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di MISRA MANU
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2018
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Abstract

This thesis aims to systematically examine the phenomenon of state compliance with investor-state arbitration (ISA) awards. Considering both legal and non-legal dimensions, it utilises an interdisciplinary approach, providing an overview of not just the legal obligation of compliance with ISA awards and the legal consequences of (or legal remedies against) non-compliance with the same, but also the social phenomenon of such compliance within a wider international order.

The thesis begins on a footing of public international law and then goes beyond the legal material to venture into the three dominant IR schools of thought that individually purport to explain compliance with international law, namely realism, liberalism and constructivism. Lastly, in tandem with theoretical analyses, the thesis triangulates this investigation with an empirical view of state compliance with ISA awards using a tool of analysis borrowed from the social sciences known as Qualitative Comparative Analysis (QCA).

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Chapter I:

Introduction

A. Research Problem

> "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[1]

> "[T]he King can do no wrong."[2]

Compliance has been regarded as one of the most central questions of international law,[3] one that has vexed all subfields in international affairs.[4] The above quotation by Louis Henkin, though ostensibly unsatisfactory, has nonetheless timelessly succeeded in encapsulating the perplexity of, and states of affairs within, the wider phenomenon of state compliance with international law.

Recent disruptions in the international legal order relating to compliance with international rulings, both within and outside the context of investor-state arbitration, such as the *Yukos* shareholders facing, what has developed into, a new 'enforcement saga' conducted by Russia, or China pushing its territorial interests in the South China seas and threatening global security

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[1] Henkin, L., 'How Nations Behave', New York, Columbia University Press, 1979, p. 47.

[2] Blackstone, W., 'Commentaries on the Laws of England', Book III, Chapter 17, 1765-176.

[3] Guzman, A. 'A Compliance-Based Theory of International Law', California Law Review, 90, 2002, p. 1826. See also, Koh, H., 'Why Do Nations Obey International Law?', Faculty Scholarship Series, Paper 2101, Yale Law School 1997.

[4] For a comprehensive bibliography of the literature on state compliance in general, see Bradford, W., 'International Legal Compliance: An Annotated Bibliography', North Carolina Journal of International Law & Commercial Regulation, 30, 2005, 379.

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by refusing to yield to an UNCLOS award rendered by the Permanent Court of Arbitration,[5] have rekindled interest in the 'compliance question' and fuelled new suspicion against international law.[6] In Europe too, such compliance has recently been hindered by not just the European Commission i.e. the '*Micula'* predicament faced by Romania against the ICSID Convention[7] but also the Italian domestic judiciary.[8]

Nonetheless, state compliance is a question which has long been dealt by and intrigued scholars, particularly 'realists' who, unlike traditional 'positivists' whose rule-based approach places greater emphasis on sources, consider compliance and authoritative interpretation as being the appropriate test for international law (or indeed any law) to be truly considered as law at all.

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[5] Page, J., 'China's Defiance of International Court Has Precedent—U.S. Defiance', The Wall Street Journal July 7, 2016. See also, Allison, G., 'Of Course China, Like All Great Powers, Will Ignore an International Legal Verdict', The Diplomat, 2016.

[6] Peters, A, 'After Trump: China and Russia move from norm-takers to shapers of the international legal order', Blog of the European Journal of International Law, EJIL Analysis, published on 10 November 2016.

[7] Tietje C. & Wachernagel C., 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration', 2015, 16 Journal of World Investment & Trade 205. See also, Herbert Smith Freehills LLP, 'The European Commission Prohibits Romania from Compliance with an ICSID Award' 2015, http://hsfnotes.com/publicinternationallaw/2015/04/16/the-european-commission-prohibits-romania-from-compliance-with-an-icsid-award-implications-for-the-enforcement-of-intra-eu-investment-treaty-awards/

[8] The Italian Constitutional Court, under Decision No. 238 of 22 October 2014, declared the unconstitutionality of Italy's compliance with the International Court of Justice (ICJ)'s judgment in *Germany v. Italy (Greece intervening).*

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Such a usage of compliance as a yardstick to test the effectiveness and status of international law as 'law' has of course been contended.[9] That said, whether or not compliance may necessarily be an effective indicator of the normative effects of the existence of international law, it is clear that understanding the former would, at the very least, be indispensable towards ascertaining the extent to which the latter realises its purposes and how it may be developed to do so better.

Although the definitional concept of compliance is, to an extent, contested by schools of both international relations and international law, the suggestion that, fundamentally, compliance occurs "when the actual behaviour of a given subject conforms to prescribed behaviour"[10] and non-compliance occurs, "when actual behaviour departs significantly from prescribed behaviour"[11], has received fairly common acceptance.

However, it is also well-established that any concept of compliance with law does not and cannot have any meaning except as a function of prior theories of the nature and operation of the law to which it pertains. Compliance is thus not said to be a free-standing concept, but one that "derives meaning and utility from theories, so that different theories lead to significantly

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[9] Howse, R. & Teitel, R., 'Beyond Compliance: Rethinking Why International Law Really Matters', NYU School of Law, Public Law Research Paper No. 10-08, 2010, available at: https://ssrn.com/abstract=1551923.

