguing that States are rational actors that comply with international law when it suits their interests); Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Harvard University Press 1995) (offering a ‘managerial’ model of compliance, whereby international actors seek to promote compliance not through coercion, but through co-operative engagement in international relations); Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 Yale LJ 2599 (providing a constructivist theory of compliance wherein repeated interactions with transnational legal processes generate patterns of behavior that ripen into the internalization of international norms); Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998), 19 M J Intl L 345 (challenging the tendency to view compliance as a freestanding concept and, instead, articulating compliance’s conceptual dependency on a stipulated theory of law); Beth A Simmons, ‘International Law and State Behavior: Commitment and Compliance in International Monetary Affairs’ (2000) 94 Am Pol Sci Rev 819 (finding that governments comply with legal obligations due to reputational concerns, particularly reputations that develop around regional standards of behavior); Joel P Trachtman, ‘International Affairs’ (2000) 94 Am Pol Sci Rev 819 (finding that governments comply with legal obligations due to reputational concerns, particularly reputations that develop around regional standards of behavior); Joel P Trachtman, ‘International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law’ (2010) 11 Chicago J Intl L 127 (focusing on the role of domestic political coalitions in driving a State’s decision to establish behavior that tends to comply with international law).

20 Stephen M Schwebel, ‘The Compliance Process and the Future of International law’ (1981) 75 ASIL Proc 178, 179.

21 Kingsbury (n 19).

22 Schwebel (n 20).

23 Moshe Hirsch, ‘Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach’ (2016) 19 J Intl Econ L 681; Christopher M Ryan, ‘Discerning the Compliance Calculus: Why States Comply with International Investment Law’ (2009) 38 Ga J Intl & Comp L 63.
they have complied with adverse awards as at 31 December 2019. The data set examined comprises more than 70 percent of all investment treaty arbitrations. In Sections V and VI, we analyze the results of the survey and set out our conclusions, respectively.

II. STATES’ OBLIGATIONS TO COMPLY WITH INVESTMENT AWARDS

The obligation of States to respect an award rendered by an investor–State tribunal is found in both international treaties and arbitration rules.

The ICSID Convention contains two provisions regulating the compliance with arbitral awards. Article 53(1) requires the disputing parties to ‘abide by and comply with the terms of the award’, whereas article 54(1) obliges every ICSID Contracting Party to recognize ICSID awards as binding.24

Non-ICSID Convention awards are subject to the international obligations set out in the 1958 New York Convention, pursuant to which States are obligated to recognize arbitral awards as binding.25

States have also assumed express obligations to abide by investor–State awards in their BITs. For instance, some BITs require the State Parties to ‘carry out’ an award ‘without delay’ and ‘provide for the enforcement’ in its territory.26 Some treaties set out special mechanisms, such as the constitution of a tribunal with the power to order compliance with the award.27

The 2010 UNCITRAL Arbitration Rules, the 2017 ICC Rules and the 2017 SCC Rules all require the parties to ‘carry out’ arbitration awards ‘without delay’.28

III. COMMONLY DISCUSSED INSTANCES OF NON-COMPLIANCE

Past assessments have posited that States have tended to comply with adverse investment awards, presenting certain cases as exceptions to the general rule of compliance.29 These include, principally:

24 ICSID Convention (n 5) arts 53–54.
25 New York Convention (n 4) art III.
26 See eg Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT) art 26(8); Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations (signed 21 March 1990, entered into force 6 August 1994) art IX(3)(c); Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) art VII.6; Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments (signed 9 November 1994, entered into force 3 August 1996) art 9(4). Certain BITs provide that the State Parties agree to enforce awards in accordance with their domestic laws. See eg Agreement Between the Republic of Kyrgyzstan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (signed 28 April 1992, entered into force 31 October 1996) art 7(3); Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (signed 28 November 1998, entered into force 27 January 2000) art 9(3).
27 See eg Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (signed 5 November 2005, entered into force 1 November 2006) art 34(8); USMCA (n 14) art 14.D.13(11); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2008, entered into force 20 November 2018) art 9.29(11); Australia–Hong Kong Investment Agreement (signed 26 March 2019, entered into force 17 January 2020) art 35(10).
28 Arbitration Rules of the United Nations Commission on International Trade Law (2010 UNCITRAL Arbitration Rules) (2010) art 34(2); Intl Chamber of Commerce Court of Arbitration Rules of Arbitration (ICC Arbitration Rules) (2017) art 35(6); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules) (2017) art 46.
29 See Antonio R Parra, ‘The Enforcement of ICSID Arbitral Awards’ in Doak Bishop (ed), (n 11) 132–4; Alexandroff and Laird (n 11) 1178–80; Schreuer and others ( n 9) 1118.
• Three (contract-based) cases from the 1980s: SARL Benvenuti & Bonfant (B&B) v People’s Republic of the Congo,\textsuperscript{30} Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia\textsuperscript{31} and Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal.\textsuperscript{32} The three States elected not to comply with the awards voluntarily, and the investors were forced to commence enforcement proceedings. Although Congo eventually complied, there is no public information that Liberia and Senegal did.

• Franz Sedelmayer v Russian Federation.\textsuperscript{33} In July 1998, a tribunal ordered Russia to pay approximately US$2.3 million to Mr Sedelmayer. When Russia refused to comply, Mr Sedelmayer commenced enforcement proceedings in Sweden and Germany. Although he was successful in recovering a part of the amount against Russian property in Germany in 2008 and in Sweden in 2014, his efforts to collect lasted years, involved countless proceedings and extraordinary effort and commitment of resources. In the course of the ordeal, Russia commenced and won a US$65 million tax arrears claim against Mr Sedelmayer before the Russian courts\textsuperscript{34} (the French courts declined to enforce the tax arrears, finding that the Russian court decision violated public policy\textsuperscript{35}). As of August 2017, it was reported that Russia had still not paid considerable interest that had accrued on the award.\textsuperscript{36}

• AIG Capital Partners v Republic of Kazakhstan.\textsuperscript{37} In October 2003, a tribunal awarded US$7.15 million to AIG. Kazakhstan refused to comply voluntarily, and AIG proceeded with enforcement in the UK. Five years later, in 2008, the parties reportedly reached a settlement, by which Kazakhstan abided as a result of pressure from the US Government.

\textsuperscript{30} SARL Benvenuti & Bonfant v People’s Republic of the Congo, ICSID Case No ARB/77/2. On the enforcement proceedings, see Schreuer and others (n 9) 1130–1; Benvenuti & Bonfant v Banque Commerciales Congolaises, Cour de Cassation [Court of Cassation] (21 July 1987) 1 ICSID Rep (1993) 373; 115 JDI 108 (1988).

\textsuperscript{31} Liberian Eastern Timber Corporation v Republic of Liberia, ICSID Case No ARB/83/2. On the enforcement proceedings, see Schreuer and others (n 9) 1132–3; Order, Liberian Eastern Timber Corporation v Republic of Liberia, (SDNY Sep 5 1986), 2 ICSID Rep 384 (1994); Liberian Eastern Timber Corporation v Republic of Liberia, 650 F Supp 73 (SDNY 1986); Liberian Eastern Timber Corporation v Republic of Liberia, 659 F Supp 606 (DDC 1987).

\textsuperscript{32} Société Ouest Africaine des Bétons Industriels v Senegal, ICSID Case No ARB/82/1. On the enforcement proceedings, see Schreuer and others (n 9) 1132–3; SOABI v Senegal, CA [Court of Appeal] (5 December 1989) 2 ICSID Rep (1994) 337.

\textsuperscript{33} Mr Franz Sedelmayer v The Russian Federation through the Procurement Department of the President of the Russian Federation, SCC, Arbitration Award (7 July 1998). On the enforcement proceedings, see Damien Charlotin, ‘Looking back: German investor, Franz Sedelmayer, was early-adopter of investment treaty arbitration, but had to engage in decade-long assets hunt against Russia’ (JA Reporter, 29 August 2017) <www.iareporter.com/articles/looking-back-german-investor-franz-sedelmayer-was-early-adopter-of-investment-treaty-arbitration-but-had-to-engage-in-decade-long-assets-hunt/> accessed 10 June 2020; Luke Eric Peterson, ‘Russia held liable for expropriation of Italian business in unpublicized investment treaty arbitration’ (JA Reporter, 18 May 2015) <www.iareporter.com/articles/russia-held-liable-for-expropriation-of-italian-business-in-unpublicized-investment-treaty-arbitration/> accessed 10 June 2020; Andrew Higgins, ‘Beating Russia at Its Own Long Game’ The New York Times (Munich, 9 February 2015) <www.nytimes.com/2015/02/10/world/europe/once-friendly-with-putin-german-goes-to-court-over-seized-assets.html> accessed 10 June 2020.

\textsuperscript{34} Andrew Higgins, ‘Beating Russia at Its Own Long Game’ The New York Times (Munich, 9 February 2015) <www.nytimes.com/2015/02/10/world/europe/once-friendly-with-putin-german-goes-to-court-over-seized-assets.html> accessed 10 June 2020.

\textsuperscript{35} CA Aix-en-Provence, 23 octobre 2018, n 16/21366 [Aix-en-Provence Court of Appeal, 23 October 2018, n 16/21366].

\textsuperscript{36} Charlotin (n 33).

\textsuperscript{37} AIG Capital Partners, Inc. and CJSC Téma Real Estate Company Ltd. v The Republic of Kazakhstan, ICSID Case No ARB/01/6. On the enforcement proceedings, see ‘Turkish phone companies await payment from Kazakhstan’ (Global Arbitration Review, 30 April 2010) <https://globalarbitrationreview.com/article/1029267/turkish-phone-companies-await-payment-from-kazakhstan/> accessed 10 June 2020; Luke Eric Peterson, ‘Kazakhstan seeks to annul $125 million ICSID award in telecoms dispute; we review earlier kazakh arbitrations’ (JA Reporter, 12 November 2008) <www.iareporter.com/articles/kazakh-seeks-to-annul-125-million-icsid-award-in-telecoms-dispute-we-review-earlier-kazakh-arbitrations/> accessed 10 June 2020; AIG Capital Partners, Inc & CJSC Téma Real Estate Company v Kazakhstan [2005] EWHC (Comm) 2239, [2006] WRL 1420.
In March 2005, a tribunal ordered Kyrgyzstan to pay more than US$1.1 million in damages to Petrobart. Kyrgyzstan initially refused to comply and unsuccessfully sought annulment in Sweden. The investor's subsequent enforcement application in the Kyrgyz courts was denied. Swedish diplomats reportedly raised this matter with the Kyrgyz Government. Subsequently, in 2011, a settlement agreement was reached whereby Kyrgyzstan agreed to pay the principal amount of damages (but not interest or the arbitration costs awarded to the investor).

In April 2019, a tribunal rendered a damages award of 8.2 million euros. Following Zimbabwe's failure to pay, the investors commenced enforcement proceedings in the United States. In 2016, Zimbabwe agreed to pay in installments over several years. At the end of 2017, it was reported that Zimbabwe had been obliging with the agreed payment schedule.

In July 2009, the UNCITRAL Tribunal rendered an award of approximately 29 million euros against the State. Thailand refused to comply, and the investor initiated enforcement proceedings in the United States and Germany. The proceedings included the successful attachment of an aircraft belonging to the Thai Crown Prince in Germany. The Thai Government issued a bank guarantee in exchange for the release of the aircraft. In October 2016, the award was finally recognized in Germany. We have not identified publicly available information on whether the Thai Government subsequently complied.

Inquiry into whether these examples constituted rare exceptions from a general practice or were instead harbingers of more zealous non-compliance by States would have necessarily been impeded by the limited pool of concluded cases existing at the time. Since 2009, when the last of these awards was rendered, more than 600 new investor–State treaty cases have been instituted and more than 500 awards issued. In this context, a fact-based assessment of States’ compliance with adverse awards is pertinent.

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38 Petrobart Limited v The Kyrgyz Republic, SCC Case No 126/2003. On the enforcement proceedings, see Ridhi Kabra, ‘Looking back: In Petrobart v Kyrgyz Republic dispute, a sales contract does not constitute an investment under the Kyrgyz foreign investment law, but it later finds protection under the Energy Charter Treaty’ (LI Reporter, 25 September 2017) <www.iareporter.com/articles/looking-back-in-petrobart-v-kyrgyz-republic-dispute-a-sales-contract-does-not-constitute-an-investment-under-the-kyrgyz-foreign-investment-law-but-it-later-finds-protection-under-the-energy-charter/> accessed 10 June 2020; Luke Eric Peterson, ‘Lengthy debt collection battle ends, as former soviet state pays arbitral award; unusual form of diplomatic assistance seen’ (LI Reporter, 29 September 2011) <www.iareporter.com/articles/lengthy-debt-collection-battle-ends-as-former-soviet-state-pays-arbitral-award-unusual-form-of-diplomatic-assistance-seen/> accessed 10 June 2020; Luke Eric Peterson, ‘BIT claim quietly pursued by Swiss claimant against Uzbekistan in long-running dispute over payment for grain shipment’ (LI Reporter, 22 October 2008) <www.iareporter.com/articles/bit-claim-quietly-pursued-by-swiss-claimant-against-uzbekistan-in-long-running-dispute-over-payment-for-grain-shipment/> accessed 10 June 2020.

39 Bernardus Henricus Funnekotter and others v Republic of Zimbabwe, ICSID Case No ARB/05/6. On the enforcement proceedings, see Lacey Yong, ‘Zimbabwe is paying, reveals Dutch farmer’ (Global Arbitration Review, 10 October 2017) <https://globalarbitrationreview.com/article/1148709/zimbabwe-is-paying-reveals-dutch-farmer/> accessed 10 June 2020; Lacey Yong, ‘Hopes raised of enforcement against Zimbabwe’ (Global Arbitration Review, 11 June 2015) <https://globalarbitrationreview.com/article/1034526/hopes-raised-of-enforcement-against-zimbabwe/> accessed 10 June 2020.

40 Walter Bau AG (In Liquidation) v The Kingdom of Thailand, UNCITRAL. On the enforcement proceedings, see Tom Jones and Sebastian Perry, ‘Thailand loses German Appeal over treaty award’ (Global Arbitration Review, 12 December 2016) <https://globalarbitrationreview.com/article/1078541/thailand-loses-german-appeal-over-treaty-award/> accessed 10 June 2020.
IV. DATA ON STATE COMPLIANCE WITH INVESTMENT AWARDS

Below, we first describe the methodology employed, including how the 32 States surveyed were chosen, and the eight categories into which all arbitrations were divided, as well as the inherent limitations of the exercise (Subsection A). We then present in Subsection B data on the compliance of each of the 32 States covered in the survey.

A. Methodology and Caveats

We have gathered data on the outcome of investment arbitrations involving 32 States that have been sued more than 10 times as at 31 December 2019. The data were collected from reputed legal and public databases, as well as corporate and media reports. The aggregate number of arbitrations examined here is 776. This study thus covers more than 70 percent of the investment treaty disputes commenced before 31 December 2019.

The possible outcomes of the arbitrations are organized into eight categories:

1. **State prevailed**: arbitrations in which the State has prevailed on jurisdiction, admissibility or the merits or succeeded in annulling an award in its entirety.
2. **Discontinued**: arbitrations discontinued before the issuance of a final award due to any reason other than a settlement, such as failure to pay advances or withdrawal of claims.
3. **Settlement pre-award**: arbitrations in which the parties reached a settlement before the issuance of an award on damages.
4. **Payment/recovery post-award**: arbitrations in which, after the issuance of an award on damages, the State made a full or partial payment or the damages were recovered from the State by means of enforcement. This category covers the following types of outcomes:
   a. where the State voluntarily agrees to a settlement agreement or pays the award without the need for enforcement proceedings; and
   b. where the State agrees to a settlement or satisfies the award after enforcement proceedings were initiated.
5. **No damages**: arbitrations in which the State was found liable, but damages were not awarded.

41 Arbitrations against State-owned entities are not included in the survey.
42 The sources include the websites of State agencies, the European Union, arbitral institutions, and databases such as Kluwer, ITALaw, the UNCTAD Investment Dispute Settlement Navigator, Investment Arbitration Reporter, Investor-State Law Guide, Global Arbitration Review, Law 360, etc. In addition, we have consulted press releases from investors and States and media publications in leading international and regional newspapers.
43 There is no publicly available information on the total number of cases arising from investment treaties, investment contracts and domestic investment laws. According to UNCTAD, 1,023 arbitrations have been filed under investment treaties alone, as at 31 December 2019: UNCTAD Investment Dispute Settlement Navigator <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 11 June 2020. Of the 776 cases analyzed here, 736 are based on investment treaties. This study also covers arbitrations based on contract and domestic investment laws.
44 It is possible that an arbitration has been discontinued because the parties had reached a settlement. However, if the fact of such settlement is not publicly reported, the arbitration was grouped in this category. For instance, the proceedings in ENGIE International Holdings BV, ENGIE SA and GDF International SAS v Hungary, ICSID Case No ARB/16/14, were discontinued in February 2018 due to the parties’ agreement, which was reportedly preceded by the sale of Engie’s local subsidiary, Égáz-Dégáz. However, given that no settlement agreement has been reported as the cause for the withdrawal of claim, this arbitration was treated as ‘Discontinued’. András Lovas, ‘Altering the energy market and the rise of the state. Legal safeguard for foreign owners of energy assets?’ Budapest Business Journal (Budapest, 12 October 2018) <https://bbj.hu/inside-view/altering-the-energy-market-and-the-rise-of-the-state-legal-safeguard-for-foreign-owners-of-energy-assets_155894> accessed 11 June 2020.
(6) **Payment not known**: arbitrations in which an award on damages or costs against a State was issued, but no information on payment is publicly available.\(^{45}\)

(7) **Arbitration pending**: arbitrations that were ongoing as at 31 December 2019.\(^{46}\)

(8) **Post-award proceedings pending**: arbitrations in which an ICSID annulment proceeding or set-aside proceeding was pending as at 31 December 2019.\(^{47}\)

We have not provided for a separate category of arbitrations following which enforcement proceedings were commenced to avoid double counting (as a case where enforcement was initiated would fit in the ‘Settlement/payment post-award’, the ‘Payment not known’, or the ‘Post-award proceedings pending’ categories). Arbitrations that have resulted in enforcement proceedings against the respondent State are discussed in Subsection B.

The analysis in this contribution is necessarily subject to limitations:

- Although the authors have endeavored to use information from reputable sources, they have not been able to verify each source independently. Further, only what has been publicly reported or is known to the authors to be correct is presented below.
- Further, given the volume of underlying data, it is possible that certain facts or nuances of a State’s compliance or conduct following an adverse award have not been fully captured. Relatedly, as one of the main intended contributions of this assessment is to present a breadth of important information and thus enable macro conclusions reflective of the state of affairs in international investment protection, that approach invariably precludes a ‘deep dive’ in individual cases where other undoubtedly valuable lessons lie.
- For various reasons, States or investors may have elected not to report publicly the fact of payment or settlement of an award. In the absence of such information, those cases have been categorized as ‘Payment not known’.

\(^{45}\) This category also includes arbitrations in which the award on damages was issued shortly before 31 December 2019, and no information on payment was available.

\(^{46}\) In certain cases, public reporting does not indicate the status or outcome of a case. For the purpose of this survey, such cases have been treated as ‘Pending’.

\(^{47}\) The number of arbitrations in this category may be larger if annulment proceedings are not publicly reported.
Arbitrations in which the award on damages was issued shortly before the publication of this article, and no information on payment was yet available, have been categorized as ‘Payment not known’.

If a State is reported to have concluded a settlement agreement, that case has been placed in either the ‘Settlement pre-award’ or ‘Payment/recovery post-award’ categories, as the case may be. These include instances in which the settlement agreement was only partially satisfied. At the same time, States do not always honor a settlement agreement. Where the fact of non-compliance with the settlement agreement is public, the case has been placed in the ‘Payment not known’ category.

Lastly, data and events following 31 December 2019 are outside the scope of this analysis.

B. Presentation of Data

This subsection provides an overview of the compliance record with investment treaty awards of the 32 most sued States. The States have been divided into five groups, on the basis of the number of cases raised against them:

1. Fifty or more arbitrations: Argentina (63); Venezuela (58); Spain (52);
2. Between 40 and 49 arbitrations: Egypt (43); Czech Republic (40);
3. Between 30 and 39 arbitrations: Mexico (33); Poland (31); Canada (30); Ecuador (30);
4. Between 20 and 29 arbitrations: Ukraine (27); Peru (26); Russia (26); India (25); Libya (25); Kazakhstan (24); Kyrgyz Republic (23);
5. Between 10 and 19 arbitrations: Romania (19); Bolivia (16); Hungary (16); United States of America (16); Croatia (15); Georgia (15); Colombia (14); Moldova (14); Turkey (14); Slovakia (13); Turkmenistan (13); Serbia (12); Costa Rica (11); Italy (11); Bulgaria (11); Algeria (10).
States involved in 50 or more investment arbitrations

a) Argentina

Argentina sits at the top of the list of the most frequently sued States. To a large extent, the investment arbitrations initiated against Argentina were related to the Argentinean sovereign debt and economic crisis of the early 2000s, and the measures that Argentina took to address that crisis. Argentina initially complied with adverse awards. As its payment obligations mounted, it began to resist compliance. Ultimately, in the face of diplomatic pressure, Argentina agreed to settle several of the awards many years after they were issued.

Of the 63 arbitrations initiated against Argentina, 22 have been settled before the issuance of an award on damages. On the pre-award settlements:

(i) Abertis Infraestructuras, SA v Argentine Republic, ICSID Case No ARB/15/48. See also Javier Mesones, ‘Abertis retira el arbitraje contra Argentina tras alargar sus concesiones [Abertis withdraws the arbitration against Argentina after having extended its concessions]’ El Economista (Madrid, 12 July 2018) <http://www.eleconomista.es/empresas-finanzas/noticias/9268165/07/18/Abertis-retira-el-arbitraje-contra-Argentina-tras-alargar-sus-concesiones.html> accessed 12 June 2020;

(ii) Repsol, SA and Repsol Butano, SA v Argentine Republic, ICSID Case No ARB/12/38, Convenio de Solución Amigable y Avenimiento de Expropiación [Amicable Solution and Expropriation Settlement Agreement] (27 February 2014); Resolución No 26/2014, 32.879 BO, 8 de mayo de 2014 [Resolution No 26/2014, 23.879 BO, 8 May 2014], 15–16;

(iii) Impregilo Spa v Argentine Republic (II), ICSID Case No ARB/08/14; Decreto No 165/10 de la Provincia de Córdoba, 26 febrero de 2010 [Decree No 165/10 of Cordoba Province, 26 February 2010] DXLI-40 BO, 5 (ratifying the Share Sale and Purchase and Liability Restructuring Agreement of 24 February 2010);

(iv) Abaclat and others (formerly Giovanna A Beccara and others) v Argentine Republic, ICSID Case No ARB/07/5, Consent Award Under ICSID Arbitration Rule 43(2) (29 December 2016) (attaching Settlement Agreement of 21 April 2016);

(v) Compañía General de Electricidad SA and CGE Argentina SA v Argentine Republic, ICSID Case No ARB/05/2; Ignacio Torterola and Diego Brian Gosis, ‘Argentina’ in Jonathan C Hamilton and others (eds), Latin American Investment Protections (Martinus Nijhoff 2012) 37;

(vi) Bank of Nova Scotia v Argentine Republic, UNCITRAL; ‘Scotiabank drops US$600 million Argentina claim’ (Global Arbitration Review, 29 July 2011) <https://globalarbitrationreview.com/article/1030505/scotiabank-drops-ususd600-million-argentina-claim> accessed 12 June 2020;

(vii) RGA Reinsurance Company v Argentine Republic, ICSID Case No ARB/04/20; Ignacio Torterola and Diego Brian Gosis, ‘Argentina’ in Hamilton and others (eds) (above) 37;
effect. For instance, in 2018, more than 15 years after the initiation of the *Gas Natural SDG* and *Camuzzi International SA* arbitrations and after 11 years of negotiation, Argentina agreed to revise its electricity tariffs in exchange for the withdrawal of the investors’ claims.49 Argentina has settled other arbitrations prior to the issuance of an award on damages by, for example, negotiating a new telecommunications regulatory framework (*Telefónica SA v Argentina*) and issuing sovereign bonds (*Repsol SA v Argentina*).50

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49 For the settlement agreements in *Gas Natural SDG* and *Camuzzi International SA*, see n 48.

50 For the settlement agreements in *Telefónica SA* and *Repsol SA*, see n 48.
Nineteen damages awards have been issued against Argentina. Of these, public information indicates that Argentina has satisfied 14. It is seeking the annulment of one award before an ICSID Ad Hoc Committee. We have not identified information on payment of the four remaining awards.

Argentina declined to pay several adverse awards for years. It first sought to annul them, largely without success. Investors who prevailed in arbitration were required to pursue enforcement proceedings or seek diplomatic support. As will be discussed next, settlements took between five and 13 years from the date of issuance of the award and were usually in the form of Argentinian sovereign bonds.

Between 2000 and 2008, ICSID tribunals issued awards in five arbitrations brought by US investors: CMS Gas, Azurix Corp, Vivendi Universal, Continental Casualty and National Grid. The rights in the CMS Gas, Vivendi Universal, Continental Casualty and National Grid awards were subsequently acquired by US creditors. Argentina refused to comply with the awards and maintained that the investors could enforce the awards only through proceedings in Argentina’s courts.

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51 The awards in the following arbitrations have been reported to have been satisfied: Saur International v Argentine Republic, ICSID Case No ARB/04/4, Award (22 May 2014); Total SA v Argentine Republic, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010); EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v Argentine Republic, ICSID Case No ARB/03/23, Award (11 June 2012); Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA) v Argentine Republic (II), ICSID Case No ARB/03/19, Decision on Liability (30 July 2010); El Paso Energy International Company v Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011); Continental Casualty Company v Argentine Republic, ICSID Case No ARB/03/9, Award (5 September 2008); National Grid Plc v The Argentine Republic, UNCITRAL, Award (3 November 2008); BG Group Plc v The Republic of Argentina, UNCITRAL, Award (24 December 2007); LG&E Energy Corp, LG&E Capital Corp. and LG&E International Inc v Argentine Republic, ICSID Case No ARB/02/1, Award (25 July 2007); Azurix Corp v The Argentine Republic (I), ICSID Case No ARB/01/12, Award (14 July 2006); CMS Gas Transmission Company v The Argentine Republic, ICSID Case No ARB/01/8, Award (12 May 2005); Compañía de Aguas del Aconquija SA and Vivendi Universal SA (formerly Compañía de Aguas del Aconquija SA, Compagnie Générale des Eaux) v Argentine Republic (I), ICSID Case No ARB/97/3, Award (21 November 2000); Suez, Sociedad General de Aguas de Barcelona, SA and Interagua Servicios Integrales de Agua, SA v Argentine Republic, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010); AWG Group Ltd v The Argentine Republic, UNCITRAL, Decision on Liability (30 July 2010).

52 Argentina has initiated annulment proceedings against the award in HOCHTIEF Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/07/31, Award (21 December 2016).

53 This concerns the awards in Impregilo SpA v Argentine Republic (I), ICSID Case No ARB/07/17, Award (21 June 2011); Mobil Exploration and Development Inc Suc. Argentina; Mobil Argentina SA v Argentine Republic, ICSID Case No ARB/04/16, Award (25 February 2016) and Autobuses Urbanos del Sur SA, Teiner SA and Transportes de Cercanias SA v Argentine Republic, ICSID Case No ARB/09/1, Award (21 July 2017); and Papel del Tucuman (in bankruptcy) v Argentine Republic, ICC Case No 12364/KGA/CCO/JRF/CA/ASM/JPA, Award (5 March 2019).

54 Argentina commenced ICSID annulment proceedings in all 20 cases in which it received adverse awards. Only the award in Sempra Energy was completely annulled, while the awards in CMS Gas and Enron were partially annulled. See Sempra Energy International v Argentina, ICSID Case No ARB/02/6, Decision on Annulment (29 June 2010); CMS Gas v Argentina, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) and Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010).

55 Enforcement proceedings were initiated at least in relation to the awards in Continental Casualty Company v Argentina, ICSID Case No ARB/03/9; Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16; CMS Gas Transmission Company v The Argentine Republic, ICSID Case No ARB/01/8 and Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3.

56 See eg ‘Obama tells Argentina to pay up’ (Global Arbitration Review, 16 November 2011) https://globalarbitrationreview.com/article/1030771/obama-tells-argentina-to-pay-up> accessed 11 June 2020; Luke Eric Peterson, ‘How many states are not paying awards under investment treaties?’ (JA Reporter, 7 May 2010) <www.iareporter.com/articles/how-many-states-are-not-paying-awards-under-investment-treaties> accessed 11 June 2020; ‘French firm Suez explores selling off debt claim against Argentina’ Buenos Aires Times (Buenos Aires, 28 February 2019) <www.batimes.com.ar/news/argentina/french-firm-suez-explores-selling-off-debt-claim-against-argentina.phtml>; Proclamation No 8788, 77 Fed Reg 61, 18899 (Mar 26 2012).

57 See http://www.arbitrationreview.com/article/1032713/argentina-agrees-to-settle-treaty-awards> accessed 11 June 2020.

58 Ignacio J Manori Lima, ‘Argentina’ in Fouret (ed) (11). We have not been able to confirm whether any of the investors attempted this.
Following lobbying efforts, the US Government espoused the creditors’ claims. The United States withdrew trade benefits extended to Argentina under the US Generalized System of Preferences (GSP) regime and voted against the World Bank and Inter-American Development Bank extending loans to Argentina. In March 2012, President Obama declared that ‘it is appropriate to suspend Argentina’s designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association that is 50 percent or more beneficially owned by United States citizens [. . .].’

Not long after these measures, Argentina agreed to settle the five awards in October 2013, by issuing sovereign bonds at a discount. The settlement eased the bilateral relationship between Argentina and the United States and the international business community. Immediately after the settlement, the World Bank agreed to provide loans worth US$3 billion to finance Argentina’s infrastructure projects. Likewise, in May 2014, the Paris Club of Creditors (of which the United States is a prominent member) and Argentina arranged to clear Argentina’s debt worth US$9.7 billion.

Argentina subsequently also settled the awards in *BG Group*, *El Paso*, *Total* and *Suez* by issuing sovereign bonds at a discounted value. Although the awards were rendered in 2007, 2011, 2013 and 2015 respectively, the settlements were reached only between 2016 and 2019. Following its re-entry into the international capital market in 2016, Argentina also paid 150 percent of the value of the defaulted bonds that were the subject-matter of the main claim in the *Abaclat* arbitration. Referring to *inter alia* the ‘resolution of certain arbitral disputes with U.S. companies’, the United States reinstated Argentina into its GSP regime on 1 January 2018.

In recent years, Argentina has been making efforts to resurrect its economy by accessing the global financial markets, and it is keen to attract foreign investments in its territory. Projecting an investor-friendly image was cited by the Argentine Government as one of the important factors for agreeing to settle the disputes with

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59 Proclamation No 8788, 77 Fed Reg 61, 18899 (Mar 26 2012). See also ‘Obama tells Argentina to pay up’ (*Global Arbitration Review*, 16 November 2011) <https://globalarbitrationreview.com/article/1030771/obama-tells-argentina-to-pay-up> accessed 11 June 2020.
60 Douglas Thomson, ‘Argentina agrees to settle treaty awards’ (*Global Arbitration Review*, 11 October 2013) <https://globalarbitrationreview.com/article/1032713/argentina-agrees-to-settle-treaty-awards> accessed 11 June 2020.
61 World Bank Press Release, ‘Argentina/BM: New Strategic Partnership 2014-16’ (10 October 2013) <www.worldbank.org/en/news/press-release/2013/10/10/anuncian-alianza-estrategica-2014-16> accessed 11 June 2020.
62 Paris Club Press Release, ‘The Paris Club and the Argentine Republic Agree to a Resumption of Payments and to Clearance of All Arrears’ (29 May 2014) <www.clubdepais.org/en/communications/article/the-paris-club-and-the-argentine-republic-agree-to-a-resumption-of-payments> accessed 11 June 2020.
63 For the government resolution regarding the settlement in (i) *BG Group v Argentina* and *El Paso v Argentina*, see *Resolución No 173/2016, 33.386 BO, 13 de mayo de 2016* [Resolution No 173/2016, 33.386 BO, 13 May 2016] 25; (ii) *Total v Argentina*, see *Resolución No 112-E/2017, 33.668 BO, 17 de julio de 2017* [Resolution No 112-E/2017, 33.668 BO, 17 July 2017] 19; Ministry of Finance Press Release, ‘Argentina enters into an agreement with TOTAL Oil Company within the context of the ICSID’ (18 July 2017) <www.minhacienda.gob.ar/en/argentina-enters-into-an-agreement-with-total-oil-company-within-the-context-of-the-icsid/> accessed 18 June 2020; and (iii) *Suez v Argentina*, see *Resolución No 241/2019, 34.111 BO, 3 de abril de 2019* [Resolution No 241/2019, 34.111 BO, 3 April 2019] 11.
64 For the settlement agreement in *Abaclat*, see *Abaclat and others (formerly Giovanna A Beccara and others) v Argentine Republic*, ICSID Case No ARB/07/5, Consent Award Under ICSID Arbitration Rule 43(2) (29 December 2016) (attaching Settlement Agreement of 21 April 2016).
65 Office of the United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program* (2018) 56 (‘The President restored Argentina’s GSP eligibility status, effective January 1, 2018, following resolution of certain arbitral disputes with U.S. companies, new commitments by the Argentine government to improve market access for U.S. agricultural products, and improved protection and enforcement of IPR’).
American, British and French energy companies, such as Total, BG Group and El Paso.66

b) Venezuela
Venezuela has had 58 arbitrations initiated against it under its BITs, investment contracts and domestic investment law, making it the second most frequent respondent State. Several of these arbitrations arise from measures taken by the Chavez-led Government in 2007 to nationalize oil projects. The wave of nationalizations also covered foreign investment in the gold and agriculture industries.

Venezuela has also terminated its participation in certain investment protection treaties. For example, in 2008, after two Dutch companies (Venezuela Holdings and ConocoPhillips Petrozuata BV) initiated arbitrations against it, Venezuela terminated its BIT with the Netherlands.67 In 2012, the Government denounced the ICSID Convention, stating that the initial decision to accede to ICSID was taken by ‘a weak provisional government [...] under the pressure of transnational economic sectors in the dismantling of Venezuela’s national sovereignty’.68

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66 Ministry of Finance Press Release, ‘Argentina enters into an agreement with TOTAL Oil Company within the context of the ICSID’ (18 July 2017) <www.minhacienda.gob.ar/en/argentina-enters-into-an-agreement-with-total-oil-company-within-the-context-of-the-icsid/> accessed 18 June 2020 (‘This agreement closes TOTAL’s claim and contributes to the restoration of direct investment, in particular from companies coming from France in the energy sector. TOTAL has recently announced investment projects in Argentina (in Neuquen and Tierra del Fuego) for amounts higher than the ones obtained as a result of this agreement’);

Ministerio de Hacienda y Finanzas Públicas [Ministry of Treasury and Public Finance] Press Release, ‘Acuerdos con BG Group y El Paso Energy en el marco del CIADI [Agreements with BG Group and El Paso Energy within the framework of ICSID]’ (13 May 2016) <www.italaw.com/sites/default/files/case-documents/italaw7319.pdf> accessed 18 June 2020 (‘Ambos acuerdos le ponen fin al reclamo de las partes y allanan el camino para restablecer inversiones directas particularmente de empresas provenientes de los países asociados con las mismas (Gran Bretaña y Estados Unidos) y en el sector energético’ [Both agreements put an end to the parties’ claim and pave the way for reestablishing direct investments, particularly from companies from the countries associated with them (Great Britain and the United States) and in the energy sector]).

67 Luke Eric Peterson, ‘Venezuela surprises the Netherlands with termination notice for BIT; treaty has been used by many investors to “route” investments into Venezuela’ (IA Reporter, 16 May 2008) <www.iareporter.com/articles/venezuela-surprises-the-netherlands-with-termination-notice-for-bit-treaty-has-been-used-by-many-investors-to-route-investments-into-venezuela/> accessed 18 June 2020.

68 ‘Hugo Chávez se aleja de centro de arbitraje [Hugo Chávez leaves arbitration center]’ El Comercio (Quito, 26 January 2012) <www.elcomercio.com/app_public.php/actualidad/negocios/hugo-chavez-se-aleja-de.html> accessed 19 June 2020 (original Spanish: ‘se adhirió a este convenio en 1993, por decisión de un Gobierno provisional débil y desprovisto de legitimidad popular, presionado por sectores económicos transnacionales que participaban del desmantelamiento de la soberanía nacional venezolana’). See also ICSID Press Release, ‘Venezuela Submits a Notice Under Article 71 of the ICSID Convention’ <https://icsid.worldbank.org/en/Pages/News.aspx?CID=47> accessed 19 June 2020.
Venezuela has settled six arbitrations prior to an award on damages, through cash payments, issuing other financial instruments and/or providing debt relief.⁶⁹ For instance, three years after the commencement of the proceedings in CEMEX, Venezuela agreed to pay the investors US$240 million in cash and US$360 million in negotiable securities issued by Petróleos de Venezuela, SA (PDVSA), the State’s oil company. It also agreed to cancel US$154 million in debt owed by the investors’ local subsidiaries.⁷⁰ After Holcim initiated an arbitration, the parties settled and Venezuela has reportedly also paid US$250 million out of the agreed US$650 million in 2010 (with subsequent payments due by 2014).⁷¹ On the other hand, even though Venezuela and the Williams Companies had agreed to settle their first arbitration for US$420 million prior to an award, the investor once again initiated an arbitration in 2019 after Venezuela had allegedly failed to make good on the settlement.⁷²

Twenty damages awards have been issued against Venezuela, in relation to five of which annulment proceedings are pending.⁷³ Until 2013, Venezuela had paid the two adverse awards without investors having to seek enforcement (in FEDAX and Aucoven).⁷⁴ It has been reported that on numerous occasions Aucoven sought the assistance of its home State (Mexico) to obtain compensation.⁷⁵

The policy seems to have shifted after 2013, perhaps coinciding with President Nicolás Maduro coming to power after the death of President Hugo Chávez. Since 2013, the only award that is known to have been paid is that in Gold Reserve (discussed below). We have not identified information that the remaining 12 damages awards have been paid. In fact, enforcement actions have been commenced against

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⁶⁹ These were the arbitrations in: Ternium SA and Consorcio Siderurgia Amazonia SL v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/19; The Williams Companies, International Holdings BV, WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v Bolivarian Republic of Venezuela (I), ICSID Case No ARB/11/10; Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/9; Holcim Limited, Holderfin BV and Caricement BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/09/3; CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/08/15; and Eni Dacim BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/4. See also ‘Ternium and Venezuela settle over Sidor’ (Global Arbitration Review, 8 May 2009) <https://globalarbitrationreview.com/article/1027457/ternium-and-venezuela-settle-over-sidor> accessed 11 June 2020; Williams Press Release, ‘Williams Completes Agreement with PDVSA to Receive Approximately $312 Million for Venezuela Assets’ (26 March 2012) <https://investor.williams.com/press-releases/press-release-details/2012/Williams-Completes-Agreement-with-PDVSA-to-Receive-Approximately-312-Million-for-Venezuela-Assets/default.aspx> accessed 11 June 2020; Cosmo Sanderson, ‘Morocco and Mexico face ICSID claims’ (Global Arbitration Review, 4 January 2019) <https://globalarbitrationreview.com/article/1178789/morocco-and-mexico-face-isd-claims> accessed 11 June 2020; Holcim Press Release, Acuerdo con Venezuela [Agreement with Venezuela] (19 October 2010) <www.holcim.com.cn/quienes-somos/ultima-edicion/last-release/article/acuerdo-con-venezuela> accessed 18 June 2020; CEMEX Press Release, CEMEX and Venezuela sign an agreement over the compensation for the nationalization of CEMEX Venezuela’ (1 December 2011) <www.cemex.com.es/web/guest/media/press-releases/-/asset_publisher/SdVoFWmaXoDU/content/about-us-press-release-cemex-and-venezuela-sign-agreement-on-compensation-for-nationalization-of-cemex-venezuela> accessed 18 June 2020; Amanda Ernst, ‘Venezuela reaches $700M settlement with Eni (Law360, 19 February 2008) <www.law360.com/articles/47352> accessed 18 June 2020.

⁷⁰ CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/08/15.

⁷¹ Holcim Limited, Holderfin BV and Caricement BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/09/3.

⁷² Lisa Bohmer, ‘Two years after discontinuing ICSID proceedings against Venezuela, oil and gas services company initiates a second arbitration under Netherlands-Venezuela BIT’ (IA Reporter, 21 October 2019) <www.iareporter.com/articles/two-years-after-discontinuing-icsid-proceedings-against-venezuela-oil-and-gas-services-company-initiates-a-second-arbitration-under-netherlands-venezuela-bit> accessed 18 June 2020.

⁷³ Venezuela has not initiated annulment proceedings in the cases initiated by Blue Bank International, Koch Minerals Sàrl, ConocoPhillips et al, Longreef, and Rusoro.

⁷⁴ José Gregorio Torrealba, ‘Venezuela’ in Fouret (ed) (n 11) 527. These were the awards issued in Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela, ICSID Case No ARB/00/5, Award (23 September 2003) and FEDAX NV v The Republic of Venezuela, ICSID Case No ARB/96/3, Award (9 March 1998).

⁷⁵ Rodrigo Polanco, The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection? (CUP 2019) 281–3.
Venezuela in many jurisdictions in relation to more than 10 awards. Many of those enforcement proceedings are pending as at 31 December 2019.

Three cases in which Venezuela was ordered to pay a combined total of US$3.2 billion are worthy of specific note.

**Gold Reserve v. Venezuela.** Gold Reserve won more than US$746 million in damages in September 2014. Gold Reserve started enforcement proceedings as early as October 2014 in Luxembourg and soon thereafter in France, the UK and the United States. In parallel, Venezuela sought annulment of the award in France and resisted enforcement. In January 2016, the US courts granted leave to Gold Reserve to enforce the award. Several months later, the parties executed a settlement agreement pursuant to which Venezuela would pay to Gold Reserve US$1 billion, comprising the full awarded amount and a fee to acquire the investor’s mining data. Gold Reserve and Venezuela would also jointly develop gold, copper and silver mining projects in Venezuela. It is possible that the settlement with Gold Reserve allowed Venezuela to obtain US$2 billion in loans. In particular, Venezuela reportedly used the mining rights obtained in the settlement as collateral for the financing.

76 Investors have commenced enforcement actions pursuant to adverse awards against Venezuela in the following arbitrations: OI European Group BV v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award (10 March 2015); Tidewater Investment SRL and Tidewater Caribe, CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Award (13 March 2015); Mobil Cero Negro Holding, Ltd., Mobil Cero Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (9 October 2014); Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award (15 April 2016); Tenaris SA and Talta-Trading e Marketing Sociedade Unipessoal Ltda v. Bolivarian Republic of Venezuela (II), ICSID Case No. ARB/12/23, Award (12 November 2016); Valores Mundiales, SL and Consorcio Andino SL v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11, Award (25 July 2017); Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Award (3 November 2017); Tenaris SA and Talta-Trading e Marketing Sociedade Unipessoal Ltda v. Bolivarian Republic of Venezuela (I), ICSID Case No. ARB/11/26, Award (29 January 2016); Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award (30 October 2017); Rusoro Mining Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016); ConocoPhillips and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Award (8 March 2019) and Cristallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016).

77 Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014).