[10] Young, O., 'Compliance and Public Authority'. Baltimore, Johns Hopkins University Press, 1979, 172 pp.

[11] *Ibid*

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different notions of what is meant by compliance."[12] Thus, as a research concept, compliance "cannot stand on its own, but must depend on a stipulated or shared theory of law."[13]

International investment law, as a system, codifies the obligations that states owe to foreign investors and gives such private parties a direct right of action against host states for breaches of those obligations. Unlike other areas of international law where obligations are perceived as merely aspirational and where the prospect of enforcement varies, such obligations are concrete and directly enforceable through an international arbitral tribunal.

Furthermore, with an ever-widening network of (predominantly bilateral) treaties and agreements, the investor-state dispute settlement (ISDS) system has grown immensely, not only in terms of the number of participating countries but also the sheer value of global foreign direct investment (FDI) that it oversees.

Unsurprisingly then, under international investment law too, compliance with arbitral awards exists not just as the daily practical question facing claimant-investors once they emerge victorious following arbitral proceedings that are often protracted and costly, but also as an important phenomenon that underpins its own legitimacy. Furthermore, with specific regard to states and their incentive to comply with investment arbitration awards, a few contextual 'realist' or 'rationalist-oriented' points are worth noting:

First, formal acceptance of international investment law, through a bilateral or multilateral investment treaty, was presumed by many states (particularly developing ones) as being a precondition to receiving foreign investment. This 'positive correlation theory' was a key

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[12] Kingsbury, B., 'The Concept of Compliance as a Function of Competing Conceptions of International Law', Michigan Journal of International Law, 19, 345, 1998, p. 346.

[13] *Ibid*

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premise based on which mainly capital-importing states entered into investment treaty negotiations with capital-exporting ones.[14] Thus, in a more 'realist-rationalist' sense, investment treaty law was created partly as a result of capital-importing states agreeing to reduce their autonomy to achieve greater satisfaction of their preferences for economic growth brought on by inward FDI.

Alternatively, some government officials and scholars have argued that the scope of international investment law has been expanded beyond the participating States' original intent and that while "careful cost-benefit considerations drove some developing countries to adopt investment treaties, this was rare."[15] Instead, developing states overestimated the benefits of BITs and ignored the risks, at times perceiving the treaties as merely "tokens of goodwill."[16]

However, unlike trade agreements and international trade flows, the relation between bilateral investment treaties (BITs) and foreign direct investment (FDI) has proven to be dubious at best.[17] For example, a recent study found "no significant linkage between French

[14] Guzman, A., 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 Virginia Journal of International Law, 1998, p. 639, 669-70. Guzman argues that the growth of BITs represents a cascade of defection from the collective interest of developing nations and concludes that although BITs may be globally welfare enhancing because they represent a retreat from the exercise of market power by developing nations, they may well have lowered the welfare of the developing world.

[15] Poulsen, L., 'Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries', Cambridge University Press, 2015. See also, Poulsen, L. N. S. 'Sacrificing sovereignty by Chance: investment treaties, developing countries, and bounded rationality', The London School of Economics and Political Science, 2011.

[16] *Ibid*

[17] See for example Egger, P. & Pfaffermayr, M., 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment', 32 Journal of Comparative Economics, 788, 2004 (finding that positive impact of BITs manifests upon execution and increases upon implementation of treaty); Jeswald, W. S. & Sullivan,

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BITs and French outward FDI."[18] Another 2016 study shows that even when BITs do stimulate bilateral FDI flows from partner countries, "they do so only so long as the host country has not had a claim brought against it to arbitration."[19] When a host-state faces a claim, "FDI from sources with a BIT in place falls significantly more than that from unprotected sources."[20]

Instead, FDI decisions have been found to be driven immensely more by economic grounds and domestic legal regime characteristics of the host state than by the presence of a ratified BIT.[21] In any case, the role of foreign investment towards boosting economic growth has recently been argued as overestimated by 'free-trade absolutists'. For example, the 'East Asian

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N. P., 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 46 Harvard International Law Journal 67, 90, 2005, (examining success of BITs in achieving goals of investment protection and promotion, finding some positive effect); Yackee J., 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International)L aw: Do BITs Promote Foreign Direct Investment?', 42 Law & Society Review, 805, 2008 (finding no direct correlation between investment decisions and increased legal protection of international arbitration guarantees in treaties); Tobin, J. & Rose-Ackerman, S., 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties', Yale Law School., Centre for Law, Economics & Public Policy, Research Paper No. 293, 2005 (asserting that BITs do not encourage investment in countries whose economic climates are risky, though they may positively impact investment in already-attractive countries).

[18] Yackee, J., 'Do BITs 'Work'? Empirical Evidence from France', Journal of Intl Dispute Settlement, Oxford Uni. Press, 7 (1): 55-71. 2016.

[19] Aisbett, E., Busse, M. & Nunnenkamp, P., 'Bilateral Investment Treaties Do Work: Until They Don't', Kiel Working Paper, No. 2021, 2016.

[20] *Ibid*

[21] The Economist Intelligence Unit, Bingham Centre for the Rule of Law, Hogan Lovells LLP, 'Risk and Return – Foreign Direct Investment and the Rule of Law', British Institute of International Comparative Law, 2015.