78 Gold Reserve Inc Press Release, ‘Gold Reserve Provides Update to Legal Proceedings Related to Collection of Arbitration Award’ (14 January 2016) <www.goldreserveinc.com/gold-reserve-provides-update-to-legal-proceedings-related-to-collection-of-arbitration-award-16-02-2/> accessed 18 June 2020; Gold Reserve Inc Press Release, ‘U.S. District Court for the District of Columbia enters Judgement Against Venezuela in Excess of $700 Million; Denies Motion to Stay Enforcement’ (23 November 2015) <www.goldreserveinc.com/us-district-court-for-the-district-of-col umbia-enters-judgement-against-venezuela-in-excess-of-760-million-denies-motion-to-stay-enforcement-15-13/> accessed 18 June 2020; Gold Reserve Inc Press Release, ‘Gold Reserve Expands its Arbitral Awards Collection Efforts to Luxembourg’ (13 April 2015) <www.goldreserveinc.com/wp-content/uploads/2016/02/15-05.pdf> accessed 18 June 2020; Gold Reserve Inc Press Release, ‘Gold Reserve Seeks Enforcement of its US$ 713 Million Award and Costs Against Venezuela in the US District Court for the District of Columbia’ (1 December 2014) <www.goldreserveinc.com/wp-content/uploads/2016/02/14-11.pdf> accessed 18 June 2020; Gold Reserve Inc Press Release, ‘Gold Reserve Provides Update to Legal Proceedings in US District Court for the District of Columbia’ (18 June 2015) <www.goldreserveinc.com/wp-content/uploads/2016/02/15-08.pdf> accessed 18 June 2020; Gold Reserve Inc Press Release, ‘Gold Reserve Inc. Updates Shareholders on ICSID Award’ (6 November 2014) <www.goldreserveinc.com/wp-content/uploads/2016/02/14-10.pdf> accessed 18 June 2020.

79 Order, Gold Reserve v. Bolivarian Republic of Venezuela, No. 14-2014 (JEB) (DDC Jan 20 2016); Gold Reserve Inc Press Release, ‘Gold Reserve Provides Further Update to Legal Proceedings Related to Collection of Arbitration Award’ (21 January 2016) <www.goldreserveinc.com/wp-content/uploads/2016/02/16-03-1.pdf> accessed 18 June 2020.

80 The parties entered into a Memorandum of Understanding on 29 February 2016, as per Gold Reserve Inc. Press Release, ‘Gold Reserve Enters into Memorandum of Understanding with the Government of Venezuela to Settle Gold Reserve’s Arbitration Award and Jointly Develop the Brisas and Las Cristinas Projects’ (29 February 2016) <www.goldreserveinc.com/wp-content/uploads/2016/02/16-04.pdf> accessed 18 June 2020. See also Gold Reserve Inc Press Release, ‘Bolivarian Republic of Venezuela Agrees to Pay Gold Reserve Arbitral Award and Aquire Mining Data and Executes an Agreement to Jointly Develop the Brisas Cristinas Gold Copper Mining Project’ (8 August 2016) <www.goldreserveinc.com/wp-content/uploads/2016/08/16-13.pdf> accessed 18 June 2020.

81 Alexandra Ulmer and Girish Gupta, ‘Venezuela, Gold Reserve to settle arbitration dispute with joint venture’ Reuters (Caracas, 25 February 2016) <www.reuters.com/article/us-venezuela-arbitration/venezuela-gold-reserve-to-settle-arbitration-dispute-with-joint-venture-idUSKCN0VY05Y> accessed 18 June 2020.
Venezuela initially did not adhere to the agreed payment timeline. However, following the dismissal of Venezuela’s annulment application by the Paris Court d’Appel in February 2017, it has reportedly been complying with the terms of the settlement agreement.

Rusoro v Venezuela. Rusoro secured an award of US$1.2 billion in August 2016. It commenced enforcement proceedings in the United States, Canada and the UK against inter alia the commercial assets of PDVSA. In 2018, the US and Canadian courts ruled in favor of Rusoro at the stage of recognition, paving the way for enforcement. Later that year, Rusoro announced that the parties had agreed to settle, with Venezuela agreeing to pay US$1.28 billion, acquire Rusoro’s mining data, and form a joint venture with Rusoro to explore and develop gold mining projects.

In parallel, Venezuela instituted set-aside proceedings in France. In January 2019, the Paris Cour d’Appel annulled the award. Rusoro has subsequently filed a petition to quash with the French Cour de Cassation and announced its intention to pursue necessary remedies to obtain appropriate compensation for its expropriated assets.

Crystallex v Venezuela. The post-award proceedings in Crystallex have involved many twists and turns. Crystallex obtained an award of US$1.38 billion in April 2016, which was recognized by both the Canadian and the US courts. In...
November 2017, Venezuela agreed to a settlement worth more than US$1 billion.92 However, in the very next month it was reported that Venezuela had failed to make the scheduled payment.93

Crystallex resumed its enforcement actions in the United States, seeking to attach PDVSA assets. The US District Court of Delaware granted Crystallex’s request in August 2018. In a rare holding to the effect that the ‘veil’ of a company should be pierced, the court examined in great detail the extent to which Venezuela controlled the day-to-day activities of PDVSA, and it found that the company was Venezuela’s alter ego.94

Once again, in November 2018, a settlement agreement followed. Venezuela agreed to satisfy the award by 2021 and, in return, Crystallex would agree to suspend the enforcement proceedings in the United States until early January 2019, when a partial payment fell due.95 Venezuela thereafter made an initial payment of US$850 million in cash and liquid securities in November 2018.96 However, less than a month later, Crystallex reported that Venezuela had breached the settlement terms for the second time.97 Venezuela resumed its appeal against the Delaware District Court’s decision before the US Court of Appeals for the Third Circuit. After a de novo review of the question whether PDVSA could be treated as Venezuela’s alter ego, the Third Circuit affirmed the District Court’s decision, holding that Venezuela and PDVSA satisfied the ‘extensive-control requirement’ needed to show that the foreign sovereign and its instrumentalities were not separate legal entities.98 Venezuela and PDVSA have indicated their intention to appeal to the US Supreme Court.99

The decisions of the District and Third Circuit Courts are momentous for opening up avenues for enforcement actions against Venezuela, whether by Crystallex or other investors. The Delaware District Court has stayed enforcement actions in Crystallex v Venezuela, OI European Group BV v Venezuela and ConocoPhillips v Venezuela.100 In addition to these, as indicated above, Venezuela is defending a number of other enforcement actions.

Rusoro and Crystallex also allege that Venezuela is shielding its assets from enforcement by transferring them out of the territories in which enforcement actions are initiated. They filed petitions before the US courts accusing PDVSA and its

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92 Susan Taylor, ‘Canada’s Crystallex, Venezuela settle mine dispute: Bloomberg’ Reuters (Toronto, 25 November 2017) <www.reuters.com/article/us-venezuela-crystallex-settlement/canadas-crystallex-venezuela-settle-mine-dispute-bloomberg-idUSKBN1DO2PV> accessed 18 June 2020.
93 Tom Hals, ‘Crystallex pursues Citgo as Venezuela misses settlement payment’ Reuters (Wilmington, 22 December 2017) <www.reuters.com/article/venezuela-crystallex/crystallex-pursues-citgo-as-venezuela-misses-settlement-payement-idUSL1N1OL2BG> accessed 18 June 2020.
94 Order, Crystallex International Corporation v Bolivarian Republic of Venezuela, No 1:17-mc-00151-LPS, (D Del Aug 9 2018).
95 Letter from Crystallex International Corporation to US District Court for the District of Delaware (26 November 2018), in relation to Crystallex International Corp v Bolivarian Republic of Venezuela, No 17-151-LPS; Crystallex International Corp. v Petroleos de Venezuela, SA and others, No 15-1082-LPS; Crystallex International Corp. v PDV Holding, Inc and others, No 16-1007-LPS.
96 Twenty-Ninth Report of the Monitor, Crystallex International Corporation v Bolivarian Republic of Venezuela, CV-11-9532-00CL (Nov 25 2018) (Canada).
97 Caroline Simson, ‘Venezuela Breached Deal Over $1.2B Award, Crystallex Says’ (Law360, 11 December 2018) <www.law360.com/internationalarbitration/articles/110117/venezuela-breached-deal-over-1-2b-award-crystallex-says> accessed 18 June 2020.
98 Crystallex Intl Corp v Bolivarian Republic of Venezuela, 932 F.3d 126 (3d Cir 2019).
99 Joint Status Report, Crystallex International Corporation v Bolivarian Republic of Venezuela, No 1:17-mc-00151-LPS, (D. Del. Oct 11 2019).
100 Memorandum Order, Crystallex International Corporation v PDV Holding Inc., ConocoPhillips Peruzausta B.V. and others v Petroleos de Venezuela SA, and others, No 15-cv-1082-LPS, No 16-cv-904-LPS, No 16-cv-1007-LPS, No 17-cv-28-LPS, No 17-mc-151-LPS, No 18-cv-1963-LPS, No 19-cv-290-LPS, No 19-mc-290-LPS, (D. Del. Dec 12 2019).
entities of fraudulently repatriating Venezuela’s assets in the United States and the Dutch Caribbean back to Venezuela. The Third Circuit denied Crystallex’s petition in 2018. It held that Crystallex had not presented evidence that PDV Holding, a subsidiary of PDVSA, was an alter ego of Venezuela, but it did observe that the ‘intent behind this series of transactions was to hinder creditors’.

In December 2019, the National Assembly of Venezuela passed a Resolution declaring the 2018 settlement agreements with Crystallex and Rusoro respectively as null and void. Therefore, in addition to many awards rendered against Venezuela not having been paid, there are important instances where the country has not complied with settlement agreements, or has even rescinded them. Long enforcement procedures have been necessary and may be needed in the years to come to obtain payment of awards against Venezuela.

c) Spain

Spanish investors have been one of the most frequent users of investor–State dispute settlement (ISDS), reportedly having initiated 53 arbitrations, mainly against Latin American countries. In the past, Spain vigorously insisted that States should honor their international obligations under BITs, and defended the ISDS system.

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101 Benjamin Button-Stephens, ‘PDVSA affiliate fails to knock out Crystallex fraud suit’ (Global Arbitration Review, 4 October 2016) <https://globalarbitrationreview.com/article/1068988/pdvsa-affiliate-fails-to-knock-out-crystallex-fraud-suit> accessed 18 June 2020; Tom Jones, ‘PDVSA company wins appeal over transfer of US assets’ (Global Arbitration Review, 4 January 2018) <https://globalarbitrationreview.com/article/1152167/pdvsa-company-wins-appeal-over-transfer-of-us-assets> accessed 18 June 2020; Jones (n 86).

102 Crystallex Intl Corp v Petroleos de Venezuela, SA, 879 F3d 79 (3d Cir 2018).

103 The National Assembly stated that it had not approved the Attorney General appointed by Nicolás Maduro and therefore the Attorney General, who signed the settlement, did not have the requisite power to bind the State. See National Assembly of the Bolivarian Republic of Venezuela, ‘Acuerdo Que Declara La Nulidad Absoluta Y Consecuente Inexistencia De Los Acuerdos De Transacción Y Demás Decisiones Adoptadas Por Reinaldo Muñoz Pedroza’ [Resolution Declaring the Absolute Invalidity and Resultant Nonexistence of Settlement Agreements and Other Actions Taken by Reinaldo Muñoz Pedroza] (10 December 2019) <https://asambleanacional-media.s3.amazonaws.com/documentos/acto/acerque-declara-la-nulidad-absoluta-y-consecuente-inexistencia-de-los-acuerdos-de-transaccion-y-demadescisiones-adoptadas-por-reinaldo-munoz-pedroza-20191210195153.pdf> accessed 18 June 2020.

104 For example, Spanish investors have initiated eleven arbitrations against Venezuela, eight arbitrations against Argentina, five arbitrations against Mexico, four arbitrations against each of Peru and Bolivia, three arbitrations against Ecuador and two arbitrations against each of Colombia and Costa Rica.

105 See eg Organisation for Economic Co-operation and Development, ‘13th Roundtable on Freedom of Investment’ (5 October 2010) 4.
In 2012, Spain vehemently lobbied the European Union for support when Argentina announced its plans to nationalize an oil company in which the Spanish company Repsol owned a majority stake.  

In recent years, the tides have turned: Spain has been a respondent in 52 arbitrations, of which 47 concern regulatory amendments that Spain enacted in relation to the renewable energy industry. Investors have argued that Spain attracted investments in its photovoltaic industry in the mid-2000s by guaranteeing an inflation-linked feed-in tariff. Investors argue that, after having benefited from significant capital influx, Spain abruptly modified the regulatory framework, at the expense of investors. Spain has argued inter alia that any intra-EU arbitration agreement is incompatible with EU law and that investors could not claim that they had a legitimate expectation that the incentive regime would not change, since Spain had not made a specific promise to that effect.

Final awards have been rendered in 15 of these arbitrations. The tribunals found in favor of Spain in three arbitrations, whereas the investors prevailed in 12. As at December 2019, Spain has been ordered to pay approximately US$880 million in damages in relation to its photovoltaic measures, with the largest award—290 million euros—going to NextEra.

Following the CJEU’s Achmea decision, in January 2019, Spain and other EU Member States issued a Declaration inter alia that tribunals under intra-EU BITs lack jurisdiction, and they vowed to seek the setting aside of any intra-EU damages awards. Before 2012, Spain voluntarily paid the only damages award rendered against it—in Maffezini v Spain, in the amount of 180,000 euros. Following the large wave of
arbitrations relating to the renewable sector, Spain has declined to comply with adverse awards. It has sought the annulment of the Eiser, Masdar, Antin Infrastructure, NextEra, InfraRed Environmental and Cube Infrastructure awards before ICSID and the Novenergia and Foresight awards before Swedish courts.\(^{114}\)

In the Novenergia setting-aside proceedings before the Svea Court of Appeal in Stockholm, Spain requested a preliminary reference to the ECJ on the compatibility of the intra-EU application of the Energy Charter Treaty (ECT) with EU law.\(^{115}\) The Svea Court of Appeal rejected Spain’s request, stating essentially that it did not find any circumstances warranting such a request.\(^{116}\) The setting-aside proceedings are pending.

For their part, the investors have initiated enforcement proceedings against Spain, mainly in the United States.\(^{117}\)

Before the enforcement courts, Spain argued that the tribunals lacked jurisdiction and that payment of the awards would amount to unlawful State aid under EU law.\(^{118}\) In one proceeding, the investor’s position on the interaction between EU law and the tribunal’s jurisdiction is supported by MOL Hungarian Oil and Gas, a Hungarian State-owned enterprise.\(^{119}\) In parallel, the European Commission has also sought to intervene as *amicus curiae* to argue that any agreement to arbitrate intra-EU investment disputes under the ECT is invalid.\(^{120}\)

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114 Laura Roddy and Sebastian Perry, ‘Spain asks for ECJ to rule on ECT’ (*Global Arbitration Review*, 31 May 2018) <https://globalarbitrationreview.com/article/1170107/spain-asks-for-ecj-to-rule-on-ect> accessed 18 June 2020; ‘Spanish solar cases at ICSID: one award is challenged, and ad-hoc committee is formed to hear another previously-filed annulment application’ (*IA Reporter*, 31 May 2019) <www.iareporter.com/articles/spanish-solar-cases-at-icsid-one-award-is-challenged-and-committee-is-formed-to-hear-another-previously-filed-annulment-application/> accessed 18 June 2020; Jack Ballantyne and Tom Jones, ‘Spain seeks annulment of solar award as arbitrator challenge rejected’ (*Global Arbitration Review*, 20 November 2019) <https://globalarbitrationreview.com/article/1211122/spain-seeks-annulment-of-solar-award-as-arbitrator-challenge-rejected/> accessed 18 June 2020; Tom Jones, ‘Spain faces more payouts over solar reforms!’ (*Global Arbitration Review*, 3 June 2019) <https://globalarbitrationreview.com/article/1193634/spain-faces-more-payouts-over-solar-reforms/> accessed 18 June 2020; Lisa Bohmer, ‘Spain files for annulment of unfavorable Infrared Solar award’ (*IA Reporter*, 6 December 2019) <www.iareporter.com/articles/spain-files-for-annulment-of-unfavorable-infrared-award/> accessed 18 June 2020; Lisa Bohmer, ‘An ICSID Ad Hoc Committee is formed to hear Spain’s bid to annul NextEra Energy award’ (*IA Reporter*, 17 December 2019) <www.iareporter.com/articles/as-reef-award-is-rendered-an-icsid-ad-hoc-committee-is-formed-to-hear-spains-bid-to-annul-nextera-energy-award/> accessed 18 June 2020; Lisa Bohmer, ‘Antin v. Spain: Three are named to ad-hoc committee that will decide fate of ICSID solar award’ (*IA Reporter*, 20 August 2019) <www.iareporter.com/articles/antin-v-spain-three-are-named-to-ad-hoc-committee-that-will-decide-fate-of-icsid-solar-award/> accessed 18 June 2020.

115 ECT (n 26); Laura Roddy, ‘Spain asks for ECJ to rule on ECT’ (*Global Arbitration Review*, 31 May 2018) <https://globalarbitrationreview.com/article/1170107/spain-asks-for-ecj-to-rule-on-ect> accessed 11 June 2020.

116 *Kingdom of Spain v Novenergia II—Energy & Environment (SCA)*, Svea Hovrätt [Svea Court of Appeal] 2019-04-25, T 4658-18 (Sweden).

117 Investors have commenced enforcement proceedings against Spain in relation to adverse awards in *Foresight Luxembourg, Masdar, Antin Infrastructure, Novenergia II and Eiser.*

118 Respondent the Kingdom of Spain’s Memorandum of Law in Support of Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award, *Novenergia II—Energy & Environment (SCA)* v Kingdom of Spain, No 1:18-cv-1148 (DDC 16 October 2018); Respondent the Kingdom of Spain’s Memorandum of Law in Support of Motion to Dismiss Petition to Enforce Arbitral Award, *Infrastructure Services Luxembourg SARL and Energia Termosolar BV v The Kingdom of Spain*, No 1:18-cv-1753 (DDC Dec 28 2018).

119 Brief of MOL Hungarian Oil and Gas Plc as Amicus Curiae in Support of Petitioner’s Response to Respondent Kingdom of Spain’s Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award, *Novenergia II—Energy & Environment (SCA)* v Kingdom of Spain, No 1:18-cv-1148 (DDC Dec 7 2018). MOL’s actions are not surprising, given that it is currently embroiled in an intra-EU dispute against Croatia under the ECT. See MOL Hungarian Oil and Gas Company Plc v Republic of Croatia, ICSID Case No ARB/13/32. This is also perhaps why Hungary did not co-sign the January 2019 Declaration and instead issued a separate Declaration that the Achmea did not affect intra-EU ECT arbitrations. See Government of Hungary, ‘Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union’ (*European Commission, Brussels*, 16 January 2019).

120 Brief of the European Commission on behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, Foresight Luxembourg Solar 1 SARL and others v The Kingdom of Spain, No 19-cv-03171-ER (SDNY May 3 2019); Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, Eiser Infrastructure Ltd. and Energia Solar Luxembourg SARL v The Kingdom of Spain, No 18-cv-01686-CCK (DDC Mar 13 2019); Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, Masdar Solar & Wind Cooperative UA v The Kingdom of Spain, No 18-cv-02254-JEB (DDC May 3 2019).
More than 90 percent of the Spanish renewable energy cases were initiated by investors from EU Member States. Given the positions taken by Spain so far, it can be expected that Spain will not voluntarily comply with any of the intra-EU damages awards.

At the same time, the burgeoning number of arbitrations likely prompted the Spanish Council of Ministers to attempt to resolve some of its disputes by adopting a new incentive scheme in the form of Royal Decree-Law 17/2019. The Royal Decree-Law stabilizes the rate of return for investments for 12 years from 1 January 2020, offering investors a higher rate of return than the rate applicable at the time of its adoption. We understand that the rate of return under this incentive scheme is lower than the rates to which the investors were entitled prior to the legislative changes that led to the flurry of arbitrations against Spain. To avail themselves of the offer, investors are required to withdraw their claims against Spain, including any enforcement proceedings, by a specified deadline.

(ii) States involved in 40–49 investment arbitrations

a) Egypt and Czech Republic

| Country        | Total arbitrations |
|----------------|--------------------|
| Egypt          | 43                 |
| Czech Republic | 40                 |

Egypt: Egypt has been involved in 43 arbitrations against investors. Fourteen of those were settled before an award on damages was issued. For instance, the three Ossama al Sharif arbitrations were settled by Egypt soon after notices.

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121 Real Decreto Ley (RD-Ley) 17/2019, de 22 de noviembre, por el que se adoptan medidas urgentes para la necesaria adaptación de parámetros retributivos que afectan al sistema eléctrico y por el que se da respuesta al proceso de cese de actividad de centrales térmicas de generación, BOE 23 de noviembre de 2019, 129281 [Royal Decree Law 17/2019, dated 22 November, adopting urgent measures for the necessary adaptation of the remunerative parameters affecting the electricity system and addressing the process to shut down thermal power plants, BOE 23 November 2019, 129281] <www.boe.es/eli/es/rdl/2019/11/22/17/dof/spa/pdf> accessed 18 June 2020.

122 These were the proceedings in LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holdings I, LLC v Arab Republic of Egypt, ICSID Case No ARB/16/37; ArcelorMittal SA v Arab Republic of Egypt, ICSID Case No ARB/15/47; ASA International Spa v Arab Republic of Egypt, ICSID Case No ARB/13/23; Ossama Al Sharif v Arab Republic of Egypt (II), ICSID Case No ARB/13/5; Ossama Al Sharif v Arab Republic of Egypt (II), ICSID Case No ARB/13/4; Ossama Al Sharif v Arab Republic of Egypt (II), ICSID Case No ARB/13/5; Al-Kholoud v Arab Republic of Egypt, UNCITRAL; Indorama International Finance Limited v Arab Republic of Egypt, ICSID Case No ARB/11/32; Hussain Sajjan, Damac Park Avenue for Real Estate Development SAE, and Damac Gransha Bay for Development SAE v Arab Republic of Egypt, ICSID Case No ARB/11/16; Bawabet Al Kuwait Holding Company v Arab Republic of Egypt, ICSID Case No ARB/11/6; Manufacturers Hanover Trust Company v Arab Republic of Egypt and General Authority for Investment and Free Zones, ICSID Case No ARB/89/1; Yousf Maiman, Merhav (MNP), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Arab Republic of Egypt, PCA Case No 2012/26 and Hashem Al Mehdan, Mohamed Al Mehdan, Badr Al Mehdar and Betoul Al Mehdar v Arab Republic of Egypt, Ad Hoc.
of arbitration were issued, with Egypt agreeing to renew the investor’s concessions.123

Until 2018, Egypt voluntarily complied with four of the five adverse awards against it.124 Since the Arab Spring in 2011, there has been a surge in commercial and treaty arbitrations against the State and Egyptian State-owned enterprises. The majority of these arbitrations resulted from the political, economic and security turmoil caused by the Arab Spring, including regime changes, transitional governance and attacks on pipelines delivering gas to other States, such as Israel. For instance, in an ICSID arbitration initiated by Unión Fenosa Gas (UFG), arising from the shutdown of a power plant in Egypt, UFG was awarded US$2 billion in damages.125 The case is now before an ICSID Ad Hoc Committee. Settlement discussions and enforcement proceedings in the United States are taking place in parallel.126

Czech Republic: The Czech Republic has been a respondent in 40 investment arbitrations.127 Sixty percent of these were discontinued, resulted in the Czech Republic prevailing, or did not involve damages (despite a finding on liability). The Czech Republic has reportedly had to pursue numerous legal actions, with little success, to recover costs awarded to it.128 It has entered into three settlements prior to the issuance of an award on damages,129 and voluntarily honored the three damages

123 ‘Egypt settles trio of ICSID claims’ (Global Arbitration Review, 9 June 2015) <https://globalarbitrationreview.com/article/1034519/egypt-settles-trio-of-icsid-claims> accessed 11 June 2020.