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Miracle' of the 1990s was more an outcome of domestic government spending and internal capital markets than foreign investment.[22]

Secondly, ISDS has itself suffered from a fundamental lack of public confidence and garnered controversy over recent years particularly from developing states[23] whose very acceptance of the system has been regarded as paradoxical.[24] Empirical studies have concluded that "poorer states remain vastly more likely to lose in arbitration than wealthier states"[25] and that "collegial dynamics contribute to making awards more investor-friendly."[26] Perhaps unsurprisingly then, a number of states sought to recalculate the costs and benefits of international investment law, with responses ranging from "overhauling of treaties to reviewing to complete repudiation of the system."[27]

Lastly, unlike international trade law, where states face the prospects of formalised sanctions carried out by the aggrieved party who is authorised by the World Trade Organisation (WTO)

[22] Avishai B., "Thomas Piketty And the Foreign-Investment Question", The New Yorker, Currency, May 27, 2014.

[23] Kollamparambil U., 'Why Developing Countries are Dumping Investment Treaties', Uni. Of Witwatersrand, The Conversation, 2016.

[24] *Supra* note 14 (Guzman 1998).

[25] Behn, D., Berge, T. & Langford, M., 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', University of Oslo Research Paper No. 2016-08, 2016.

[26] Tucker, T., 'Inside the Black Box: Collegial Patterns on Investment Tribunals', Journal of International Dispute Settlement, Oxford University Press, 7 (1), 2016, p. 183-204. See also, Van Harten, G., 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration', Osgoode Legal Studies Research Paper No. 31/2016.

[27] Trakman L. & Musayelyan, D., 'The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration' ICSID Review Foreign Investment Law Journal, 43(1), 2016, p. 194.

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to retaliate with trade sanctions equivalent to the harm done by the violating state, under investment law such sanctions that carry teeth are minimal, though not entirely unprecedented.[28]

The above three factors would suggest that state compliance with arbitral awards resulting from ISDS would observably be constrained to an extent. After all, parties are not reasonably expected to participate in a voluntary system if they cannot predict and rely upon the result[29] and if the system itself is not what they envisaged, states will find greater incentives to defect.[30]

Such 'defection' was indeed considered unlikely to arise in investment law by early writings[31] but has nonetheless occurred. Concerns about state compliance first grew after a slew of awards were issued under the Argentina cases.[32] Though the state eventually settled,[33] similar

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[28] Rosenberg C., 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards', Georgetown Journal of International Law, 44 503, 2013.

[29] Profaizer J. R., 'Emerging Issues in the Enforcement of Foreign Arbitral Awards', Investing with Confidence: Understanding Political Risk Management in the 21st Century, World Bank Publications, 2009, p. 163

[30] Simmons, B., 'Compliance with International Agreements', Annual Review of Political Science, 1998, 1:75–93.

[31] See for example, Shihata, I., 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', ICSID Review Foreign Investment Law Journal, 1 (1): 1-25, 1986, p. 9.

[32] Nonetheless even then, a list of states which had previously not voluntarily complied would not have been restricted to Argentina. See for example, OECD Secretariat, 'Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012', OECD, 2012, p. 29

[33] Herbert Smith Freehills LLP, 'Argentina Settles Five Outstanding Investment Treaty Arbitration Claims in Historic Break with its Anti-Enforcement Stance', 2013, available at http://hsfnotes.com/arbitration/2013/10/14/argentina-settles-five-outstanding-investment-treaty arbitration-claims-in-historic-break-with-its-anti-enforcement-stance/.

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actions were observed when Ecuador decided to comply only after partial annulment of award.[34] More recently, after the much-celebrated *Yukos* awards emerged against Russia, non-compliance arose as a 'defence' that was not envisaged by the system.[35]

Broadly, however, the vast majority of participants in the international investment law system have abided by their obligations and state compliance with investor-state arbitral awards has been largely prevalent. There exist only about 20 known cases where a state has not voluntarily complied with an adverse arbitral award, which, in light of the total number of known cases where states not emerged victorious, roughly amounts to a remarkably high compliance rate above 80%.[36]

Surely then there exist forces, both legal and non-legal, which have led to not only such a high overall rate of compliance, but also compliance under cases such as *CME v. Czech Republic*[37] where, despite a parallel tribunal coming to a contrary conclusion regarding the state's liability, the Czech Republic paid, what at the time was, the largest publicly known award against a state of $355mn award issued in 2003. Such ardent compliance without formal

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[34] Scheyder E., 'Ecuador say it will Comply with Occidental Arbitration Award', Reuters Global Markets News, November 4, 2015, available at http://www.reuters.com/article/us-ecuador-occidental-idUSKCN0ST2SM20151104.

[35] Markert, L. A. & Titi, C., 'States Strike Back - Old and New Ways for Host States to Defend Against Investment Arbitrations', in Bjorklund A., 'Yearbook on International Investment Law & Policy 2013-2014', Oxford University Press, 2015, p. 401-435, 2015, p. 421.

[36] According to the latest UNCTAD records, by the end of 2015, out of 696 known ISDS cases, a total of 444 ISDS proceedings have been concluded, of which 26%, or roughly 115, cases resulted in unfavourable awards for states. See UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2015', United Nations Conference on Trade & Development, International Investment Agreements Issues Note, No. 2, June 2016.

[37] CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award, 14 March 2003.

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sanctions and an uncertain enforcement system contradicts our conventional image of how legal systems operate, resulting in what some have regarded as "a puzzle at the heart of international law."[38]

B. Aim & Significance

It is precisely this set of forces, including both legal and non-legal dimensions, that this thesis, as a contribution to the investment law literature, intends to explore towards its primary aim of systematically examining the phenomenon of state compliance with investor-state arbitration awards. The conclusions thus drawn would relate to pertinent questions of when and why state compliance occurs and would help to identify and expound on the risks of non-compliance for states who have, in some cases unwittingly, found themselves to be embedded in a complex network of treaty commitments. Such analysis of why and when states either adhere to or breach their obligation to comply is a critical one for two key reasons:

First, the ISDS system, in its current form, relies on voluntary compliance to underpin its legitimacy. After all, the defining characteristic of arbitration itself is finality[39] and the place of arbitration as a dispute resolution mechanism between states and investors depends upon the

[38] Ginsburg, T. & McAdams, R.H., 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', William and Mary Law Review, 45 1229, 2004, p. 1233.

[39] For example, most financial institutions perceive the finality of an award in international commercial arbitration and the limited grounds for challenge to be an advantage compared to litigation and perceive the enforceability of such awards as a key advantage. See ICC, 'Financial Institutions & International Arbitration', Commission on Arbitration & ADR, International Chamber of Commerce Commission Report 2016.

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value accorded to a valid award.[40] The often prolonged and costly enforcement proceedings which result from non-compliance therefore negatively impact the efficacy of arbitration and lowers user confidence. This is further true given how, even though effective enforceability before national courts has been one of the key features of arbitration as a viable alternative to litigation, final execution of ISA awards by national courts against state-owned assets has nonetheless of late been tricky and problematic[41] due to the current contours of the doctrine of sovereign immunity.[42]

Secondly, given how states have recently entered into a "phase of evaluating the costs and benefits of IIAs and reflecting on their future objectives and strategies as regards these treaties"[43], it is argued that any reforms of the ISDS system, particularly relating to the consequences of and remedies for non-compliance would be more effective and better positioned to be implemented with a thorough understanding of the compliance 'phenomenon'. Indeed, it has been previously suggested that there is room for creativity so as to ensure better compliance with ICSID awards, and ways to strengthen compliance (such as trade sanctions) should be explored.[44]

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[40] Sepúlveda-Amor, B. & Lawry-White, M., 'State Responsibility and the Enforcement of Arbitral Awards', Arbitration International, Oxford University Press, 32:3, 2016.

[41] Barra, M., 'Enforcement of Arbitral Awards Against the State in Foreign Investment Disputes', Transnational Dispute Management, TDM 1, 2005.

[42] See for example, Brandon, R., 'States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair', 2015, available at ssrn.com/abstract=2673335.

[43] UNCTAD, 'Reforming the International Investment Regime: An Action Menu', United Nations Conference on Trade & Development, World Investment Report 2015, Chapter IV, p. 124.

[44] Boisson De Chazournes, L., 'The Growth in Investment Litigation: Perspectives and Challenges', in Echandi R. & Sauvé, P., 'Prospects in International Investment Law and Policy', Cambridge University Press, 2013, p. 306-309.

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The gravity of this question has previously been (and may yet be) undervalued as voluntary compliance has traditionally been presumed to be "as a matter of routine"[45] and essentially considered as a non-issue, particularly by practitioners.[46] Given the current dynamics of inter-state relations and state sovereign immunity, considered the last and crucial bastion of defence for states,[47] it is argued that this presumption may be too generous, particularly for large awards

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[45] Reinisch, A., 'The Future of Investment Arbitration' in 'International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer', Oxford University Press, 2009, p. 898. While Reinisch notes this, he also remarks that, for states, the "really hard question about the attractiveness of investment arbitration" remains compliance.

[46] Rubins, N., Partasides, C., Mohtashami, R. & Blackaby, N., 'Will Growth in BIT Claims Really Slow Down?', Freshfields Bruckhaus Deringer, 2015, available at www.freshfields.com/foresight/article-06.html.

[47] Gaillard, E., 'Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles', in 'IAI Series on International Arbitration No. 4, State Entities in International Arbitration', Shearman & Sterling LLP, 179, 2008. Gerlich, O., 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?', American Review of International Arbitration, 26 (1), 2015. Bjorklund, A., 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes', American Review of International Arbitration, 211, 2010, Foster, G., 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform', Arizona Journal of International and Comparative Law, Vol. 25, No. 3, 2008. Bankas, E. K., 'The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts', Springer Berlin, 2005. Ostrander, J., 'The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgements, Berkeley Journal of International Law, 22, 2004, p. 541, Schill, S., 'International Investment Law and the Law of State Immunity: Antagonists or Two Sides of the Same Coin', in Hofmann, R. & Tams, C. 'International Investment Law and General International Law : from Clinical Isolation to Systemic Integration?', Nomos, 2011.