124 Egypt has settled the following four awards: Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award (20 May 1992); Wena Hotels Limited v Arab Republic of Egypt, ICSID Case No ARB/98/4, Award (8 December 2000); Wagich Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, ICSID Case No ARB/05/15, Award (1 June 2009) and Middle East Cement Shipping and Handling Co SA v The Arab Republic of Egypt, ICSID Case No ARB/99/6, Award (12 April 2002). Mohamed S Abdel Wahab, ‘Egypt’ in Fouret (ed) (n 11) 220–1. We have not found information about payment in Mailcorp Ltd v Arab Republic of Egypt, The Egyptian Airport Company, The Egyptian Holding Company for Aviation, CRCICA Case No 382/2004, Award (7 March 2006).

125 Unión Fenosa Gas, SA v Arab Republic of Egypt, ICSID Case No ARB/14/4, Award (31 August 2018).

126 On the US enforcement proceedings, see Complaint, Unión Fenosa Gas, SA v Arab Republic of Egypt, No. 18-cv-02395 (DDC Oct 17 2018). On the settlement negotiations, see Mohamed Samir, ‘UFG denies reaching settlement agreement with Egypt’ (Daily News Egypt, 19 February 2019) <www.dailynewsegypt.com/2019/02/19/ufg-denies-reaching-settlement-agreement-with-egypt/> accessed 11 June 2020; Mohamed Adel, ‘Government negotiations to bring down Egypt’s $2bn fine for Unión Fenosa’ Daily News Egypt (5 January 2019) <www.dailynewsegypt.com/2019/01/05/government-negotiations-to-bring-down-egypts-2bn-fine-for-union-fenosa/> accessed 11 June 2020.

127 The study includes Czechoslovak AS v Czech Republic, whose initiation was reported by UNCTAD and certain authors, but whose mention cannot be found on the website of the Ministry of Finance of Czech Republic. See UNCTAD Investment Dispute Settlement Navigator <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 11 June 2020; Filip Cerny, ‘Investment Arbitration and the Czech Republic: 2009 in Hindsight’ in Alexander J Belohlavek and Nadezda Rozenhalnova (eds), Czech Yearbook of International Law 2010: Second Decade Ahead: Tracing the Global Crisis (Juris Publishing Inc 2010) 329; Czech Min of Fin, ‘Prehled arbitražních sporů vedených proti české republice [Overview of arbitration disputes against the Czech Republic]’ <www.mfcr.cz/cs/zahranicky-sektor/ochrana-financniho-zaamu/arbitrace/prehled-arbitraznych-spuro-vedenych-prot/> accessed 11 June 2020.

128 Luke Eric Peterson, ‘Czech Republic: Govt releases cache of BIT awards, strives to collect costs orders, and currently faces eleven pending treaty claims’ (IA Reporter, 24 February 2015) <www.iareporter.com/articles/czech-republic-govt-releases-cache-of-bit-awards-strives-to-collect-costs-orders-and-currently-faces-eleven-pending-treaty-claims/> accessed 11 June 2020.

129 For background on the settlement in (i) K+S Venture Partners v Czech Republic, UNCITRAL, see ‘Czech Republic settles K+ claim’ (Global Arbitration Review, 26 January 2007) <https://globalarbitrationreview.com/article/1025927/czech-republic-settles-k-claim> accessed 11 June 2020; (ii) Mittal Steel Company NV v Czech Republic, UNCITRAL, see Luke Eric Peterson, ‘Cases closed: Mittal v. Czech Republic and Transglobal Petroleum v. Jordan’ (IA Reporter, 11 May 2009) <www.iareporter.com/articles/cases-closed-mittal-v-czech-republic-and-transglobal-petroleum-v-jordan/> accessed 11 June 2020; and (iii) Saluka Investments BV v Czech Republic, UNCITRAL, see Luke Eric Peterson, ‘Czech Republic to pay Dutch firm Saluka $181 million (US), plus 55 million interest; contractual counter-claim withdrawn’ (IA Reporter, 1 July 2008) <www.iareporter.com/articles/czech-republic-to-pay-dutch-firm-saluka-181-million-us-plus-55-million-interest-contractual-counter-claim-withdrawn/> accessed 11 June 2020.
awards that have been rendered against it. The Czech Republic is currently involved in 10 arbitrations, six of which are brought by EU investors under intra-EU BITs and/or the ECT.

(iii) States involved in 30–39 investment arbitrations

a) Mexico

| Total arbitrations: 33 |
|------------------------|
| State prevailed | Discontinued |
| Settlement pre-award | Payment/recovery |
| post-award | No damages |
| Payment not known | Arbitration pending |
| Post-award proceedings pending |

Mexico has had 33 arbitrations initiated against it, a majority of which arose under the North American Free Trade Agreement (NAFTA). Of these, nine awarded damages to the investors. Although in some cases it initially pursued annulment, Mexico has voluntarily complied with the adverse awards, and often within a year of the final decision.

The arbitrations brought by EU investors are Fymerdale Holdings BV v Czech Republic, PCA Case No 2018-18; Natland Investment Group NV, Natland Group Limited, GHHI Limited, Radiance Energy Holding Sàrl v The Czech Republic, PCA Case No 2013-35; AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic, PCA Case No 2017-15; WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v The Czech Republic, UNCITRAL; Václav Fischer v The Czech Republic (I), PCA Case No 2019-37; and Václav Fischer v The Czech Republic (II), Ad Hoc.

These are the awards in Abengoa, SA v COFIDES, SA v United Mexican States, ICSID Case No ARB(AF)/09/2, Award (18 August 2013); Cargill, Inc v United Mexican States, ICSID Case No ARB(AF)/05/2, Award (18 September 2009); Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc v United Mexican States, ICSID Case No ARB(AF)/04/5, Award (21 November 2007); Talsud, SA v United Mexican States, ICSID Case No ARB(AF)/04/4, Award (16 June 2010); Gemplus, SA, SLP, SA, and Gemplus Industrial SA de CV v United Mexican States, ICSID Case No ARB(AF)/04/3, Award (16 June 2010); Corn Products International, Inc v United Mexican States, ICSID Case No ARB(AF)/04/1, Award (18 August 2009); Tecnica Medioambientales Tecmed v United Mexican States, ICSID Case No ARB(AF)/00/2, Award (29 May 2003); Marvin Roy Feldman Karpa v United Mexican States, ICSID Case No ARB(AF)/99/1, Award (16 December 2002); Metalclad Corporation v The United Mexican States, ICSID Case No ARB(AF)/97/1, Award (30 August 2000).

Adrián Magallanes, ‘Mexico’ in Fouret (ed) (n 11) 318; ‘Mexico pays up over car registry’ (Global Arbitration Review, 26 April 2011) <https://globalarbitrationreview.com/article/1036266/mexico-pays-up-over-car-registry> accessed 18 June 2020; Hilary Russ, ‘Mexico pays corn products $88M NAFTA Award’ (Law360, 26 January 2011) <www.law360.com/articles/222117/mexico-pays-corn-products-88m-nafta-award> accessed 18 June 2020; Government of Mexico, Tecnica Medioambientales, S.A. (TECMED) c. los Estados Unidos Mexicanos (Case Report) <www.gob.mx/cms/uploads/attachment/file/42026/Ficha_tecnica_Tecnicas_Medioambientales_SA.pdf> accessed 18 June 2020; Government of Mexico, Marvin Roy Feldman Karpa c. los Estados Unidos Mexicanos (Case Report) <www.gob.mx/cms/uploads/attachment/file/42024/Ficha_tecnica_Marvin_Roy_Feldman_Karpa.pdf> accessed 18 June 2020; Government of Mexico, Metalclad c. los Estados Unidos Mexicanos (Case Report) <www.gob.mx/cms/uploads/attachment/file/42025/Ficha_tecnica_Metalclad.pdf> accessed 18 June 2020.
We understand that enforcement proceedings were commenced only in the *Cargill* case.\(^{135}\) Mexico’s unwillingness to comply with the *Cargill* award appears to be due to its significant disagreement with the tribunal’s reasoning.\(^{136}\) The *Cargill* arbitration was one of three—in addition to those in *Archer Daniels* and *Corn Products*—related to Mexico’s introduction of a tax on High Fructose Corn Syrup (HFCS). Mexico lost all three cases. In *Cargill*, Mexico appears to have been particularly dissatisfied with the tribunal’s decision to extend subject-matter jurisdiction\(^{137}\) beyond Cargill’s Mexican operations, to include HFCS produced in the United States and shipped to and sold in Mexico.\(^{138}\) After Mexico failed to annul the award in Canada, the parties ultimately arrived at a settlement, four years after the award was rendered, and discontinued the enforcement proceedings.\(^{139}\)

**b) Poland**

![Pie chart showing arbitration outcomes in Poland](chart)

**Total arbitrations: 31**

Investors have initiated 31 arbitrations against Poland. It is the third most sued State under intra-EU BITs. Six arbitrations are pending against it as at 31 December 2019, four of which are intra-EU.

Poland has received seven damages awards.\(^{140}\) Two of these awards—in *Saar Papier (I)* and *Cargill*—were paid only after the investors started enforcement proceedings.

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\(^{135}\) Luke Eric Peterson, ‘Cargill says Mexico is latest member of non-payer’s club; IA Reporter review found half-dozen States not paying BIT awards’ (*IA Reporter*, 14 November 2012) <www.iareporter.com/articles/cargill-says-mexico-is-latest-member-of-non-payers-club-iareporter-review-found-half-dozen-states-not-paying-bit-awards/> accessed 18 June 2020.

\(^{136}\) Luke Eric Peterson, ‘Mexico persists in battle to reduce $77 million NAFTA debt; published damages award applied several notable discounts, including effect of social protests against investor’s product’ (*IA Reporter*, 15 March 2011) <www.iareporter.com/articles/mexico-persists-in-battle-to-reduce-77-million-nafta-debt-published-damages-award-applied-several-notable-discounts-including-effect-of-social-protests-against-investors-product/> accessed 18 June 2020.

\(^{137}\) The issue was addressed by the tribunal both under the jurisdiction and damages rubrics in *Cargill, Inc v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009) paras 141–54, 515–26.

\(^{138}\) Peterson (n 136).

\(^{139}\) ‘Payment of awards update: new reporting on arbitral debts of the Dominican Republic and Mexico’ (*IA Reporter*, 22 February 2013) <www.iareporter.com/articles/payment-of-awards-update-new-reporting-on-arbitral-debts-of-the-dominican-republic-and-mexico/> accessed 18 June 2020.

\(^{140}\) Manchester Securities Corporation v Republic of Poland, PCA Case No 2015-18, Award (7 December 2018); PL Holdings Sarl v Republic of Poland, SCC Case No 2014/165, Award (28 September 2017); Honthol Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v Poland, PCA Case No 2014-31, Award (16 February 2017); Flemingo DutyFree Shop Private Limited v The Republic of Poland, UNCITRAL, Award (12 August 2016); Les Laboratoires Servier, SAS, Biofarma, SAS, Arts et Techniques du Progres SAS v Republic of Poland, UNCITRAL, Award (14 February 2012); Cargill, Inc v Republic of Poland, ICSID Case No ARB(AF)/04/2, Award (29 February 2008); Saar Papier Vertriebs GmbH v Republic of Poland, UNCITRAL, Award (16 October 1995).
proceedings in Germany and the United States respectively. Payment of the Saar Papier (I) award took approximately four years, whereas the Cargill award was complied with within a year.\textsuperscript{141} A Polish official has confirmed in 2018 that the award in Flemingo Duty Free was settled (and that various further agreements had been entered into between Poland and the investor).\textsuperscript{142}

Poland is currently seeking to annul the PL Holding award before the Swedish courts, on the ground of the invalidity of the arbitration agreement in the Luxembourg–Poland BIT arising from EU law. The Svea Court of Appeal recognized the award, finding that Poland’s related objection based on incompatibility with EU law was raised out of time: the objection had been raised in the setting-aside proceedings, but not in the arbitration.\textsuperscript{143} In December 2019, the Swedish Supreme Court referred to the CJEU the question whether, in light of the Achmea judgment, Poland could have implicitly consented to arbitration by failing to raise the intra-EU jurisdictional objection and participating in the arbitral proceedings.\textsuperscript{144} Poland is also reportedly seeking to set aside the award in Manchester Services Corporation.\textsuperscript{145}

We have not been able to retrieve information on whether Poland has paid the damages awarded in Horthel Systems and others, and Les Laboratoires Servier and others.

c) Canada

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{State Compliance with Investment Awards}
\end{figure}

| State prevailed | Discontinued | Settlement pre-award | Payment/recovery post-award | No damages | Payment not known | Arbitration pending | Post-award proceedings pending |
|----------------|-------------|----------------------|---------------------------|-----------|------------------|----------------------|-----------------------------|
| 1              | 4           | 6                    | 8                         | 2         | 3                | 1                    | 1                           |

Total arbitrations: 30

\textsuperscript{141} Filip Balcerzak and Luke Eric Peterson, ‘In first known UNCITRAL BIT award, arbitrators considered a state’s duty to mitigate damages; Poland declined to pay until Central Bank funds were frozen’ (IA Reporter, 29 January 2014) <www.iareporter.com/articles/in-first-known-uncitral-bit-award-arbitrators-considered-a-states-duty-to-mitigate-damages-poland-declined-to-pay-until-central-bank-funds-were-frozen/> accessed 12 June 2020; Luke Eric Peterson, ‘Poland pays award in treaty dispute with Cargill over allotment of sweetener production quotas; award unpublished’ (IA Reporter, 17 April 2009) <www.iareporter.com/articles/poland-pays-award-in-treaty-dispute-with-cargill-over-allotment-of-sweetener-production-quotas-award-unpublished/> accessed 12 June 2020.

\textsuperscript{142} Secretary of State at the Ministry of Infrastructure, ‘Response to the interpolation No 27106 on the dispute between Przedsiębiorstwo Państwowe “Porty Lotnicze” and tenants of commercial space’ (6 December 2018) <http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=B78JWY> accessed 12 June 2020.

\textsuperscript{143} Joel Dahlquist, ‘Analysis: a full run-down of the Svea Court of Appeal’s reasoning in the recent PL Holdings v. Poland set-aside decision’ (IA Reporter, 23 February 2019) <www.iareporter.com/articles/analysis-a-full-run-down-of-the-svea-court-of-appeals-reasoning-in-the-recent-pl-holdings-v-poland-set-aside-decision/> accessed 12 June 2020.

\textsuperscript{144} Joel Dahlquist, ‘Swedish Supreme Court to send Achmea-related question to European Court of Justice’ (IA Reporter, 14 December 2019) <www.iareporter.com/articles/swedish-supreme-court-sends-achmea-related-issue-to-european-court-of-justice/> accessed 12 June 2020.

\textsuperscript{145} Damien Charlotin and Luke Eric Peterson, ‘Poland round-up: an update on a new ruling, a new claim and another threatened one’ (IA Reporter, 16 July 2019) <www.iareporter.com/articles/poland-round-up-an-update-on-a-new-ruling-a-new-claim-and-another-threatened-one/> accessed 12 June 2020.
Canada has been involved in 30 arbitrations against it, mostly under the NAFTA. Five damages awards have been issued against Canada.\(^{146}\) The awards in *Windstream Energy* and *Mobil Investments Inc.* and *Murphy Oil Corporation* were paid in full, approximately within a year of their issuance.\(^{147}\) Canada is reported to have also complied with the *Pope & Talbot Inc* and *SD Myers* awards, although the timing of payment is unclear.\(^{148}\) As regards the recent *Clayton and Bilcon* award, the investors have applied to the courts in Ontario (the seat of the arbitration) to set aside the award on damages.\(^ {149}\)

d) Ecuador

![Diagram showing arbitration outcomes]

**Total arbitrations: 30**

Ecuador has faced 30 arbitrations arising out of BITs and investment contracts. It has settled seven arbitrations before an award on damages. In *Noble Energy and Machala Power Cia Ltd v Ecuador* and *IBM World Trade Corp v Ecuador*, after the tribunals dismissed Ecuador’s preliminary objections, the parties arrived at a settlement.\(^{150}\)

Ecuador has also paid or settled eight out of the nine damages awards against it, including a payment of US$980 million towards the satisfaction of the *Occidental (II)*

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\(^{146}\) The five adverse awards were issued in *Windstream Energy LLC v Government of Canada*, PCA Case No 2013-22, Award (27 September 2016); *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Award (20 February 2015); *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002); *SD Myers, Inc v Government of Canada*, UNCITRAL, Second Partial Award (21 October 2002); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada*, PCA Case No 2009-04, Award of Damages (10 January 2019).

\(^{147}\) Government of Canada, Global Affairs Canada, ‘Cases filed against the Government of Canada, *Windstream Energy LLC v Government of Canada*’ (19 December 2017) <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/windstream.aspx?lang=eng> ; Government of Canada, Global Affairs Canada, ‘Cases filed against the Government of Canada, *Mobil Investments Inc. and Murphy Oil Corporation v Government of Canada*’ (19 December 2017) <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng> accessed 19 June 2020.

\(^{148}\) Julien Cantegreil, ‘Implementing Human Rights in the NAFTA Regime—The Potential of a Pending Case: Glamis Corp v USA’ in Pierre-Marie Dupuy and others (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 384.

\(^{149}\) William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and The Investors of Delaware Inc v Government of Canada, PCA Case No 2009-04, Procedural Order No 27 (8 May 2019) para 5.

\(^{150}\) Alison Ross, ‘Noble and Ecuador settle as port dispute looms’ (*Global Arbitration Review*, 12 January 2009) <https://globalarbitrationreview.com/article/1027229/noble-and-ecuador-settle-as-port-dispute-looms> accessed 18 June 2020; *IBM World Trade Corp v Republic of Ecuador*, ICSID Case No ARB/02/10, Award (22 July 2004).
award, one of the largest voluntary payments made by a State.\textsuperscript{151} As regards the award in \textit{Murphy (II)}, Ecuador publicly committed to pay, though there has been no report of actual compliance.\textsuperscript{152} Ecuador has applied to annul the \textit{Perenco} award, which the investor is currently seeking to enforce in the United States.\textsuperscript{153}

In most cases, Ecuador has agreed to a settlement several years following the award and after having sought annulment of the award. Investors initiated recognition and enforcement proceedings in the United States in relation to at least two awards.\textsuperscript{154} The \textit{Chevron (I)} award was paid five years after its issuance and following an unsuccessful setting-aside attempt.\textsuperscript{155} In parallel, Chevron obtained recognition of the award in the United States.\textsuperscript{156} A month after the US Supreme Court dismissed Ecuador's appeal,\textsuperscript{157} Ecuador paid US$112 million to Chevron.\textsuperscript{158} The second and larger Chevron dispute concerning the Lago Agrio is pending as at 31 December 2019.\textsuperscript{159} It has been reported that Chevron lobbied the US Government to withdraw trade benefits provided to Ecuador while the arbitration proceedings were ongoing.\textsuperscript{160}

In the past, Ecuador expressed skepticism towards the ISDS regime, withdrew from the ICSID Convention in 2009 and subsequently denounced its BITs.\textsuperscript{161} A
change in government has led to a new investment protection law which provides for the settlement of investment disputes via arbitration.162

(iv) States involved in 20–29 investment arbitrations

a) Ukraine

As of 31 December 2019, Ukraine has been involved in 27 investment arbitrations. It has prevailed in seven and settled four prior to a decision on damages. In _Laskaridis v Ukraine_, for instance, the State and the investor settled soon after the tribunal dismissed the investor’s jurisdictional objections.163 The terms of that settlement are not public. Another pre-award settlement was reached in _Gazprom v Ukraine_. That case concerned an antitrust fine of more than US$7 billion issued by Ukraine in relation to alleged abuse by Gazprom of its monopoly of the Ukrainian gas transit market.164 Subsequently, as part of efforts to collect on the fine, Ukraine’s Ministry of Justice confiscated all of Gazprom’s assets on the territory of Ukraine, including its shares in a gas transit venture owned jointly with Naftogaz and others.165 Reportedly, under the settlement, Ukraine will not pay any compensation for the seized and confiscated assets, but the Antimonopoly Committee of Ukraine

162 ‘Ecuador gives go-ahead to arbitration of investment disputes’ (Global Arbitration Review, 22 August 2018) <https://globalarbitrationreview.com/article/1173443/ecuador-gives-go-ahead-to-arbitration-of-investment-disputes> accessed 18 June 2020.
163 Luke Eric Peterson, ‘After UNCITRAL BIT arbitration clears jurisdictional hurdle, Ukraine agrees to settlement of an investment treaty claim (Laskaridis v. Ukraine)’ (IA Reporter, 12 October 2012) <www.iareporter.com/articles/after-uncitral-bit-arbitration-clears-jurisdictional-hurdle-ukraine-agrees-to-settlement-of-an-investment-treaty-claim-laskaridis-v-ukraine/> accessed 12 June 2020.
164 On the fine on Gazprom, Initially, the Committee imposed a US$3.5 billion fine: see Resolution of the Antimonopoly Committee of Ukraine dated 12 January 2016 No 18-p [Decision of the Antimonopoly Committee of Ukraine dated 12 January 2016 No 18-p] <http://www.amc.gov.ua/amku/doccatalog/document?id=120807&schema=main> accessed 17 June 2020. Subsequently, the fine was doubled by the Ukrainian Court to incorporate late payment penalties: see Resolution of High Commercial Court of Ukraine dated 16 May 2017 in case No 910/18299/16 [Resolution of High Commercial Court of Ukraine dated 16 May 2017 in case No 910/18299/16] <https://verdictum.ligazakon.net/document/66534949> accessed 17 June 2020.
165 ‘Київ заарештував всі українські активи Газпрому [Kyiv seized all Ukrainian assets of Gazprom]’ (Korrespondent.net, 20 March 2018) <https://ua.korrespondent.net/ukraine/3953096-kyiv-zaareshtuvav-vsi-ukrainiski-aktyvy-hazpromu> accessed 17 June 2020. See also ‘Україна заарештувала активи “дочки” “Газпрому” в рамках сплати штрафу AMКУ [Ukraine seized assets of Gazprom’s daughter company as part of AMCU fine]’ (Unian, 21 June 2017) <www.unian.ua/economics/energetics/1987364-ukrajina-zaareshtuvala-aktivi-dochni-gazpromu-v-ramkah-styagnennya-shtrafu-amku.html> accessed 17 June 2020.
State Compliance with Investment Awards

will waive the levied fines on Gazprom. At the same time, Naftogaz and Gazprom reached a deal that will secure gas transit from Russia to Western Europe through the territory of Ukraine. The deal also mandates a payment by Naftogaz of US$2.9 billion related to an award won by Naftogaz related to previous dealings between the two companies.