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in the future where the "costs may outweigh states' willingness to comply for (only) the payoff of an abstract future reputation."[48]

Unsurprisingly then, other than in relation to enforcement procedures, compliance as a concept is largely remote in the existing international investment law literature which has, of late, witnessed an unprecedented emphasis on substantive rules and comparative analyses. More generally, although international lawyers have been regarded as having had "too little to say about fundamentals of compliance beyond anecdotes and broad impressions"[49] and questions of compliance have been considered as being "poorly understood"[50], scholarly interest on the topic has been steady. Such interest, however, has leaned more towards primary compliance with international norms, embodied either in customary international law or in treaty obligations.[51]

Relatively neglected is the question of secondary compliance i.e. why states comply with decisions rendered by international courts and tribunals. In particular, theoretical explanations for compliance with investment awards have received little attention, barring a few prominent

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[48] Wellhausen, R., 'Recent Trends in Investor–State Dispute Settlement', Journal of International Dispute Settlement, Oxford University Press, 7 (1): 117-135, 2016, p. 29.

[49] See Schwebel, S. M., 'The Compliance Process and the Future of International Law', Proceedings of The American Society of International Law, 75, 1981, p. 178-85.

[50] Haas, P., 'Choosing to Comply: Theorizing from International Relations and Comparative Politics', in Shelton, D., 'Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System', Oxford, Oxford University Press, 2003, p. 64.

[51] See for e.g., Posner, E. & Goldsmith, J., 'A Theory of Customary International Law', University of Chicago Law Review, 66, 1113, 1999) integrated into 'The Limits of International Law', Oxford University Press 2006.

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exceptions.[52] This omission, i.e. to thoroughly deal with the secondary compliance question, is disconcerting as non-compliance undermines the foundations of international investment law.

This research therefore ultimately aims to close a clear gap in the investment law literature. By using an interdisciplinary approach and employing theories and empirical methodologies borrowed from the social sciences, it intends to provide a thorough analysis of not just the legal obligation of compliance with investor-state arbitral awards but also the wider phenomenon of such compliance itself.

C. Approach & Methodology

The suitability of an interdisciplinary approach towards such a study cannot be emphasised enough. It is argued that traditional 'positivist' legal analysis cannot, by itself, provide a satisfactory explanation for state compliance and stands the risk of being inadequate or incorrect. International affairs, after all, do not exist in a vacuum of legal rules and procedures but in a dynamic socio-political and economic environment. Indeed, Brierly's *Law of Nations* considers international law to be "neither a chimera nor a panacea, but just one institution among others which we have at our disposal for the building up of a saner international order."[53]

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[52] Hirsch, M., 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach', Journal of International Economic Law, Oxford University Press, 19 (3), 2016, p. 681-706.

[53] Brierly, J. L. & Clapham, A., 'Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations', Oxford University Press, 7th ed., 2012.

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More particularly, while international law has been a regular resource for international relations ("IR") scholarship,[54] international legal scholars too have successfully drawn from the various schools of thought within the field of IR to "diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; reconceptualise or reframe particular institutions or international law generally."[55] Such interdependence between international law and IR is inevitable, due to their common actors, and has proven to be beneficial. So much so that adopting IR as a social science approach has been regarded as being able to "make International Lawyers better lawyers."[56]

Therefore, in order to tackle state behaviour conclusively, this research will first begin on a footing of public international law and go beyond the legal material to venture into the three dominant IR schools of thought that individually purport to explain compliance with international law, namely realism, liberalism and constructivism.[57] Such an approach would take advantage of the rich compliance literature within IR to gain better insights into the compliance calculus that states face.

The employment of empirical methods in tandem with theoretical work on international law and IR is essential if one were to subscribe to the view that "norm idealism without reality check

[54] See for example, Simmons, B.A., 'International Law and State Behaviour: Commitment and Compliance in International Monetary Affairs', The American Political Science Review, Vol. 94, No. 4, 2000, p. 819-835.

[55] Slaughter, A. M., Tulumello, A.S. & Wood, S., 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', American Journal of International Law, 92, 367-397, 1998, p. 369.

[56] Slaughter, A. M., 'International Law and International Relations: Millenial Lectures', The Hague Academy of International Law, 2000.

[57] Snyder, J., 'One World, Rival Theories', Foreign Policy Magazine, 145, December 2004, p.52.

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is at best naïve, at worst untruthful."[58] This impliedly inherent weakness of solely theoretical work is therefore an important hurdle to overcome if richer conceptualizations are to be developed and compliance behaviours better understood. A deeper understanding of the effectiveness of international commercial arbitration in resolving international commercial disputes, for example, has also in the past been achieved through empirical research by tracking and understanding the ultimate fate of international commercial arbitration awards.[59] Within empirical approaches specifically, this research utilises Qualitative Comparative Analysis ("QCA"), a method primarily aiming at causal interpretation, which is one of the key objectives at hand.

The second chapter deals with the public international law principles relating to compliance with international investment awards, including both the obligation and the remedies against non-compliance. Under chapter three, compliance is viewed not as a legal regime but as a social phenomenon and a state choice within a wider international order. The justification for selecting international relations as a lens to view compliance is provided and followed by a discussion of how the dominant IR approaches view compliance, such views then being crystallised as individual hypotheses. The fourth chapter discusses previous applications of QCA in studies of compliance with international law and provides a brief introduction to the method. Utilising the hypotheses derived in Chapter III, it then applies QCA and triangulates this investigation with an empirical view of compliance with ISA awards.