Ukraine has settled or complied with the majority of the seven adverse awards against it. The four awards in Alpha Projektholding, Inmaris Perestroika Sailing Maritime Services, Joseph C Lemire and Remington Worldwide Limited have already been satisfied. It did not oppose the investors’ applications for recognition and enforcement before the domestic courts in two cases, namely in Alpha Projektholding and Inmaris Perestroika Sailing Maritime Services. By contrast, in Remington Worldwide Limited, Ukraine challenged the enforcement decisions before both the Kyiv District Court and the Kyiv Court of Appeal. In Joseph C Lemire, Ukraine transferred the damages amount to an escrow account as security, while ICSID annulment proceedings were pending. The Ad Hoc Committee upheld the award. Not having found evidence to the contrary, we assume that the investor received satisfaction by drawing on the amount in escrow.

Information regarding compliance with three other awards—City-State and others, JKX Oil & Gas and Tätneft—is not clear. Reportedly, in two of these cases, the investors are closely connected to Ukrainian businessmen, while Tätneft is a Russian oil company. Tätneft obtained favorable recognition decisions from courts in the

166 Vladislav Dyanie, ‘Ukraine’s Deputy Justice Minister announces settlement of multi-billion dollar BIT arbitration with Gazprom’ (LA Reporter, 30 December 2019) <www.lareporter.com/articles/ukraines-deputy-justice-minister-announces-settlement-of-multi-billion-dollar-bit-arbitration-with-gazprom/> accessed 17 June 2020; See also ‘Мирова угода не перебиває попереднього актов “Газпрому”—“Нафтогаз”’ [Gas agreement does not provide for return of Gazprom assets—Naftogaz] (Unian, 9 January 2020) <www.unian.ua/economics/energetics/10823555-mirova-upodane-peredbachaye-povernennya-aktiviv-gazpromu-naftogaz.html> accessed 17 June 2020.

167 Gazprom Press Release, ‘Package of documents signed for Russian gas transit across Ukraine to continue beyond 2019’ (30 December 2019) <www.gazprom.com/press/news/2019/december/article497259/> accessed 19 June 2020.

168 Reports of the Ministry of Justice of Ukraine indicate that these awards have been paid. See Ministry of Justice of Ukraine, ‘Інформація про виконання результаційних покажчиків, що характеризують виконання бюджетної програми [Information on the performance of the effective indicators that characterize the implementation of the budget program]’ (2011); Ministry of Justice of Ukraine, ‘Інформація про виконання результаційних покажчиків, що характеризують виконання бюджетної програми [Information on the performance of the effective indicators that characterize the implementation of the budget program]’ (2012). (i) Alpha Projektholding, see Ухваля Петерського районного суду міста від 22 червня 2011 у справі No 2-к-7-111 [Ruling of Pechersky District Court dated 23 June 2011 in case No 2-k-7/11]; (ii) Inmaris Perestroika Sailing Maritime Services, see Ухваля Петерського районного суду міста від 26 вересня 2012 у справі No 2-к-14/12 [Ruling of Pechersky District Court dated 26 September 2012 in case No 2-k-14/12].

169 Ухваля апеляційного суду міста Києва від 25 грудня 2012 у справі No 22-12749 [Ruling of Court of Appeal of Kyiv dated 25 October 2012 in case No 22-12749]; Ухваля Вищого спеціалізованого суду з розгляду цивільних і кримінальних справ від 26 грудня 2012 у справі No 6-48380 с/з [Ruling of High Civil and Criminal Court of Ukraine dated 26 December 2012 in case No 6-48380c/12].

170 Ministry of Justice of Ukraine, ‘Інформація про виконання результаційних покажчиків, що характеризують виконання бюджетної програми [Information on the performance of the effective indicators that characterize the implementation of the budget program]’ (2011).

171 Joseph Charles Lemire v Ukraine, ICSID Case No ARB/06/18, Excerpts of Decision on Annulment (8 July 2013).

172 Alexander Droug and Olesia Gontar, ‘GAR Know-How on Ukraine’ (Global Arbitration Review, 30 September 2019) <https://globalarbitrationreview.com/jurisdiction/1006275/ukraine/> accessed 17 June 2020.

173 As regards City-State and others v Ukraine, a Ukrainian businessman, Anatoliy Yurkevich, is mentioned as the Chairman of the Supervisory Board of City State LLC; see Olga Manko, Interview with Anatoliy Yurkevich, the Chairman of the Supervisory Board of City State LLC <http://www.citystate.com.ua/main/ua/publication/content/258.html> accessed 17 June 2020. As regards JKX Oil & Gas v Ukraine, reportedly, the investor is connected to two Ukrainian businessmen – Ihor Kolomoyskyi and Gennadiy Bogolyubov, as well as to Russian businessmen. See Oleksandr Volkov, ‘Investors against Ukraine. Буквална на правовий загиб і газовий арбітраз [Investors vs. Ukraine. The saga of Poltava gas and the Hague arbitration]’ (Economicna Pravda, 27 March 2017) <www.epравда. com.ua/publications/2017/03/27/622884/> accessed 17 June 2020.
US, the UK and Russia and is believed to have initiated enforcement actions. In City-State NV, the Kyiv Court of Appeal granted enforcement of the award in September 2019. Cassation proceedings were pending before the Ukrainian Supreme Court as at 31 December 2019. In November 2019, the Ukrainian Supreme Court ordered Ukraine to pay the awarded amount in JKX Oil & Gas, but there is no information on whether Ukraine has actually paid the award.

We note that four out of the seven pending arbitrations against Ukraine are brought under the Russia–Ukraine BIT or indirectly by Russian nationals. Given the significant political tension that has existed between the two States since 2014, it is possible that Ukraine will not comply with any adverse awards in favor of Russian nationals.

b) Russian Federation

Russia has been involved in 26 arbitrations under the ECT and its BITs. Out of these, it has prevailed in five, whereas one claim was withdrawn before an award. A pre-award settlement in relation to the Nomura International Ltd (UK Bank) has been reported, but the details are not clear.

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175 For background on the enforcement actions by Tatneft, see Tatneft PJSC Press Release, ‘Tatneft to enforce $144m arbitral award against Ukraine in London and Moscow’ (13 April 2017) <http://www.tatneft.ru/press-center/press-releases/more/5177/?lang=en> accessed 17 June 2020; Caroline Simson, ‘Tatneft Gets OK To Enforce $112M Ukraine Award In England’ (Law360, 17 July 2018) <www.law360.com/commercialcontracts/articles/1063525/tatneft-gets-ok-to-enforce-112m-ukraine-award-in-england> accessed 17 June 2020; Caroline Simson, ‘Russian Court Says Ukraine Must Pay $112M Award To Tatneft’ (Law360, 28 February 2019) <www.law360.com/internationalarbitration/articles/1133866/russian-court-says-ukraine-must-pay-112m-award-to-tatneft> accessed 17 June 2020.

176 City-State NV v Ukraine, Указа Кийського апеляційного суду від 16 вересня у справі Но 824/138/19 [Ruling of Court of Appeal dated 16 September 2019 in case No 824/138/19].

177 Постанова Верховного суду від 21 грудня 2019 у справі Но 824/22/2019 [Resolution of Supreme Court dated 21 November 2019 No 824/22/2019]. For background on the enforcement actions by JKX Oil, see JKX Oil & Gas plc, ‘JKX Oil & Gas plc Half-Yearly Report 2018’ (27 July 2018) 23 <www.jkx.co.uk/~media/Files/J/JKX-V2/download-centre/half-yearly-report-2018.pdf> accessed 17 June 2020.

178 See eg Ministry of Land and Property of the Republic of Tatarstan v Ukraine, UNCITRAL; Igor Boyko v Ukraine, PCA Case No. 2017-23; Finexconombank v Ukraine, SCC.

179 Emorgofin BV and Velby Holdings Ltd v Ukraine, ICSID Case No ARB/16/35. See Zoe Williams, ‘Russian aluminum giant, Rusal, files treaty-based arbitration against Ukraine’ (IA Reporter, 26 October 2016) <https://www.iareporter.com/articles/russian-aluminum-giant-rusal-files-treaty-based-arbitration-against-ukraine/> accessed 19 June 2020.

180 Luke Eric Peterson, ‘Tribunal in Spanish shareholders’ Yukos claim holds that narrow arbitration clause permits expropriation claim’ (IA Reporter, 16 April 2009) <www.iareporter.com/articles/tribunal-in-spanish-shareholders-yukos-claim-holds-that-narrow-arbitration-clause-permits-expropriation-claim/> accessed 15 June 2020.
Thus far, Russia has generally not complied with adverse awards. It has usually sought annulment and resisted enforcement.\(^{181}\) As discussed above, it took two decades, countless proceedings and important resources for Mr Sedelmayer to receive partial satisfaction. Similarly, it has been reported that the investors in *Valle Esina* sought the support of the Italian Government to secure payment of a 10 million euro award.\(^{182}\) The same media report indicates that setting-aside or enforcement proceedings had not been identified, implying that the parties had possibly settled.

Russia vigorously opposed enforcement of the *Yukos* awards. This included diplomatic pressure and lobbying. For example, in the course of the recognition proceedings, Russia issued diplomatic notes that any enforcement over Russian property in the matter would result in reciprocal seizure of property in Russia.\(^{183}\) While recognition proceedings were ongoing in France and Belgium, both countries amended their legislation to require court authorization prior to the attachment of foreign State assets.\(^{184}\)

Ten arbitrations have been brought by Ukrainian investors against Russia in relation to the annexation of Crimea in 2014. Three of these have not reached a decision on liability.\(^{185}\) Russia has been found liable for treaty breaches in three arbitrations,—*Naftogaz*, *PJSC CB PrivatBank* and *Aeroport Belbek LLC*—in all of which a ruling on damages is awaited.\(^{186}\) In *Oschadbank, Everest Estate, Stabil and Ukrnafta*, the tribunals have issued awards on damages against Russia.\(^{187}\)

Russia challenged the *Ukrnafta* and Stabil awards in Switzerland and the *Tribunal fédéral* rejected the applications.\(^{188}\) While setting-aside proceeding are pending in the Netherlands in *Everest Estate*, in September 2018, the Kyiv Court of Appeal granted

\(^{181}\) Noah Rubins and Evgeniya Rubinina, ‘GAR Know-How on Russia’ (*Global Arbitration Review*, 25 September 2019) (https://globalarbitrationreview.com/jurisdiction/1006341/russia) accessed 15 June 2020.

\(^{182}\) Luke Eric Peterson, ‘Russia held liable for expropriation of Italian business,’ *Valle Esina* S.p.A., in unpublicized investment treaty arbitration’ (*IA Reporter*, 18 May 2015) (www.iareporter.com/articles/russia-held liable-for-expropriation-of-italian-business-in-unpublicized-investment-treaty-arbitration/) accessed 15 June 2020.

\(^{183}\) Carl Schreck, ‘Russia Warned France of Reprisals Months before Yukos Asset Freeze’ (*RFERL*, 19 June 2015) (https://globalarbitrationreview.com/article/1149646/yukos-shareholders-abandon-belgian-front/) accessed 15 June 2020.

\(^{184}\) Douglas Thomson, ‘Yukos shareholders abandon Belgian front’ (*Global Arbitration Review*, 2 November 2017) (https://globalarbitrationreview.com/article/1149646/yukos-shareholders-abandon-belgian-front/) accessed 15 June 2020.

\(^{185}\) *Limited Liability Company Lugzor and Others v Russian Federation*, PCA Case No 2015-29; *NPC Ukrenergo v the Russian Federation*, UNCITRAL; *PJSC DTEK Krymenenergo v Russian Federation*, UNCITRAL.

\(^{186}\) The awards are, however, not public: for *NJSC Naftogaz of Ukraine*, *PJSC State Joint Stock Company Chornomornaftogaz*, *PJSC Ukrgezydobuvannya* and others *v The Russian Federation*, PCA Case No 2017-16, see Tom Jones, ‘Russia liable for seizure of Naftogaz assets in Crimea’ (*Global Arbitration Review*, 1 March 2019) (https://globalarbitrationreview.com/article/1811094/russia liable-for-seizure-of-naftogaz-assets-in-crimea/) accessed 15 June 2020; for *PJSC CB PrivatBank and Finance Company Finilon LLC* *v The Russian Federation*, PCA Case No 2015-21 and *Aeroport Belbek LLC* and Mr. Igor Valerievich Kolomoisky *v The Russian Federation*, PCA Case No 2015-07, see Luke Eric Peterson, Russia held liable for expropriation of bank operations in billion dollar arbitration, as well as of airport’ (*IA Reporter*, 15 February 2019) (www.iareporter.com/articles/russia-held-lia for-expropriation-of-bank-operations-in-billion-dollar-arbitration-as-well-as-of-airport/) accessed 15 June 2020.

\(^{187}\) For *Oschadbank v Russian Federation*, PCA Case No 2016-14, Award (26 November 2018), see Alison Ross, ‘Ukrainian bank wins billion-dollar award against Russia’ (*Global Arbitration Review*, 26 November 2019) (https://globalarbitrationreview.com/article/1177269/ukrainian-bank wins-billion-dollar-award-against-russia) accessed 15 June 2020; for *Everest Estate LLC*, *Edelvoit-2000* PE, *Fortuna CJSC and others v The Russian Federation*, PCA Case No 2015-36, Award (2 May 2018), see Luke Eric Peterson, ‘Russia held liable in confidential award for expropriation of hotels, apartments and other Crimean real estate; arbitrators award approximately $150 million (plus legal costs) for breach of Ukraine bilateral investment treaty’ (*IA Reporter*, 9 May 2018) (www.iareporter.com/articles/russia-held-lia for-confidential-awardfor-expropriation-of-hotels-apartments-and-other-crimean-real-estate-arbitrators-award-approximately-150 million-plus-legal-costs-for-breach-of-ukraine-bil/) accessed 15 June 2020; for *Crimea-Petrol LLC*, *Elefteria LLC*, *Novelt-Estate LLC and others v The Russian Federation*, PCA Case No 2015-35, Award (12 April 2019) and *PJSC Ukrnafta v The Russian Federation*, PCA Case No 2015-34, Award (12 April 2019), see Tom Jones and Sebastian Perry, ‘Russia ordered to pay for petrol stations seized in Crimea’ (*Global Arbitration Review*, 16 April 2019) (https://globalarbitrationreview.com/article/1190269/russia-ordered-to-pay-for-petrol-stations-seized-in-crimea/) accessed 15 June 2020.

\(^{188}\) For *BGer vom 12 December 2019 (4A_246/2019)* [Federal Supreme Court 12 December 2019 (4A_244/2019)] (www.bger.ch) accessed 28 February 2021.
enforcement of the US$159 million award as well as the attachment of shares held by three Russian State-owned banks (Vnesheconombank, VTB Bank and Sberbank) in Ukrainian banks.\textsuperscript{189} Vnesheconombank has initiated an arbitration against Ukraine for expropriation of its assets as a result of the decision.\textsuperscript{190} The subsequent enforcement proceedings in \textit{Everest Estate} before the Supreme Court of Ukraine brought about further notable developments. Although absolute sovereign immunity generally applies in Ukraine, in January 2019 the Supreme Court ruled that article 9 of the Russia–Ukraine BIT (which, \textit{inter alia}, provides that ‘Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation’) constituted a waiver of immunity. Accordingly, the court confirmed the attachments, albeit restricting them to the extent to which the Russian Federation actually owns shares in the three Russian banks.\textsuperscript{191} The Russian State-owned banks have denounced these proceedings as political.\textsuperscript{192}

c) Kazakhstan

Investors have brought 24 arbitrations against Kazakhstan. While it has complied with four out of the seven adverse awards issued against it (in \textit{Aktia Petrol, Rumeli Investors have brought 24 arbitrations against Kazakhstan. While it has complied with four out of the seven adverse awards issued against it (in \textit{Aktia Petrol, Rumeli

\textsuperscript{189} \textit{Everest Estate LLC, Edelveis—2000 PE and others v The Russian Federation, Указа Кайсієвого апеляційного суду від 5 вересня 2018 у справі No 796/165/18} [Ruling of Kyiv Court of Appeals dated 5 September 2018 in case No 796/165/18]; \textit{Everest Estate LLC, Edelveis—2000 PE and others v The Russian Federation, Указа Кайсієвого апеляційного суду від 25 вересня 2018 у справі No 796/165/18} [Ruling of Kyiv Court of Appeals dated 25 September 2018 in case No 796/165/18]; ‘Crimea award enforced in Ukraine’ (Global Arbitration Review, 3 October 2018) <https://globalarbitrationreview.com/article/1175219/crimea-award-enforced-in-ukraine> accessed 15 June 2020.

\textsuperscript{190} ‘ВЭБ будет добиваться от Украины компенсации за экспроприацию инвестиций’ [VEB will seek compensation from Ukraine for the expropriation of investments] Vedomosti (Moscow, 14 September 2018) <www.vedomosti.ru/politics/articles/2018/09/14/780916-veb-ukrained/> accessed 15 June 2020; Sebastian Perry, ‘Sanctioned Russian bank brings treaty claim against Ukraine’ (Global Arbitration Review, 21 June 2019) <https://globalarbitrationreview.com/article/1194368/sanctioned-russian-bank-brings-treaty-claim-against-ukraine> accessed 15 June 2020.

\textsuperscript{191} Постановка Верховного Суду від 25 серпня 2019 у справі No 796/165/2018 [Resolution of Supreme Court dated 25 January 2019 in case No 796/165/2018]; Oleksii Maslov, ‘Україне висупаєся з непереважним підходом до суверенних ємностей’ (Kluwer Arbitration Blog, 14 March 2019) <http://arbitrationblog.kluwerarbitration.com/2019/03/14/ukraines-supreme-court-takes-an-unexpected-approach-into-sovereign-immunities/> accessed 15 June 2020.

\textsuperscript{192} In reaction to this ruling, VTB made a statement that the Ukrainian courts are politically biased. See VTB Group, ‘VTB statement on the situation with its bank in Ukraine’ (27 November 2018) <www.vtb.com/o-banke/press-centr/ novosti-i-press-reлизy/2018/11/2018_11_27_zayavlenie-vtb-o-nashem-banke-na-ukraine/> accessed 15 June 2020. The Russian Federation did not participate in the arbitration proceedings and stated that it does not recognize the award. See ‘Russian state banks arrested in Ukraine’ Kommersant (Moscow, 13 September 2018) <www.kommersant.ru/doc/3739328> accessed 15 June 2020.
Kazakhstan resisted enforcement against several other awards for extended periods.

In *Rumeli Telekom*, Kazakhstan sought the annulment of a US$125 million ICSID award. Upon the Ad Hoc Committee’s order, Kazakhstan provided a written assurance that the award would be fully satisfied if upheld. Nevertheless, even though it failed to prevail in the annulment proceedings, Kazakhstan only complied with the award following several years of enforcement litigation. 194

Similarly, in *AIG*, Kazakhstan paid the award five years after it was issued. During that time, AIG unsuccessfully attempted to seize assets of Kazakhstan’s central bank in the UK. 195 The High Court of England found that the targeted cash accounts of the National Bank of Kazakhstan did not constitute debt owed to Kazakhstan and that the accounts are in any event immune from enforcement under the UK State Immunity Act. 196 Reportedly, Kazakhstan paid the amounts under the award only after the US Government applied pressure. 197

The *Stati* enforcement dispute also merits mention. The tribunal awarded the Stati family nearly US$500 million in December 2013. 198 Relying on documents obtained in Section 1782 proceedings in the United States, 199 Kazakhstan has insisted that the Statis fraudulently inflated the value of their investment and accordingly the tribunal’s damages calculations. The reaction to these arguments has been mixed. Some have refused to hear the fraud argument. 200 Notably, while rejecting Kazakhstan’s annulment application, the Swedish courts also rejected Kazakhstan’s allegations of fraud and confirmed the award. 201 The US courts have

193 Aktaş Petrol Ticaret AS v Republic of Kazakhstan, ICSID Case No ARB/15/8, Award (13 November 2017); *Rumeli Telekom AS and Telstım Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008); AIG Capital Partners, Inc and CJSC Tima Real Estate Company Ltd v Republic of Kazakhstan, ICSID Case No ARB/01/6, Award (7 October 2003); Biedermann International, Inc v Republic of Kazakhstan and Association for Social and Economic Development of Western Kazakhstan ‘Intercaspian’, SCC Case No 97/1996, Award (2 August 1999).

194 ‘Kazakhstan must assure payment, tribunal says’ (*Global Arbitration Review*, 30 March 2009) <https://globalarbitrationreview.com/article/1027391/kazakhstan-must-assure-payment-tribunal-says> accessed 15 June 2020; Alison Ross, ‘Kazakhstan must pay up, says ICSID annulment committee’ (*Global Arbitration Review*, 5 October 2018) <https://globalarbitrationreview.com/article/1175322/kazakhstan-must-pay-up-says-icsid-annulment-committee> accessed 15 June 2020.

195 Luke Eric Peterson, ‘Kazakhstan seeks to annul $125 Million ICSID award in telecoms dispute; we review earlier Kazakh arbitrations’ (*IA Reporter*, 12 November 2008) <https://www.iareporter.com/articles/kazakhstan-seeks-to-annul-125-million-icsid-award-in-telecoms-dispute-we-review-earlier-kazakh-arbitrations> accessed 15 June 2020.

196 AIG Capital Partners, Inc & CJSC Tima Real Estate Company v Kazakhstan [2005] EWHC (Comm) 2239, [2006] WRL 1420.

197 ‘Turkish phone companies await payment from Kazakhstan’ (*Global Arbitration Review*, 30 April 2010) <https://globalarbitrationreview.com/article/1029267/turkish-phone-companies-await-payment-from-kazakhstan> accessed 15 June 2020.

198 Ascom Group SA, Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v The Republic of Kazakhstan, SCC Case No V 116/2010, Award (19 December 2013).

199 Richard Woolley, ‘Kazakhstan cleared to access documents from Clyde & Co’ (*Global Arbitration Review*, 25 June 2015) <https://globalarbitrationreview.com/article/1034560/kazakhstan-cleared-to-access-documents-from-clyde-co> accessed 15 June 2020.

200 Sebastian Perry, ‘Kazakhstan faces multibillion-dollar asset freeze’ (*Global Arbitration Review*, 9 January 2018) <https://globalarbitrationreview.com/article/1152435/kazakhstan-faces-multibillion-dollar-asset-freeze> accessed 15 June 2020; Caroline Simson, ‘Italian Court Enforces $500M Award Against Kazakhstan’ (*LAW360*, 4 March 2019) <https://law360.com/internationalarbitration/articles/1135098/italian-court-enforces-500m-award-against-kazakhstan> accessed 15 June 2020; Republic of Kazakhstan v Stati Anatolie, Stati Gabriel, Ascom Group SA and Terra Raf Trans Traiding Ltd., CA Roma, 27 febbraio 2019, No 3666 [Court of Appeal of Rome, 27 February, No 3666].

201 Luke Eric Peterson, ‘As Kazakhstan pursues set-aside of $800+ million energy charter treaty award, government takes aim at Stockholm Chamber’s handling of arbitration’ (*IA Reporter*, 23 May 2014) <https://www.iareporter.com/articles/as-kazakhstan-pursues-set-aside-of-500-million-energy-charter-treaty-award-government-takes-aim-at-stockholm-chambers-handling-of-arbitration> accessed 15 June 2020; Lacey Yong, ‘ECT award survives fraud challenge in Sweden’ (*Global Arbitration Review*, 12 December 2016) <https://globalarbitrationreview.com/article/1078672/ect-award-survives-fraud-challenge-in-sweden> accessed 15 June 2020; Luke Eric Peterson, ‘Kazakhstan fails in bid to set aside half billion dollar Energy Charter Treaty award’ (*IA Reporter*, 9 December 2016) <https://www.iareporter.com/articles/kazakhstan-fails-in-bid-to-set-aside-half-billion-dollar-energy-charter-treaty-award> accessed 15 June 2020; Luke Eric
not entertained Kazakhstan’s fraud claims either. On the other hand, the Amsterdam Court of Appeal held that Kazakhstan should be allowed to present evidence on fraud. Likewise, an English court found that there was a prima facie case that the award had been obtained by fraud, and it decided to examine the allegations at a trial. However, the Statis subsequently withdrew the enforcement proceedings in England.

As of 2014, the Stati family has initiated enforcement proceedings in the UK, Belgium, Italy, Luxembourg, the Netherlands, Sweden and the United States. In 2017, in the Netherlands and Belgium, the Statis succeeded in obtaining garnishment orders freezing assets worth US$22.6 billion and held on behalf of the National Bank of Kazakhstan (NBK) as well as attachment of shares worth US$5.2 billion held by Kazakh sovereign wealth fund Samruk-Kazyna in a Dutch company. The attachment order in relation to the NBK assets was subsequently reduced by the Belgian courts to the amount of the award, ie, US$530 million. Similarly, in Luxembourg, the Statis have obtained garnishment orders against other assets, estimated to be worth US$450 million. In January 2018, the Swedish courts granted the attachment shares worth US$100 million in various companies. Lastly, in 2019 the Statis obtained favorable decisions from the Italian and Belgian courts, in which the award was declared enforceable.

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Peterson, ‘As Kazakhstan pursues its fraud allegations against investors who won $500 million ECT award, Swedish Supreme Court confirms it won’t set aside the ruling’ (IA Reporter, 30 October 2017) <www.iareporter.com/articles/as-kazakhstan-pursues-its-fraud-allegations-against-investors-who-won-500-million-ect-award-swedish-supreme-court-confirms-it-wont-set-aside-the-ruling/> accessed 15 June 2020.

Judgment, Anatolie Stati and others v Republic of Kazakhstan, No 18-7047, (DC Cir Apr 19 2019); Caroline Simson, ‘DC Cir. Won’t Nit OK of $500M Award Against Kazakhstan’ (Law360, 19 April 2019) <www.law360.com/articles/1151827/> accessed 15 June 2020.

Developments in the case post this decision have not been publicly reported. The decision of the Amsterdam Court of Appeal on the allegation of fraud is pending as at 31 December 2019. See Hof Amsterdam 6 november 2018, NJF 2019 [Amsterdam Court of Appeal 6 November, NJF 2019].

Stati Anatolie, Stati Gabriel, Ascom Group SA and Terra Raf Trans Trading Ltd v The Republic of Kazakhstan [2017] EWHC 1348 (Comm) [92-93], [2017] 2 Lloyd’s Rep 201.

Initially, an English judge refused to dismiss the proceedings, but that decision was reversed on appeal in August 2018, which put an end to the enforcement proceedings in the UK. See Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trading Ltd v Republic of Kazakhstan [2018] EWHC (Cir) 1896, [2019] 1 WLR 897; Damien Charlotin, ‘Stati and Ascom v. Kazakhstan: UK appeals court allows claimants to avoid fraud trial, after they decide to abandon enforcement efforts in that jurisdiction’ (IA Reporter, 13 August 2018) <www.iareporter.com/articles/stati-and-ascom-v-kazakhstan-uk-appeals-court-allows-claimants-to-avoid-fraud-trial-after-they-decide-to-abandon-enforcement-efforts-in-that-jurisdiction/> accessed 16 June 2020.

For background on the Dutch and Belgian decisions, see National Bank of Kazakhstan, Republic of Kazakhstan v Bank of New York Mellon SA/NV London Branch [2017] EWHC (Comm) 3512 [24–25, 31]. The BNY opined that it was obligated to freeze all of NBK’s assets, even if their value far exceeded the awarded amount, under Belgian and Dutch law. See ‘Dutch court lifts multibillion Kazakh asset freeze’ (Global Arbitration Review, 24 January 2018) <https://globalarbitrationreview.com/article/1153060/dutch-court-lifts-multibillion-kazakh-asset-freeze/> accessed 16 June 2020; Caroline Simson, ‘Kazakhstan Can’t Get Freeze Order Nixed In $506M Award Row’ (Law360, 8 May 2019) <www.law360.com/articles/1157264/kazakhstan-can-t-get-freeze-order-nixed-in-506m-award-row/> accessed 16 June 2020.

Ascom Group SA Press Release, ‘Luxembourg Appellate Court Confirms US$540 Million Award Against The Republic of Kazakhstan’ (20 December 2019) <www.prnewswire.com/in/news-releases/luxembourg-appellate-court-confirms-us-540-million-award-against-the-republic-of-kazakhstan-860007060.html> accessed 16 June 2020.

Lacey Yong, ‘Kazakh creditors seek discovery from asset managers’ (Global Arbitration Review, 7 March 2018) <https://globalarbitrationreview.com/article/1166379/kazakhstan-creditors-seek-discovery-from-asset-managers/> accessed 16 June 2020; Jack Ballantyne, ‘Kazakh assets remain frozen in Sweden’ (Global Arbitration Review, 6 August 2019) <https://globalarbitrationreview.com/article/1195672/kazakhstan-assets-remain-frozen-in-sweden/> accessed 16 June 2020.

CA Roma, 27 febbraio 2019, No 1490/2019 [Court of Appeal of Rome, Judgement No 1490/2019 published 27 February 2019]; Caroline Simson, ‘Italian Court Enforces $500M Award Against Kazakhstan’ (Law360, 4 March 2019) <www.law360.com/internationalarbitration/articles/1135098/italian-court-enforces-500m-award-against-kazakhstan/> accessed 16 June 2020; Ascom Group SA, ‘Belgian Court Confirms US$540 Million Award Against The Republic of Kazakhstan’ (23 December 2019) <www.prnewswire.com/news-releases/belgian-court-confirms-us540-million-award-against-the-republic-of-kazakhstan-300979092.html> accessed 16 June 2020.
d) Kyrgyzstan

Kyrgyzstan has been a respondent in 23 arbitrations. Twelve did not reach the stage of compliance. In four instances, the awards were set aside by French or Russian courts. The award in *Valeri Belokon v Kyrgyz Republic* was set aside by the Paris *Cour d’Appel* on public policy grounds, finding that the investor had engaged in money laundering.\(^{210}\) The other three related to disputes under the CIS Investor Rights Convention—in *Lee John Beck, OKKV and others*, and *Stans Energy Corp and Kutisay Mining LLC (I)—were subsequently set aside by the Russian courts for lack of consent to arbitrate investor–State disputes under that treaty.\(^{211}\) Five proceedings are pending as at 31 December 2019.

Of the remaining four adverse awards, there is no information about payment in three. The post-award developments in *Petrobart* were discussed above. Reportedly, before payment was ultimately made in 2011, bilateral diplomatic discussions were

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\(^{210}\) For the setting-aside decisions of the Russian court, (i) *Определение Арбитражного суда города Москвы от 19 ноября 2014 г. по делу No. A40-25942/2014* [Definition of Arbitration Court of Moscow dated 19 November 2014 in case No. A40-25942/2014] <https://sudact.ru/arbitral/doc/mwwSwR3aS31e/> accessed 18 June 2020 (ii) *Определение Арбитражного суда города Москвы от 25 мая 2015 г. по делу No. A40-64831/2014* [Definition of Arbitration Court of Moscow dated 25 May 2015 in case No A40-64831/14] <https://sudact.ru/arbitral/doc/tbHCHY0IWrRmR/arbitral-txt=%D0%9040-64831%2F14&arbitral-case_doc=&arbitral-judge=&arbitral-date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-lawchunkinfo=&arbitral%20date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-judge=&arbitral-lawchunkinfo=&arbitral%20date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-judge=&_1576001438017> accessed 18 June 2020; and (iii) *Определение Арбитражного суда города Москвы от 5 июля 2015 г. по делу No A40-19518/2014* [Definition of Arbitration Court of Moscow dated 5 June 2015 in case No A40-19518/2014] <https://sudact.ru/arbitral/doc/pifL8cflk5R/arbitral-txt=%D0%9040-19518%2F14&arbitral-case_doc=&arbitral-lawchunkinfo=&arbitral%20date_from=&arbitral-date_to=&arbitral-region=&arbitral-court=&arbitral-judge=&_1576001860025> accessed 18 June 2020. See also Jarrod Hepburn and Luke Eric Peterson, ‘Arbitrators selected for Stans Energy’s New Claim vs. Kyrgyzstan, as battle over earlier award continues’ (*IA Reporter*, 11 November 2015) <www.iareporter.com/articles/arbitrators-selected-for-stans-energies-new-claim-vs-kyrgyzstan-as-battle-over-earlier-award-continues/> accessed 16 June 2020; Jarrod Hepburn, ‘CIS Economic Court issues authoritative interpretation of investment treaty at root of series of investor-state arbitrations’ (*IA Reporter*, 23 September 2014) <www.iareporter.com/articles/cis-economic-court-issues-authoritative-interpretation-of-investment-treaty-at-root-of-series-of-investor-state-arbitrations/> accessed 16 June 2020; Kyriaki Karadelis, ‘Kyrgyzstan overturns Stans award in Russia’ (*Global Arbitration Review*, 30 April 2015) <https://globalarbitrationreview.com/article/1034422/kyrgyzstan-overturns-stans-award-in-russia> accessed 16 June 2020; Douglas Thomson, ‘Kyrgyzstan quashes CIS treaty award in Russia’ (*Global Arbitration Review*, 25 November 2014) <https://globalarbitrationreview.com/article/1033901/kyrgyzstan-quashes-cis-treaty-award-in-russia> accessed 16 June 2020.
held between Sweden and Kyrgyzstan on four occasions.\textsuperscript{212} Despite enforcement attempts in Canada and the United States, the Turkish investors in \textit{Sistem Muhendislik} have reportedly not succeeded in collecting the amount awarded in 2009.\textsuperscript{213}

e) Peru, India and Libya

Peru: Of the 26 arbitrations against it, Peru has received three adverse awards. The \textit{Bear Creek Mining} award was reported to have been paid two years after the award.\textsuperscript{214} There has been limited reporting about the payment of two other awards – \textit{Tza Yap Shu} and \textit{Duke Energy}.\textsuperscript{215} It is believed that the awards were likely satisfied since, at the annulment stage, Peru submitted a written assurance to the ICSID annulment committees that it would honor the awards if they were not annulled.\textsuperscript{216} The ICSID annulment committees subsequently upheld the awards in 2011 and 2015 respectively. No enforcement proceedings have been reported to have taken place after the annulment proceedings were concluded.

India: Twenty-five investment arbitrations have been initiated against India. It has settled nine, all arising from disputes relating to the Dabhol power plant. This involved a one-time payment to the investors in 2005.\textsuperscript{217} India has complied with the only adverse award issued against it—in \textit{White Industries v India}—without enforcement proceedings having been initiated.\textsuperscript{218} The amount at stake was AUS$8 million. More than half of the arbitrations against India are pending.

\textsuperscript{212} Luke Eric Peterson, ‘Lengthy debt collection battle ends, as former soviet state pays arbitral award; unusual form of diplomatic assistance seen’ (\textit{IA Reporter}, 29 September 2011) <www.iareporter.com/articles/lengthy-debt-collection-battle-ends-as-former-soviet-state-pays-arbitral-award-unusual-form-of-diplomatic-assistance-seen/> accessed 16 June 2020.

\textsuperscript{213} Joyce Hanson, ‘Kyrgyzstan Faces Penalties In Turkish Co’s Arbitration Suit’ (\textit{Law360}, 1 November 2018) <www.law360.com/articles/1097814/> accessed 16 June 2020; Order, \textit{Sistem Muhendislik Insaat Sanayi ve Ticaret, AS v The Kyrgyz Republic}, No. 12-CV-4502 (ALC), (SDNY Oct 31 2018).

\textsuperscript{214} Hugo Supo, ‘Gobierno pago 32 millones de dolares a Bear Creek por caso Santa Ana [Government paid 32 million dollars to Bear Creek for the Santa Ana case]’ \textit{Diario Correo} (Puno, 1 January 2019) <https://diariocorreo.pe/edicion/puno/gobierno-pago-32-millones-de-dolares-bear-creek-por-caso-santa-ana-862129/> accessed 18 June 2020.

\textsuperscript{215} Clorinda Flores, ‘Perú enfrenta tres arbitrajes en el Ciadi con demandas que superan los $400 millones [Peru faces three ICSID arbitrations with claims over USD 400 million]’ \textit{Diario Correo} (Lima, 19 March 2018) <https://diariocorreo.pe/economia/peru-enfrenta-tres-arbitrajes-en-el-ciadi-con-demandas-que-supera-los-400-millones-808886/> accessed 18 June 2020.

\textsuperscript{216} \textit{Tza Yap Shu v Republic of Peru, ICSID Case No ARB/07/6, Decision on Annulment (12 February 2015) para 16; Duke Energy International Peru Investments No 1 Ltd v Republic of Peru, ICSID Case No ARB/03/28, Decision of the Ad Hoc Committee (1 March 2011) para 17.}

\textsuperscript{217} Ronald J Bettauer, ‘India and International Arbitration: The Dabhol Experience’ (2010) 41 Geo Wash Intl L Rev 381, 386–7.

\textsuperscript{218} Jarrod Hepburn, ‘With investment arbitration threats mounting, India takes a decision as to whether it will comply with unfavourable BIT award’ (\textit{IA Reporter}, 26 July 2012) <www.iareporter.com/articles/with-investment-arbitration-threats-mounting-india-takes-a-decision-as-to-whether-it-will-comply-with-unfavourable-bit-award/> accessed 16 June 2020.
Libya: There is a paucity of payment information in relation to awards rendered against Libya. Of 25 arbitrations, Libya has prevailed in four and 13 are currently ongoing. Tribunals have rendered damages awards against Libya in eight arbitrations; there is no public information whether any of these has been satisfied.\(^{219}\)

(v) States involved in 10–19 investment arbitrations

a) Bolivia

Bolivia’s skepticism towards ISDS over more than a decade is well documented. It began denouncing its 21 BITs in 2006 and announced that disputes between foreign investors and Bolivia ought to be resolved in Bolivian courts or through arbitration in Bolivia.\(^{220}\) In 2007, it also became the first country to denounce the ICSID Convention.\(^{221}\) Despite this, Bolivia has settled around 75 percent of the 16 arbitrations against it either before or soon after an award: nine prior to and three after an award on damages.

In two of the three arbitrations in which damages were awarded against it—in Rurelec and Quiborax\(^{222}\)—Bolivia settled without any enforcement actions being

\(^{219}\) Etrak İnşaat Taahüt ve Ticaret Anonim Şirketi v Libya, ICC, Award (22 July 2019); Cengiz İnşaat Sanayi ve Ticaret AS v Libya, ICC Case No 21537/ZF/AYZ, Award (7 November 2018); Odebrecht Engineering & Construction Ltd., TAV-Tepe Ağaç Investment Construction & Operation Co., Libyan Consolidated Contractors Company v The State of Libya, ICC Case No 20892/MCP/DDA, Award (21 December 2018); General Dynamics United Kingdom Ltd v The State of Libya, ICC Case No 19222/EMT, Award (5 January 2016); Olim Holdings Ltd v State of Libya, ICC Case No 20355/MCP, Award (25 May 2018); Sorelec v Libya, ICC, Award (10 April 2018); Slim Ben Mokhtar Ghenia v Libya, UNCITRAL, Consent Award (9 December 2016), Decision overturning the Consent Award (24 May 2019); Mohamed Abdulmohsen Al-Kharafi & Sons Co v The Government of the State of Libya and others, CRCICA, Award (22 March 2013); Internesa Bau AG v Libya, UNCITRAL, Award (1 January 2010).

\(^{220}\) Bolivia subsequently passed an investment protection law in 2014, which, as supplemented, set forth a special arbitration regime applicable to disputes involving foreign investment in Bolivia, providing, inter alia, that arbitration proceedings involving investments in Bolivia should have a place of arbitration in Bolivia. See Ley No 516, Ley de Promoción de inversiones, 633NEC Gaceta Oficial de Bolivia, 4 de abril de 2014 [Law No 516, Investment Promotion Law, 633NEC Official Gazette of Bolivia, 4 April 2014] art 26, Second Transitory Provision; Ley No 708, Ley de Conciliación y Arbitraje, 770NEC Gaceta Oficial de Bolivia, 25 de junio de 2015 [Law No 708, Conciliation and Arbitration Law, 770NEC Official Gazette of Bolivia, 25 June 2015] art 129.

\(^{221}\) ‘La salida de Bolivia del CIADI es oficial’ [Bolivia’s exit from ICSID is official] (Bolivia.com, 3 May 2007) <www.bolivia.com/noticias/autonoticas/DetalleNoticia35253.asp> accessed 18 June 2020.

\(^{222}\) Guaracachi America, Inc. and Rurelec Plc v The Plurinational State of Bolivia, PCA Case No 2011-17, Award (31 January 2014); Quiborax SA, Non-Metallic Minerals SA v Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award (16 September 2015).
initiated against it. The Rurelec award was reportedly settled approximately three months after its issuance. The Quiborax award was reportedly settled approximately three months after its issuance. Bolivia initially sought to annul the Quiborax award before an ICSID Ad Hoc Committee. At the same time, the parties entered into settlement talks and enforcement of the award was provisionally stayed by the ICSID Secretary General. When the settlement talks fell through, the ICSID Ad Hoc Committee did not lift the stay on the basis of Bolivia’s public statements and official submissions that it would honor the award if it was not annulled. The award was upheld and the parties reached a settlement in June 2018, envisaging a 25 percent discount.

b) Romania, Hungary and Slovakia

Romania: Romania has been involved in 19 arbitrations under the ECT and its BITs. Of the three adverse awards, Romania voluntarily paid the Awdi award—an ICSID award pursuant to the Romania–US BIT—within a year of issuance of the award. Romania has been resisting enforcement of the Micula award, rendered under the Romania–Sweden BIT, in multiple jurisdictions on the basis, inter alia, that compliance would amount to a violation of EU State aid law and that the Achmea decision renders the arbitration clause contained in the BIT invalid. In December 2019, Romania allegedly agreed to pay the awarded amount, but we have not identified a source confirming that Romania has indeed made the payment (and, as at 31 December 2019, enforcement proceedings against Romania were pending).