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[58] Van Aaken, A. & Trachtman, J., 'Political Economy of International Law: Towards a Holistic Model of State Behaviour', in Fabricotti, A., 'The Political Economy of International Law: A European Perspective', Edward Elgar, 2016.

[59] Tannock, Q., 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards', Transnational Dispute Management, 4, 2006.

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Chapter II:

State Compliance with ISA Awards & Public International Law (PIL)

The following chapter focuses on state compliance with ISA awards primarily from the viewpoint of public international law. It begins by discussing the legal obligation of compliance, considering both treaty law and customary international law separately as two distinct forms of legal obligation.

A justification for considering rulings of the International Court of Justice (ICJ) as being reflective of customary international law is also provided. The chapter then proceeds onto discussing the two forms of solutions available to foreign investors facing non-compliance by recalcitrant states, including both judicial means in the form of domestic enforcement and non-judicial means such as diplomatic protection.

A. The International Law Obligation of Compliance with ISA Awards

The international law obligation to comply with ISA awards originates from both customary international law and treaty law.[60] With regard to the former, the obligation is derived from the binding character of the arbitration award and from the finality of arbitration as an international

[60] Sepúlveda-Amor, B. & Lawry-White, M. (2017), 'State Responsibility and the Enforcement of Arbitral Awards', Arbitration International, Volume 33, Issue 1, 1 March 2017, Pages 35–61.

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dispute settlement procedure.[61] This binding nature is commonly expressed in terms of a general principle of international law known as *res judicata*.[62]

In addition, given the inclusion of an express agreement to comply with resultant awards within many BITs and institutional rules of arbitration, the maxim or general principle of *pacta sunt servanda*[63] may also be utilised to endorse an ISA award's binding nature, which in turn gives rise to the obligation for states to comply with the terms of adverse ISA awards.

It is worth noting that, such general principles of international law, such as *pacta sunt servanda*, principle of state sovereignty, state equality, principle of consent and good faith, which are of a deeply fundamental nature, are considered to provide "the foundations of the international legal system[64] and provide "the preconditions for treaty law and are guarantors for the functioning of treaties and of the international legal system in general."[65]

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[61] Chittharanjan, F. A., 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation', Vanderbilt Journal of Transnational Law, 793-812, 1976.

[62] Schreuer, C., 'The ICSID Convention: A Commentary', Cambridge University Press, 2nd ed. 2009 at 1099. Note that Article 38 of the International Court of Justice Statute provides a list of sources of international law, amongst which are "general principles of law recognized by civilized nations" (i.e. general principles of fairness and justice which are applied universally in legal systems around the world). Examples of these general principles of law are laches, good faith and res judicata.

[63] See Vienna Convention on the Law of Treaties art. 26, Part III. Observance, Application and Interpretation of Treaties ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[64] Voigt, C., 'The Role of General Principles in International Law and their Relationship to Treaty Law', Retfaerd Årgang, Vol. 31, No 2/121, 2008.

[65] *Ibid* at 13.

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i. Treaty Law

Under international investment law, several instances of this final and binding nature of ISA awards (as *res judicata*) and the treaty obligation to comply being expressly established are observable. The express inclusion of such wording (found in investment treaties, investment chapters of free-trade agreements and institutional rules of arbitration[66]) thus also creates a 'treaty obligation' to comply with ISA awards.[67] The contours and nature of this treaty obligation would of course be dependent upon the language of each respective provision.

For example, Article 1136 of the NAFTA (relating to 'Finality and Enforcement of an Award') stipulates that "an award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case"[68] and that "subject to . . . the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay."[69]

While paragraph 113(4) of the NAFTA also provides that each party "shall provide for the enforcement of an award in its territory",[70] paragraphs (5), (6), and (7) then set out different mechanisms through which enforcement may be sought which includes a provision for state-state arbitration to settle secondary disputes relating to non-compliance with the primary dispute's award. References are also made to the New York Convention and the Inter-American

[66] See, for example, Art 19(3) of the Australia–Mexico BIT, Art 1136(4) of NAFTA, Art 53(1) of the ICSID Convention and Art 34(2) of the 2010 UNCITRAL Rules.

[67] Reinisch, A. 'Enforcement of Investment Awards' in Katia Yannaca-Small (ed), Arbitration Under International Investment Agreements: A Guide to the Key Issues (OUP 2010)

[68] North American Free Trade Agreement, Art. 1136, Chapter XI, available at http://www.sice.oas.org/trade/nafta/chap-112.asp.

[69] *Ibid*

[70] *Ibid*

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Convention for the purpose of enforcing both ISA and also state-to-state awards. Given the perfect compliance record attributable to NAFTA-based disputes, the latter kind of inter-state arbitral awards have not been observed yet.