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223 Luke Eric Peterson, ‘Investors strike deal with Bolivia in order to secure “rapid” payment of some of the compensation awarded by arbitrators’ (IA Reporter, 30 April 2014) <www.iareporter.com/articles/investors-strike-deal-with-bolivia-in-order-to-secure-rapid-payment-of-some-of-the-compensation-awarded-by-arbitrators/> accessed 18 June 2020.
224 Luke Eric Peterson, ‘Payment of investment treaty arbitration awards: an update on developments in Latin America’ (IA Reporter, 12 June 2018) <www.iareporter.com/articles/payment-of-investment-treaty-arbitration-awards-an-update-on-developments-in-latin-america/> accessed 18 June 2020; Damien Charlotin, ‘A stay of award is kept in place in Bolivia case, and ad-hoc committee picks a side in debate over powers to order posting of bank guarantees’ (IA Reporter, 23 February 2017) <www.iareporter.com/articles/a-stay-of-award-enforcement-is-kept-in-place-in-bolivia-case-and-ad-hoc-committee-picks-a-side-in-debate-over-powers-to-order-posting-of-bank-guarantees/> accessed 18 June 2020.
225 TriMetals Mining Inc. Press Release, ‘TriMetals Mining to Receive US$ 25.8 Million from Bolivia’ (29 August 2019) <www.trimetalsmining.com/site/assets/files/3921/tmi_pr-arb_trimetals_mining_signs_settlement_with_bolivia_-sedar_short_version_2019-08-29.pdf> accessed 18 June 2020; Complaint For The Recognition And Enforcement Of International Arbitral Award, South American Silver Limited (Bermuda) v The Plurinational State Of Bolivia, No 119-cv-00540 (District of DC 28 February 2019).
226 Victor Lupu, ‘Lebanese Sentenced To Prison, Compensated By The Romanian State With EUR 10m’ (The Romania Journal, 11 January 2016) <www.roanjurnal.ro/society-people/social/lebanese-sentenced-to-prison-compensated-by-the-romanian-state-with-eur-10m/> accessed 16 June 2020.
227 Micula/Romania (2014/C) (ex 2014/NN) Commission Decision 2015/1470 [2015] OJ L232.
228 Jack Ballantyne, ‘Romania to pay out on Micula award’ (Global Arbitration Review, 16 December 2019) <https://globalarbitrationreview.com/article/1212205/romania-to-pay-out-on-micula-award/> accessed 16 June 2020.
ongoing). There is no public information regarding payment of the Gavazzi award, rendered under the Italy–Romania BIT.

**Hungary:** Hungary has received seven adverse awards in 16 arbitrations. As at 31 December 2019, Hungary is pursuing annulment of the Edenred SA, Dan Cake, Sodexo and UP and CD Holding Internationale awards before ICSID Ad Hoc Committees. There is no publicly available information about payment of the Inicia Zrt award, issued under the UK–Hungary BIT. As reported, and to our knowledge, Hungary has paid the EDF and ADC awards.229

**Slovakia:** Thirteen investment claims have been filed against Slovakia. It settled one arbitration before it reached the damages phase. Two adverse awards have been issued against Slovakia: CSOB and Achmea. Slovakia voluntarily paid the CSOB award—which arose from an intra-EU BIT—in 2005.230 Following the CJEU’s judgment, the Supreme Court of Germany set aside the Achmea award in October 2018.231

**c) Turkey**

![Diagram showing Turkey's arbitration outcomes](image)

- **Total arbitrations:** 14

Turkey has prevailed or settled prior to an award on damages over two-thirds of its 14 arbitrations. In all six Uzan family arbitrations, tribunals have ruled in favor of Turkey. In the Uzan awards (issued between 2009 and 2016), the investors were ordered to pay more than US$25 million in costs to Turkey in the aggregate.232 Public reporting suggests that Turkey has only been able to recover 20 percent of this

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229 ‘Atutaltak a ferihegyi perben megı´te´lt ka´rte´rı´te´st [Compensation awarded in the Ferihegy trial has been transferred]’ (Népszabadság, 31 October 2006) <http://nol.hu/archivum/archiv-422794-233114> accessed 16 June 2020.

230 Československá obchodní banka, a. s., ‘CSOB Bank posted CZK 4.27 bn in Net Profit for 1Q 2005 (unconsolidated, unaudited)’ (29 April 2005) <www.csob.cz/portal/documents/10710/743434/PR050429a.pdf> accessed 16 June 2020.

231 Slovak Republic v Achmea BV, BGH, 31.10.2018 - I ZB 2/15 [Federal Court of Justice, 31 October 2018 case I ZB 2/15].

232 Cem Cengiz Uzan v The Republic of Turkey, SCC Case No 2014/023, Award on Respondent’s Bifurcated Preliminary Objection (20 April 2016); Cementownia ‘Nowa Huta’ SA v Republic of Turkey (I), ICSID Case No ARB(AF)/06/2, Award (17 September 2009); Cementownia ‘Nowa Huta’ SA (Poland) and Polska Energetyka Holding SA (Poland) v Republic of Turkey (II), UNCITRAL, Award (1 January 2009); Mr Saba Fakes v Republic of Turkey, ICSID Case No ARB/07/20, Award (14 July 2010); Europe Cement Investment & Trade SA v Republic of Turkey, ICSID Case No ARB(AF)/07/2, Award (13 August 2009); Libananco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/ 8, Award (2 September 2011).
amount as of 2013.\textsuperscript{233} On the other hand, Turkey has voluntarily paid the only adverse award rendered against it, in the \textit{PSEG} case, without any enforcement proceedings (US$9 million).\textsuperscript{234}

Two of the three ongoing cases against Turkey reportedly arose out of the Turkish Government’s seizure of companies allegedly having links to Fethullah Gulen, the exiled imam who the Turkish government claims masterminded the failed coup in 2016.\textsuperscript{235}

d) Georgia, Serbia and Moldova

![Georgia: Georgia has been a respondent in 14 arbitrations, three of which are pending. It voluntarily paid all of the four damages awards against it.\textsuperscript{236} In some cases, compliance took place after the investors commenced enforcement proceedings.\textsuperscript{237} The Kardassopoulos and Fuchs arbitration may be briefly noted. In March 2010, Mr Kardassopoulos and Mr Fuchs were awarded more than US$90 million after an ICSID tribunal found Georgia liable for terminating a concession to develop an oil pipeline. Georgia sought to annul the award before an ICSID Ad Hoc Committee. While the annulment proceeding was pending, Georgia arrested Mr Fuchs as he visited to the country, which he alleged was at the invitation of the Georgian Prime Minister to negotiate a post-award settlement.\textsuperscript{238} He was accused of offering a bribe

\textsuperscript{233} It has been reported that Turkey succeeded in collecting US$5 million from the Uzan family Claimants. Mehmet Nayır, ‘\textit{Uzanlar 6 milyar dolar götürmiş} [The Uzans took $ 6 billion]’ Sabah (Istanbul, 25 September 2013) <www.sabah.com.tr/yasam/2013/09/25/uzanlar-6-milyar-dolar-goturmus> accessed 16 June 2020.

\textsuperscript{234} Ziya Akinci, ‘Turkey’ in Fouret (ed) (n 11) 464.

\textsuperscript{235} Tom Jones, ‘Details of ICSID claim against Turkey emerge’ (Global Arbitration Review, 12 July 2018) <https://globalarbitrationreview.com/article/1171913/details-of-icsid-claim-against-turkey-emerge> accessed 16 June 2020; ‘Turkey faces claim over media crackdown’ (Global Arbitration Review, 1 March 2018) <https://globalarbitrationreview.com/article/1166235/turkey-faces-claim-over-media-crackdown> accessed 16 June 2020.

\textsuperscript{236} Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia, ICSID Case No ARB/08/19, Award (9 August 2012); Ron Fuchs v The Republic of Georgia, ICSID Case No ARB/07/15, Award (3 March 2010); Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No ARB/05/18, Award (3 March 2010); and Ares International Srl and MetalGeo Srl v Georgia, ICSID Case No ARB/05/23, Award (28 February 2008). See Ziya Akinci, ‘Turkey’ in Fouret (ed) (n 11) 467; Sebastian Perry, ‘Fuchs released after settling with Georgia’ (Global Arbitration Review, 2 December 2011) <https://globalarbitrationreview.com/article/1030820/fuchs-released-after-settling-with-georgia> accessed 16 June 2020. Georgia represented its intention to pay the Ares International award. Luke Eric Peterson, ‘ICSID panel orders Georgia to post $100 million financial security as condition for staying enforcement of arbitral award while review process plays out’ (IA Reporter, 25 November 2010) <www.iareporter.com/articles/icsid-panel-orders-georgia-to-post-100-million-financial-security-as-condition-for-staying-enforcement-of-arbitral-award-while-review-process-plays-out> accessed 16 June 2020. The authors understand that the parties settled after the award was rendered.

\textsuperscript{237} Kyriaki Karadelis, ‘Fuchs and Kardassopoulos seek enforcement in New York’ (Global Arbitration Review, 21 November 2011) <https://globalarbitrationreview.com/article/1030788/fuchs-and-kardassopoulos-seeking-enforcement-in-new-york> accessed 16 June 2020.

\textsuperscript{238} Paul M Barrett, ‘The Surprise Ending to the Rony Fuchs Affair’ Bloomberg Businessweek (New York, 8 December 2011) <www.bloomberg.com/news/articles/2011-12-08/the-surprise-ending-to-the-rony-fuchs-affair> accessed 16 June 2020.
to the deputy finance minister and was sentenced to seven years’ imprisonment.\(^\text{239}\) Mr Fuchs maintained that he was innocent and viewed his incarceration as pressure to forgo payment of the award.\(^\text{240}\) In parallel, Mr Fuchs commenced enforcement proceedings in New York and filed a claim before the European Court of Human Rights.\(^\text{241}\) Following a request from Mr Fuchs’s home State, Israel, he was pardoned and left the country. Reportedly, the parties agreed to settle for US$37 million.\(^\text{242}\)

Serbia: Five awards on damages have been issued against Serbia in a total of 12 arbitrations. Serbia has honored three.\(^\text{243}\) We have not been able to retrieve information as to whether the awards in ‘Congress’ Holding GmbH and and UAB ‘ARVI’ ir ko and UAB ‘SANITEX’ have been paid.’\(^\text{244}\)

Moldova: Tribunals have rendered an award on damages in five out of the 14 arbitrations against Moldova.\(^\text{245}\) Moldova is reported to have paid the amounts awarded to the investors in ‘Frank Arif, Iurii Bogdanov (III) and Iurii Bogdanov et al (I),’\(^\text{246}\) but there is no confirmation of compliance with the award in ‘Zbigniew Piotr Grot and others.’\(^\text{247}\) Moldova is currently seeking to annul the Energoalians award before the French courts, on the ground that Energoalians’ (now Komstroy)\(^\text{248}\) claims for money from Moldova’s State-owned energy operator did not qualify as an investment under the ECT. On 12 April 2016, the Paris Cour d’Appel set the award aside, finding that a claim to money deriving from a cross-border electricity supply contract does not.

\(^{239}\) Sebastian Perry, ‘Fuchs released after settling with Georgia’ (Global Arbitration Review, 2 December 2011) <https://globalarbitrationreview.com/article/1030820/fuchs-released-after-settling-with-georgia> accessed 16 June 2020.

\(^{240}\) Gornitzky & Co, ‘Israeli Hostage Rony Fuchs Will Appeal Conviction by Georgia to European Court of Human Rights, says Jailed Man’s Lawyer, Archil Kbilashvili’ (4 April 2011) <www.prnewswire.com/news-releases/israeli-hostage-rony-fuchs-will-appeal-conviction-by-georgia-to-european-court-of-human-rights-says-jailed-mans-lawyer-archil-kbilashvili-110961069.html> accessed 16 June 2020.

\(^{241}\) Kyriaki Karadelis, ‘Fuchs and Kardassopoulos seek enforcement in New York’ (Global Arbitration Review, 21 November 2011) <https://globalarbitrationreview.com/article/1030788/fuchs-and-kardassopoulos-seek-enforcement-in-new-york> accessed 16 June 2020.

\(^{242}\) Perry (n 239).

\(^{243}\) ‘Set-aside application by Serbia is discontinued in relation to $40 million Greek BIT Award’ (IA Reporter, 27 February 2018) <www.iareporter.com/articles/set-aside-application-by-serbia-is-discontinued-in-relation-to-mytilia-neo-award> accessed 16 June 2020; Damien Charlotin, ‘Revealed: in a still-confidential ICC award against Serbia, sole arbitrator Michael Pryles grappled with questions of state succession and apparent authority to contract’ (IA Reporter, 13 December 2019) <www.iareporter.com/articles/revealed-in-a-still-confidential-icc-award-against-serbia-sole-arbitrator-michael-pryles-grappled-with-questions-of-state-succession-and-apparent-authority-to-contract> accessed 16 June 2020. Marijana Avakumovic, ‘У 2020. за изгублене спорове даћемо 20 милијарди динара [We Will Pay 20 Billion Dinar for Lost Cases in 2020]’ Politika (Belgrade, 28 November 2019) <www.politika.rs/scclanak/442951/Ekonomska-U-2020-za-izgubljenesporove-dademo-20-miliard-dinar> accessed 18 June 2020.

\(^{244}\) Kunstrans Holding GmbH and Kunstrans slo Boograds v Republic of Serbia, ICSID Case No ARB/16/10, Award (19 November 2018), IAB ‘ARVI’ ir ko and UAB ‘SANITEX’ v Republic of Serbia, ICSID Case No ARB/09/21, Award (16 March 2015).

\(^{245}\) Zbigniew Piotr Grot, Grot Cimarron LLC, ICS Laguardia SRL and Laguardia USA LLC v Republic of Moldova, ICSID Case No ARB/16/8, Award (28 June 2018); Mr Franck Charles Arif v Republic of Moldova, ICSID Case No ARB/11/23, Award (8 April 2013); Energoalians Ltd v The Republic of Moldova, UNCITRAL, Award (23 October 2013); Yury Bogdanov v Republic of Moldova (II), SCC Case No 11/2008, Final Arbitral Award (30 March 2010); Iurii Bogdanov, Agardino-Invest Ltd. and Agardino-Chimia JSC v Republic of Moldova (I), SCC, Arbitral Award (22 September 2005).

\(^{246}\) According to a decision of the ECHR, Moldova complied with the Frank Arif award: ‘Le Bridge Corporation Ltd SRL v Republic of Moldova’ (App no 48027/10) ECHR 27 March 2018 18. It is reported that the Iurii Bogdanov and others (I) award was satisfied after the Moldovan Supreme Court recognized it in February 2006 and that the Iurii Bogdanov (III) award was voluntarily paid. See Jarrod Hepburn, ‘Moldova loses another treaty arbitration with Russian investor, but shows signs of cooperation with the arbitration system’ (IA Reporter, 17 May 2011) <www.iareporter.com/articles/moldova-loses-another-treaty-arbitration-with-russian-investor-but-shows-signs-of-cooperation-with-the-arbitration-system> accessed 16 June 2020.

\(^{247}\) The award of damages in ‘Zbigniew Piotr Grot and others v Moldova’ appears to be confidential. See Lacey Yong, ‘Moldova held liable in case over farm leases’ (Global Arbitration Review, 3 July 2018) <https://globalarbitrationreview.com/article/1171291/moldova-held-liable-in-case-over-farm-leases> accessed 16 June 2020.

\(^{248}\) After having acquired Energoalians’ rights, Komstroy appears as respondent in the French setting-aside proceedings.
not qualify as a protected investment under the ECT. The decision was quashed by the Cour de Cassation in 2018. In September 2019, the Paris Cour d’Appel suspended the proceedings on remand and referred to the European Court of Justice the question whether a claim to money under an electricity sales contract could qualify as an investment under the ECT.

(v) States with few or no adverse awards

Of the countries that have been respondents in more than 10 but fewer than 20 arbitrations, Algeria, Bulgaria, Colombia, Costa Rica, Croatia, Italy, Turkmenistan and the USA have had little to no involvement in complying with an adverse award. The following points are of note:

- Thirteen of the 14 arbitrations against Colombia are pending as at 31 December 2019. Colombia has announced its intention to seek annulment of the award in Glencore International (I).
- Italy has thus far been unsuccessful in two of the 11 arbitrations against it. The two arbitrations CEF Energia v Italy and Greentech Energy Systems and others.

Luke Eric Peterson, ‘Breaking: Energy Charter Treaty award is set aside in seat of arbitration, as court finds that contract debts did not qualify as a protected investment’ (IA Reporter, 13 April 2016) accessed 16 June 2020.

Damien Charlotin, ‘Energy Charter Treaty award is revived by court, re-stoking debate as to whether a “contribution” is an essential feature of an investment - or whether a mere “claim to money” also qualifies’ (IA Reporter, 10 April 2018) accessed 16 June 2020.

Algeria has not lost in any of its 10 cases.

Bulgaria appears to have received only one damages award out of its 10 arbitrations. In that case, Novena AD and others, a non-public settlement was likely reached. The award on damages remains confidential, see Jarrod Hepburn and Zoe Williams, ‘Bulgaria round up: as two tribunals are constituted to hear claims against the state, authorities lock down arbitral award in a third case’ (IA Reporter, 23 February 2016) accessed 18 June 2020. For information regarding the settlement, see Csongor Nagy, Investment Arbitration in Central and Eastern Europe: Law and Practice (Elgar Arbitration Law and Practice 2019) 2.038.

Costa Rica has been unsuccessful in two out of the 11 arbitrations against it, namely in the Unglaube and Santa Elena cases. It has voluntarily complied with both awards. Patricio Grané Labat and Dyalal Jiménez, ‘Costa Rica’ (Global Arbitration Review, 27 August 2015) accessed 18 June 2020. (“Consistent with its obligations under international law, including under the ICSID Convention, Costa Rica has complied with the only two awards that have ordered it to pay compensation to foreign investors”).

Colombia has been a respondent in 15 arbitrations. The tribunal in B3 Croatian Courier Coöperatief Ud found Colombia liable, but did not award damages. ‘Colombia found in breach of BIT, but not liable for any damages in dispute over bankrupted express courier’ (IA Reporter, 11 April 2019) accessed 18 June 2020. See Georg Gavrilovic and Gavrilovic doo v Republic of Croatia, ICSID Case No ARB/12/39, Award (26 July 2018).

The USA has faced 16 arbitrations, all arising under the NAFTA. None of the arbitrations against the United States of America has reached the compliance stage. The United States has won 60% of the arbitrations against it, while the remainder were either withdrawn or settled before an award on damages was issued. For instance, the rejection of their bid to construct the Keystone XL Pipeline led investors to initiate an arbitration in 2016. The proceeding was discontinued a year later when the Trump administration allowed the pipeline to be built. Douglas Thomson, ‘TransCanada drops US$15 billion NAFTA case’ (Global Arbitration Review, 27 March 2017) accessed 18 June 2020.
Novenergia v Italy are both based on intra-EU BITs/ECT. It is not yet known whether Italy has honored the awards.

- Turkmenistan has faced 13 arbitrations, two of which resulted in adverse awards. The Adam Dagan award was apparently satisfied within a year of its issuance. It is not clear whether Turkmenistan has paid the award in Garanti Koza.

V. ANALYSIS

The principal goal of the preceding section has been to examine whether the prevalent paradigm (or mantra) that States largely comply with investment awards is in tension with the publicly known facts. We will address this in what follows, together with other inferences from the data and developments presented above.

A. States Prevail More Often than Investors

It is helpful first to take note of the overall results from concluded proceedings. This allows us to contextualize compliance/non-compliance.

It is known by now that States generally prevail in investment treaty arbitration more often than investors. The 32 States discussed above were involved in 528 concluded arbitrations. In 185 instances, or 35 percent of the arbitrations, the State prevailed or no damages were payable by the State despite an adverse ruling on liability. Some 170 arbitrations, or 32 percent of the concluded arbitrations, resulted in a damages award in favor of the investor. Lastly, a claim was withdrawn or settled prior to an award of damages in 173 arbitrations, or 33 percent of the concluded cases.

This largely corresponds to UNCTAD data. Those statistics indicate that States have defeated investors’ claims (on preliminary objections, merits or damages) in 38.6 percent of the 674 publicly known concluded investment treaty disputes. Settlements before a damages award or discontinued arbitrations account for the remaining 32 percent of all concluded arbitrations. Investors have secured damages awards in 29.4 percent of the cases. Such damages awards will include instances in which the investor has received a small fraction of the claimed amount, which the State might also see as a

258 CEF Energia BV v Italian Republic, SCC Case No 158/2015, Award (16 January 2019); Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v Italian Republic, SCC Case No 2015/095, Award (23 December 2018).

259 ‘Turkmenistan pays to stay’ (Global Arbitration Review, 21 January 2015) <https://globalarbitrationreview.com/article/1033999/turkmenistan-pays-to-stay> accessed 18 June 2020.

260 Garanti Koza LLP v Turkmenistan, ICSID Case No ARB/11/20, Award (19 December 2016).

261 In a limited number of instances we have chosen to classify certain investor–State proceedings differently than UNCTAD. For example, the authors chose to treat State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria, ICSID Case No ARB/15/43, as ‘Discontinued’ on account of the fact that the investors had withdrawn their claims before an award on damages and that the ensuing award allocated costs only to Bulgaria. The UNCTAD Investment Dispute Settlement Navigator instead categorizes the case as ‘Decided in favor of State’. Jack Ballantyne, ‘Bulgaria gets costs after Omani fund withdraws claim’ (Global Arbitration Review, 20 August 2019) <https://globalarbitrationreview.com/article/1196532/bulgaria-gets-costs-after-omani-fund-withdraws-claim> accessed 11 June 2020. Likewise, our dataset includes cases that are not part of the UNCTAD database. As explained in the ‘Methodology and caveats’ section above, our study counts arbitrations arising out of investment contracts and the State’s domestic investment law, in addition to those under investment treaties, unlike UNCTAD. For example, Kazakhstan has seen a few cases, such as World Wide Minerals v Republic of Kazakhstan (I), UNCITRAL, Ruby Roz Agricol and Kaseem Omar v Kazakhstan, UNCITRAL, and Enrho St Limited v Republic of Kazakhstan, ICSID Case No ARB/02/11, arising purely under its investment law and/or an investment contract.

262 UNCTAD Investment Dispute Settlement Navigator <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 11 June 2020. Within this category, States may also make payments or other concessions to investors, but it would be difficult to say who had the better bargain in the circumstances even if data on such settlements were always public, which it is not.
‘win’. Likewise, as converging empirical studies have shown, in practice, the damages awarded to investors are significantly less than the amount claimed—according to one author, approximately 30 percent of the compensation sought.

Concluded arbitrations - UNCTAD

![Pie chart showing the outcomes of concluded arbitrations.]

- 29.40% Investor prevailed
- 32% State prevailed/ No damages payable
- 38.60% Withdrawn/ Settled prior to award on damages

B. States Often Seek Annulment

Ordinarily, the obligation to comply with an award arises at the time of the award (or, more specifically, at the date established in the award itself). At the same time, both under the ICSID Convention system and outside it, States (and investors) can seek the annulment or setting aside of an award. Whereas a State may seek an order to stay enforcement while annulment is pending, such orders do not affect the obligation to comply with an award: they address the award creditor’s efforts forcibly to collect while annulment is ongoing.

Rate of annulment sought (170 awards against States)

![Pie chart showing the rate of annulments sought.]