Another example of an express obligation to comply can be Article 19(3) of the Australia–Mexico BIT which states that the "decision of an arbitral tribunal in an arbitration of this Agreement shall be binding on the parties to the dispute with respect to the particular case. The parties shall abide by and comply with the terms of the award."[71] Also, Article 9(7) of the Switzerland–Venezuela BIT[72] is presented in language embodying *res judicata* and stipulates that "the arbitral award shall be final and binding for the parties involved in the dispute."[73]

A similar obligation to comply is observable in many prominent arbitration rules, an early example being Article 37 of The Hague Convention of 1907, wherein "recourse to arbitration implies an engagement to submit in good faith to the Award."[74] Similarly, under Article 30, the ILC Model Rules state that "once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately."[75]

A more recent example may be Article 34(2) of the 2010 UNCITRAL Arbitration Rules, according to which "all awards shall be made in writing and shall be final and binding on the

[71] Article 19(3) of the Australia–Mexico BIT

[72] Switzerland–Venezuela Bilateral Investment Treaty (BIT) of 18 November 1993.

[73] Or in French version of the treaty, "La sentence arbitrale est définitive et obligatoire pour les parties au différend."

[74] Convention for the Pacific Settlement of International Disputes of 18 October 1907.

[75] ILC Model Rules on Arbitral Procedure (1958).

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parties. The parties shall carry out all awards without delay."[76] Also, Article 35(6) of the 2012 ICC Arbitration Rules (as amended in 2017) stipulates that "every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."[77]

Most prominently, Article 53(1) of the ICSID Convention provides that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." The language adopted in Article 53 is a "restatement of customary international law based on the concepts of pacta sunt servanda and res judicata."[78] Furthermore, the Report of the Executive Directors on the ICSID Convention reinforces the assertion that under Article 53, "the parties are bound by the award."[79]

Indeed, according to the authoritative commentary on the ICSID Convention, "the obligation to abide by and comply with the terms of the award is a logical consequence of its binding

[76] UNCITRAL Arbitration Rules (as revised in 2010) Section IV. The award Form and effect of the award. Available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[77] Article 35(6), International Chamber of Commerce Arbitration Rules 2012 (as amended in 2017), available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf

[78] Broches, A. 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2(2) ICSID Review 287-289, 1987.

[79] Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention of 18 March 1965 (Report of the Executive Directors) para 41.

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nature."[80] The commentary also mentions that "the principle was contained in all drafts leading to the Convention and was never cast into doubt during the deliberations."[81] It further elaborates that the drafters of the ICSID Convention shared "a general expectation that compliance by the host State with ICSID awards would not be a practical problem and that voluntary compliance would be a natural consequence of the treaty obligation expressed in Art. 53."[82]

ii. Customary International Law

In addition to the treaty obligation of compliance with ISA awards, states are concurrently also under a customary obligation to do so under general international law that is distinct from the obligation expressly codified within international agreements and arbitral rules. As indicated before, this obligation is based upon the principles of *res judicata* and *pacta sunt servanda* and the nature of arbitration as a "creature of consent."[83]

It is important to note that such customary principles of international law may be not just complementary but also supplementary to treaty law. For example, in the *Nicaragua* case,[84] the ICJ, while discussing *inter alia* the relationship between customary law and treaty law in different contexts, demonstrated that the two may co-exist not just where the customary law

[80] *Supra* note 62 (Schreuer 2009).

[81] *Ibid*

[82] *Ibid*

[83] Reed, L. & Martinez, L., 'Treaty Obligations to Honour Arbitral Awards' in Doak Bishop (ed), Enforcement of Arbitral Awards Against Sovereigns (JurisNet LLC) 13, 2009.

[84] Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States). International Court of Justice. June 27, 1986 General List No. 70.

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principles were identical to treaty provisions and but also where there were different rights or obligations under customary and treaty law in respect of the same subject matter.

Resultantly, international tribunals often rely on customary norms to 'fill the gap' when faced with an absence of explicit authority in treaty law that may be applied towards adjudicating an international dispute. Moreover, the ICJ opined that, in case of a divergence between the two, treaty provisions may apply as *lex specialis* for the parties to the treaty, amongst themselves.[85]

Generally, for a rule or to be considered as customary international law, a 'two-element approach'[86] applies. This formulation first entails objective element of uniform and consistent state practice in accordance with the rule and secondly, a subjective element of *opinio juris* i.e. that the international community believes that such practice is required or obligated as a matter of law. However, it should be noted that for the purposes of this thesis, rulings of prominent international courts, in particular the ICJ, the principal judicial organ of the United Nations, are considered here to be reflective of customary law.

This usage of ICJ jurisprudence is primarily based on the workings and opinions of the International Law Commission (ILC), a body of experts subordinate to the United Nations General Assembly (UNGA) and created for the purpose of codifying and developing international laws, as reflected by its working documents and the records of its annual sessions.

The ILC has played an instrumental role in the codification and progressive development of international law over the several decades and in the recent past, has considered the relevant

[85] *Ibid* at 178 -181.

[86] As articulated in the North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands (1969) ICJ Reports 3.