- 16% Annulment initiated by State
- 84% No annulment initiated by State

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264 See eg Pope & Talbot Inc v The Government of Canada, UNCITRAL, Award in Respect of Damages (31 May 2002) (US$0.4 million awarded and US$507 million claimed); Georg Gavrilovic and Gavrilovic doo v Republic of Croatia, ICSID Case No ARB/12/39, Award (25 July 2018) (US$3.2 million awarded and US$231.8 million claimed).

265 Rachel L. Wellhausen, ‘Recent Trends in Investor-State Dispute Settlement’ (2016) 7(1) JIDS 117. See also Roberto Echandi, ‘The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications’ (2019) 34(1) ICSID Rev—FILJ 32, 55; Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study’ (2015) 25(4) EJIL 1147, 1157–60; Franck (n 18) 58–64.

266 ICSID Convention (n 5) arts 53–54. See also Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (5 March 2009) para 27 (‘An ICSID award is immediately payable by the award debtor, irrespective of whether annulment is sought or not. A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour of granting a stay of enforcement’).

267 ICSID Convention (n 5) art 52; UNCITRAL Model Law (2006) art 34.

268 ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) r 54; UNCITRAL Model Law art 36(2); New York Convention (n 4) art VI. See also UNCITRAL Guide on the New York Convention (n 4) 272–3.
Although the standard for ICSID annulment is exacting,269 States often seek to annul or set aside adverse awards. Of the 170 disputes resulting in damages awards that we have examined, States have initiated annulment or setting-aside proceedings in 141, or 83 percent of the cases. The remaining 26 awards were mostly complied with voluntarily (or, in some cases, it is not known whether the payment was made). Bolivia, for instance, has never sought to annul an adverse award against it. On the other hand, States that appear more frequently as respondents, such as Argentina, Venezuela, Ecuador and Russia, have challenged most adverse awards. A State is thus likely to seek annulment and not voluntarily to comply with an award while annulment proceedings are ongoing. This may be so: (i) because of unwillingness to take the responsibility for payment of significant amounts where a remedy is still theoretically available or where such a remedy is being pursued; (ii) due to political considerations; (iii) as a result of earnest convictions that the award is incorrect or unjust; (iv) in order to obtain additional time to comply; (v) for reasons of posturing vis-à-vis other investors as a State reluctant to pay damages, etc. In other words, for certain States, voluntary compliance becomes an option only when they have exhausted all available remedies against the adverse award.

C. The Instances of Non-Compliance are Notable and will Mount

This contribution’s primary inquiry has been to test the prediction of the founders of the modern international investment regime—and the hypothesis supported by most observers—that compliance with investment awards would be (or is) the norm, generally and even overwhelmingly.

It is correct that many States have observed their international obligations to comply with investment awards, with approximately a third of the States examined here having perfect records and several others not having complied with one award only. For example, Ecuador and Bolivia (past heavy critics of the investment regime that denounced the ICSID Convention) and Egypt and the Czech Republic (among the top five most sued States) have generally complied with adverse awards against them.270

At the same time, and as the above discussion has shown, the instances of non-compliance are significant.

269 See eg Alapli Elektrik BV v Republic of Turkey, ICSID Case No ARB/08/13, Decision on Annulment (10 July 2014) para 32 (‘In the Committee’s view, and in light of the text of the Convention, annulment is a limited remedy with a strictly circumscribed role: to safeguard the fundamental fairness and integrity of the underlying proceeding’). In 2016, ICSID reported that 16% of the annulment proceedings instituted by then resulted in partial or full annulment. See ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’ (5 May 2016) 24.

270 As at 31 December 2019, Ecuador is currently seeking to annul one damages award and Egypt was in settlement talks in relation to one outstanding award.
The States reviewed in this survey have paid damages in 85 of the 170 cases that they lost. There is no public information about payment in 51, or 30.5 percent, of these cases. As noted above, it is possible that some of the disputes recorded here as ‘Payment not known’ have been settled (partly or fully) without information of such compliance being available publicly. Even with that caveat in mind, the data examined here show that non-payment can no longer be considered a theoretical possibility.

As discussed above, among the three most sued States, compliance issues abound:

- In many cases, Argentina’s compliance with investment awards was preceded by investors pursuing enforcement or by diplomatic pressure. Often, settlement took years to achieve.
- As regards Venezuela, with the exception of Gold Reserve, there is no public information that the State has satisfied any of the post-2012 damages awards against it (12 for which payment remains unknown and five in relation to which annulment proceedings are pending). Enforcement action against Venezuela is ongoing in numerous jurisdictions.
- As for Spain, there is no indication that Spain has paid any award since Maffezini (itself rendered in November 2000 and worth 180,000 euros) and there is little hope that, following Achmea, Spain will voluntarily comply with intra-EU awards.

Public information on compliance is also lacking in relation to an important number of awards against the Russian Federation, Kazakhstan, Kyrgyzstan, Libya and Ukraine. Conversely, the most widely publicized enforcement efforts are associated with some of these jurisdictions.

Several other points emerge from the data set examined in this study.

First, where a State observes its obligations under an arbitral award, such observance usually follows a decision on annulment. Whereas most States have made payments promptly following an unsuccessful annulment outcome, some States have complied with significant delays and settlements have involved significant discounts. The matter of delay can be addressed with the awarding of interest, whereas, as far as discounts are concerned, some investors may already include relevant markdowns in

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271 The enforcement proceedings before the Ukrainian courts in relation to two awards against Ukraine are in their final phases.
their long-term economic models. At the same time, for other industries or types of investors, there may be little margin for delayed and/or discounted recovery.

Secondly, where a State agrees to settle a dispute, it might not comply with the terms of the settlement at a later stage. This is seen, for example, in the case of Venezuela. Venezuela failed to observe several settlements, and recently its National Assembly has declared the arrangements with Crystallex and Rusoro null and void. Similarly, the Williams Companies have launched a second arbitration, alleging that Venezuela’s failure to comply with the settlement of the first arbitration violates international law.

Thirdly, and perhaps unsurprisingly, the information examined here supports the conclusion that where States face a series of arbitrations related to the same or similar measures with the risk of numerous consecutive losses, they are unlikely to comply (or, at least, comply promptly). This is borne out by the discussion of the experiences of Argentina, Venezuela and Spain, but is also likely to be relevant, for example, to the Crimea cases against the Russian Federation.

Faced with the prospect of billions in damages, a State may not have the means—or simply be unwilling—to pay. A State could be concerned that an early arrangement with one investor would create a precedent or otherwise weaken its overall negotiation position. Or, a State may firmly believe that, for whatever reason (economic, legal, political or other), it had the right or legitimacy to take the important measures leading to the flurry of proceedings.

Such defaults will have practical ramifications for investors. Unlike domestic legal systems, international law does not contain rules for orderly, efficient and rule-based (eg, hierarchical or pro-rata) payment of creditors. Award creditors will be required to litigate concurrently and in competition with one another, as is the case with investors seeking to enforce against Venezuela and Spain at present. In such circumstances, the ability of an investor to come in first in obtaining an award, negotiating an arrangement and/or attaching assets will be paramount. At the same time, first-in-time investors may blaze the trail for those who follow, by both securing substantive findings of tribunals and opening enforcement avenues. For example, Crystallex’s successful piercing of PDVSA’s veil is likely to cause other creditors to swarm the assets of Venezuela’s oil giant.

Fourthly, the data examined here neither firmly supports nor disproves the intuitive notion that a State may be less likely to comply with high-value awards as opposed to lower-value ones. Of the 20 cases in which the highest damages were awarded, nine are currently pending annulment, five appear to have resulted in compliance and for six payments is unknown. Payments that reached nearly a US$1billion were made in Gold Reserve, Occidental II and CSOB, by Venezuela, Ecuador and Slovakia respectively. Given that States rarely communicate the reasons for settlement or payment, it is not always possible to discern why a State may comply with awards or why it would comply with one award but not others. For example, whereas Venezuela has not paid many high-value awards, the payment of the award in Gold Reserve may have been motivated by ancillary reasons. For example, it has been reported that the settlement allowed Venezuela to acquire certain mining rights,

272 See Subsection IV.B(i).
273 Vaughan Lowe, ‘Some Comments on Procedural Weaknesses in International Law’ (2004) 98 ASIL Proc 37, 39.
which it then used as collateral for a US$2 billion loan.\textsuperscript{274} At the same time, we have identified five cases in which the damages range between US$400,000 and US$5 million, annulment proceedings are not ongoing, and information on payment is unavailable.\textsuperscript{275} Accordingly, even low-value awards may not be honored.

Fifthly, States may not be willing to comply due to political reasons. The Russian Federation has not complied and is unlikely voluntarily to pay damages relating to the annexation of Crimea. Ukraine may not feel compelled to honor awards in favor of Russian companies or individuals.

Sixthly, States may refuse payment due to strong disagreement with the correctness of an award. As discussed above, Mexico, which has a perfect overall compliance record, initially did not want to pay the award in Cargill despite the fact that it had complied with other awards relating to the very same measures. Mexico bore a principled disagreement with the ruling in Cargill that extended damages (or the tribunal’s jurisdiction, depending on one’s interpretation of the award) to goods (ie, HFCS) produced in the United States and traded in Mexico: the State appears to have considered that such trade of goods originating from the United States was squarely that—international trade—and not an investment matter. Similarly, Argentina had ample arguments not to pay the CMS award, after the ICSID Ad Hoc Committee heavily criticized the award but did not annul it.\textsuperscript{276}

Finally, since Achmea, many of the EU Member States examined here, including, Spain, Poland, Romania, Slovakia and Italy have not complied or have signaled that they would not comply with adverse intra-EU awards. One may debate whether the conflict between EU law and investment law originated in truly competing legal paradigms or was actually engineered by structures within the EU who disliked the experience or prospect of being a respondent in investment arbitration more than they liked the protection that investment treaties offer to their own investors. But this is irrelevant for how EU States will behave in relation to adverse intra-EU awards: these are very unlikely to be complied with within the EU and massive enforcement efforts will be required for any State-owned assets outside the EU.

D. Enforcement is Both Difficult and Unavoidable

It is not the purpose of this article to delve into the specific difficulties presented by enforcement against sovereigns. This subject has been amply discussed in commentary.\textsuperscript{277}

The difficulty in enforcing against States arises from the concurrent operation of two principles: the State’s sovereign immunity from execution over non-commercial assets and the separate legal personality of State entities that often hold title over the

\textsuperscript{274} Alexandra Ulmer and Girish Gupta, ‘Venezuela, Gold Reserve to settle arbitration dispute with joint venture’ Reuters (Caracas, 25 February 2016) <www.reuters.com/article/us-venezuela-arbitration/venezuela-gold-reserve-to-settle-arbitration-dispute-with-joint-venture-idUSKCN0VY05Y> accessed 11 June 2020.

\textsuperscript{275} Zbigniew Piotr Grot, Grot Cimarron LLC, I.C.S. Laguardia SRL and Laguardia USA LLC v Republic of Moldova, ICSID Case No ARB/16/8, Award (28 June 2018); Mr. Franz Sedelmayer v The Russian Federation, SCC, Arbitration Award (7 July 1998); Garanti Koza LLP v Turkmenistan, ICSID Case No ARB/11/20, Award (19 December 2016); Marco Garavazzi and Stefano Garavazzi v Romania, ICSID Case No ARB/12/25, Award (18 April 2017); Les Laboratoires Servier, SAS, Biofarma, SAS, Arts et Techniques du Progres SAS v Republic of Poland, UNCITRAL, Award (14 February 2012).

\textsuperscript{276} CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of The Argentine Republic (25 September 2007) para 158.

\textsuperscript{277} See eg Doak Bishop (ed) (n 11); Fouret (ed) (n 11). Professor Schreuer has observed that enforcing investment awards against States is the ‘Achilles’ heel’ of the ICSID system. See also Schreuer and others (n 9) 1154.
State’s commercial assets. Where it may not be reasonable or even desirable to call for significant exceptions to the principle of sovereign immunity from execution for jure imperii activities, it is the legal framework on the piercing of the corporate ‘veil’ that could give way to allow for execution over assets held by entities and instrumentalities that are the State’s alter ego. Yet, the instances of successful ‘veil’ piercing continue to be extremely rare, with Crystallex’s victory against PDVSA in the United States being the leading example in recent times.

The result is that enforcing against a State can be very difficult. It requires exceptional financial resources, specific expertise and an abundance of time. Even if an investor would have access to such resources, it may be reluctant to employ them where it has an ongoing relationship with the State, given that enforcement is usually received as particularly hostile. And even where an investor is unbridled in its ability and inclination to enforce, there simply may not be sufficient attachable assets outside the State. Relatedly, the more that States are exposed to enforcement action, the more they will seek (or learn) to shield their property with varying degrees of sophistication. As discussed above, a US court denied the investors’ petitions to preclude Venezuelan companies from repatriating assets, but nevertheless observed that the ‘intent behind this series of transactions was to hinder creditors’.\textsuperscript{280}

Frequently, an investor’s endgame will be to secure settlement, by causing sufficient nuisance via enforcement and perhaps also by waiting for a new administration that may be more amenable to discussion. An investor may also seek to monetize its award by selling or assigning the right to compensation to third parties. Alternatively, investors may plan ahead for the non-compliance scenario by obtaining political risk insurance for a State’s failure to comply with an investment award or by securing waivers of sovereign immunity from execution.

Where States have not sought to comply with a significant number of awards and/or have pursued annulment, it is unsurprising that investors have often had to pursue enforcement.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{enforcement_actions_initiated.png}
\caption{Enforcement actions initiated}
\end{figure}

\begin{itemize}
\item Enforcement initiated
\item No enforcement
\end{itemize}

\textsuperscript{278} Emmanuel Gaillard, ‘Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles’ in Emmanuel Gaillard and Jennifer Younan (eds), \textit{State Entities in International Arbitration} (Juris Publishing 2008) 183 (‘when creditors try to enforce a decision against a State through assets allocated to jure imperii activities, the State will raise its immunity from execution; when creditors try to seize assets allocated to jure gestioni activities, they will be told that they are not pursuing the right debtor. As a result, the State is effectively in a position where it has the power to enforce, at its own discretion, only those awards it chooses to enforce’).

\textsuperscript{279} ibid 189–93.

\textsuperscript{280} Crystallex Int'l Corp v Petroleos de Venezuela, SA, 879 F3d 79 (3d Cir 2018).
Investors have initiated enforcement proceedings in 67 out of the 170 cases in which a damages award was rendered in their favor, i.e., in 40 percent of the cases. According to public information, enforcement action has been taken against almost every state examined here that has been ordered to pay damages, with the exception of the Czech Republic, Hungary, India, and Canada.

Often, those enforcement efforts have involved sprawling, multi-year and multi-jurisdiction litigation. In addition to the enforcement chronicles often referred to by commentators (such as the Sedelmayer dispute), the post-award litigation between the Statis and Kazakhstan exemplify global and all-in battles. As discussed above, these proceedings have lasted years, and involved allegations of procedural fraud and the discovery of documents relating to the fraud allegations before US courts. The Micula brothers continue to seek the enforcement of their 2013 award, having also gone through countless domestic and EU court proceedings. Similarly, the majority shareholders in the former Yukos Oil Company witnessed the amendment of the domestic rules on attachment in two jurisdictions while they were in the course of seizing assets.

In short, enforcement is often necessary. Where investors will usually have significant hurdles to surmount, enforcement efforts may be accompanied by other forms of pressure, such as diplomatic protection and State countermeasures, which are discussed next.

E. Non-Compliance Breeds Re-politicization of Disputes

Where the host State fails to comply and where enforcement actions do not yield results, the investor has one recourse left: to turn to its own State.

As the Permanent Court of International Justice held in 1924, diplomatic protection is rooted in the ‘elementary principle of international law that a State is entitled to protect its subjects’ where ‘they have been unable to obtain satisfaction through the ordinary channels’. Although the source of diplomatic protection is international law, its nature is inherently political. First, espousal is not automatic, but rather a matter left entirely to the State’s discretion, driven by any consideration that the State deems relevant, including politics. The decision whether to engage in diplomatic protection can thus involve the weighing of various factors, including the importance of the national seeking protection, the State’s relationship with the offending State and the relative power of the two States. Secondly, the exercise of diplomatic protection can entail peaceful diplomatic exchanges or the initiation of intra-State proceedings, but it can also be accompanied by countermeasures, namely self-help action that is otherwise wrongful. In that context, States have

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281 The Mavrommatis Palestine Concessions (Greece v United Kingdom) PCJ Series A No 2 21.

282 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgement) [1970] ICJ Rep 3 [79] (‘The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action’).

283 International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ in Report of the International Law Commission to the General Assembly on the work of its fifty-eighth session, UN Doc A/56/10 (2006) (ILC Draft Articles on Diplomatic Protection) art 1 [9]-[10].

284 ILC Draft Articles on Diplomatic Protection art 16.

285 ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (n 283). See also Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) 79 BYBIL 264.
historically feared that other States would abuse retaliatory action and even resort to the use of armed force in the form of a countermeasure.286

Treaty regimes, including the ICSID system, were created to address precisely these problems with States taking up their nationals’ cause.287 The ‘fundamental objective’ of ICSID—and, it could be said, the modern international investment regime more generally—is to depoliticize investment-related disputes.288 To this end, the ICSID Convention precludes diplomatic protection in relation to a dispute that an investor and a State have consented to arbitrate, with one exception:289 where a State fails to comply with an award, an investor may solicit its home State to exert diplomatic pressure on the host State.290 Still, as discussed, the ICSID drafters considered that such failures would be rare. As the International Court of Justice held in Diallo, ‘the role of diplomatic protection somewhat faded, as in practice recourse is only made to in rare cases where treaty regimes do not exist or have proved inoperative. […] [Diplomatic protection] would therefore appear to constitute the very last resort for the protection of foreign investments’.291

The cases examined above indicate, however, that this ‘very last resort’ is not a very infrequent reality and is sometimes used prior to an award:

- Argentina paid numerous awards only after a number of investors lobbied their governments and the United States took action against Argentina. In particular, the US placed significant reliance on trade benefits and opposed World Bank and Inter-American Development Bank loans being issued to Argentina, all worth billions of US dollars;
- AIG and Chevron sought the US Government’s assistance in relation to their claims against Kazakhstan and Ecuador respectively;
- Aucoven sought the assistance of Mexico to compel Venezuela to pay its award, on numerous occasions;
- Repsol lobbied Spain and the European Union when Argentina planned to take over its Argentinian arm;
- Israel was involved in the process leading to the post-award settlement between Mr Fuchs and Georgia;
- on numerous occasions, Sweden advocated for Petrobart when Kyrgyzstan failed to comply with the award; and
- Valle Esina solicited the Italian Government to secure payment of its award against the Russian Federation.

The post-award power struggle is bidirectional. To take one example discussed above, when the Yukos majority shareholders began enforcement action against Russia, the State issued diplomatic notes to the States where enforcement proceedings were ongoing, in which it threatened reciprocal seizures of property. In that context and at that time, France and Belgium changed their laws on attachment.

286 James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 572–5.
287 John Dugard, Special Rapporteur, *Fourth Report on Diplomatic Protection* (6 June 2003) 19.
288 Shihata, (n 6).
289 For differing views on whether diplomatic protection is available where an investor has seized a tribunal outside the ICSID Convention, see Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 BYBIL 151, 167–84; Paparinskis (n 285) 281–96.
290 ICSID Convention (n 5) art 27.
291 *Case Concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* (Preliminary Objections Judgment) [2007] ICJ Rep 582 [88].
There are therefore notable instances where the investment treaty regime has proven ‘inoperative’ and where investors have turned to their own State for help. But diplomatic protection and the use of countermeasures themselves bring back—through the back door, as it were—problems that the modern investment protection regime sought to preclude in the first place. To name a few: (i) the host State may consider itself illegitimately overpowered by the home State; (ii) the home State may have no leverage vis-a-vis the host State; (iii) the home State may be wary of taking more aggressive action—such as countermeasures—that is otherwise wrongful and subject to strict international law conditions; and (iv) the home State may have little interest in devoting time and resources to the particular investor’s claims.

VI. CONCLUSION

In some respects, how one sees the results from the present analysis may be said to be a function of whether one is more inclined towards the ‘glass half full’ or the ‘glass half empty’ viewpoint.

A preliminary point that is not a matter of taste: the ICSID founders’ prognosis that compliance with investment awards would be a non-issue—framed, as it was, in such sweeping terms—has not held true. Whereas the majority of States have promptly complied with adverse awards usually after seeking annulment (with many having immaculate records), the instances of non-compliance or significantly delayed compliance are important. Since the 2000s, instances of non-compliance have increased and, by all accounts, are likely to continue to do so, especially where disputes are burgeoning, intra-EU or political. In 40 percent or more of the cases in which a State lost, enforcement proceedings were initiated. Several disputes have required the involvement of the investor’s home State. In view of the more extensive data set examined here, the early instances of non-compliance discussed in the previous scholarship appear to have been more symptomatic of systemic weaknesses than exceptions proving the rule of compliance. In practice this means that there are, and will be, cases in which, to get from expropriation to compensation, an injured investor will need to go through arbitration, annulment, enforcement and even diplomatic protection. That is a costly prospect.

Whether this state of affairs is alarming or not is perhaps more dependent on one’s point of view. Seen in the abstract, instances of non-compliance may cause reason for concern and may trigger debate about the gap between the authority and the effectiveness of the investment protection regime. Seen in historic context, the assessment may be different. As that giant of arbitration, the late Johnny Veeder, has observed, it took decades of inter-State toing-and-froing for the UK investor to obtain compensation in relation to the award in the famous Lena Goldfields arbitration against the Soviet Union. That dispute played out within the classical framework for investment dispute resolution, the effectiveness of which rested entirely on the State’s ability and inclination to espouse its nationals’ claims. Compared with pre-ICSID times, it may be said without hesitation that the modern system continues to be revolutionary in ensuring rule-based international investment protection and adjudication—regardless of the imperfect compliance record described above.

292 VV Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots of Three Ideas’ (1998) 47 ICLQ 747.
Improvements are both possible and necessary. Still, the ongoing discussion about the future of investment protection has hardly focused on compliance, enforcement and, more generally, effectiveness. Conversely, the ideological and myopic attacks on the system that appear to abound in the debate may provide States with arguments not to comply. And where States watchfully observe each other's conduct, non-compliance may breed further non-compliance.