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materials appropriate towards identifying the formation and evidence of customary international law.[87]

In its 64th session, the ILC decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed a Special Rapporteur, Sir Michael Wood, for the topic.[88]

In the 65th session of the ILC, as part of the debate pertaining to the same topic, “while there was general support for the proposal to examine the jurisprudence of international, regional and sub-regional courts, several members expressed particular support for an analysis of the jurisprudence of the International Court of Justice.”[89]

More importantly, “some members of the Commission expressed the view that the jurisprudence of the ICJ may be considered the primary source of material on the formation and evidence of rules of customary international law as it constituted the principal judicial organ of the United Nations whose authoritative status on such matters was widely recognized.”[90]

Furthermore, in his third report, the Special Rapporteur “considered two ‘subsidiary’, albeit significant, means for the determination of rules of customary international law: judicial

[87] Milisavljević, B. & Čučković, B., ‘Identification of Custom in International Law’, Annals of the Faculty of Law in Belgrade, Belgrade Law Review, vol. 62-3, str. 31-51, 2014.

[88] ILC, Summary of the Sixty-Fourth Session of the International Law Commission (2012), available at http://legal.un.org/ilc/sessions/64/

[89] ILC, Report of the International Law Commission on the work of its Sixty-Fifth Session, 6 May to 7 June and 8 July to 9 August 2013, General Assembly Official Records, Sixty-Eighth Session, Supplement No. 10 (A/68/10), chapter VII, 98, para. 93. Available at http://legal.un.org/ilc/reports/2013/english/chp7.pdf.

[90] *Ibid* at 98, para 93.

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decisions and writings. By judicial decisions, the report referred to both decisions of international courts and tribunals and decisions of national courts. The importance of the former was underlined."[91]

Also, in the third report of the Special Rapporteur, within the summary of the debate of the ILC on the topic, "some members of the Commission emphasized the special importance of judicial decisions, which could not be considered as secondary or subsidiary evidence. The central importance of the International Court of Justice was highlighted by some members."[92]

Most recently, in the 67th session of the ILC, the body's drafting committee compiled a full set of sixteen draft conclusions on the topic of 'identification of customary international law.'[93] The text of the draft conclusions, provisionally adopted by the Drafting Committee during previous sessions, explicitly states "the decisions of international courts and tribunals, in particular of the International Court of Justice"[94], as a subsidiary means for the determination of customary rules.

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[91] ILC, Report of the International Law Commission on the work of its Sixty-Seventh Session, Chapter VI, Identification of Customary International Law, at para 70 available at http://legal.un.org/ilc/reports/2015/english/chp6.pdf

[92] *Ibid* at para 86.

[93] For a discussion on the same, See Murphy, S. D., 'The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission', American Journal of International Law, 109 (2015), No. 4, pp. 822-844.

[94] ILC, Report of the International Law Commission on the work of its Sixty-Eighth Session, 2 May-10 June and 4 July-12 August 2016, 'Identification of Customary International Law, Text of the Draft Conclusions provisionally adopted by the Drafting Committee, at 4. Available at http://legal.un.org/docs/?symbol=A/CN.4/L.872

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The ILC's working documents therefore provide sufficient evidence supporting the suitability of considering ICJ rulings as being reflective of custom. Indeed, the jurisprudence of the ICJ and also of its predecessor, the Permanent Court of International Justice (PCIJ), has "helped to clarify many issues concerning the formation of customary international law, in cases such as the Lotus (1927), the Asylum (1950), the North Sea Continental Shelf (1969) and the Nicaragua (1986) cases."[95]

Returning to the issue at hand, as shown below, the obligation to comply with arbitral awards in good faith is a well-settled rule of public international law, especially ICJ, jurisprudence and has been accepted without dissent.[96]

In the early case of *Societe Commerciale De Belgique*,[97] although the PCIJ did not expressly use the term *res judicata*, it nonetheless illustrated this acceptance and noted the obligatory character of arbitral awards. Here, Greece had refuse to comply with two arbitration awards issued in favour of a Belgian entity. In response, Belgium espoused the claim and sought a declaration that Greece violated its international obligations and that the awards had a definitive and obligatory character, in addition to an order for payment of the sums due as per the awards.

Interestingly, Greece itself expressly acknowledged in its pleadings that the arbitral awards were res judicata. The PCIJ held that "everything…follows logically from the definitive and

[95] Ferreira, A. R. et al, 'Formation and Evidence of Customary International Law', UFRGS Model United Nations Journal, Vol. 1, pp. 182-201, 2013, at 183 & 184.

[96] Schachter, O. 'The Enforcement of International Judicial and Arbitral Decisions', 54 American Journal of International Law 1, 2 1960.

[97] *Socie´te´ Commerciale de Belgique (Belgium v Greece)* Ser AB (No 78) (PCIJ 1939).

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obligatory character of the arbitral awards. If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand."[98]

In the case concerning the Arbitral Award made by the King of Spain of 23 December 1906[99]), Nicaragua had failed to comply with an arbitral award issued against it in 1906 in response to which Honduras sought a declaration from the International Court of Justice (ICJ) that the actions or omissions of Nicaragua constituted a breach of an international obligation of general international law, within the meaning of Article 36(2)(c) of the ICJ Statute.

In the operative part of its judgement dated 18 November 1960, the International Court of Justice (ICJ) did not explicitly declare the arbitral award a being *res judicata* either. However, here too it did hold the not only was the award "valid and binding" but also that Nicaragua was "under an obligation to give effect to it."[100]

Later in 1992, in the case concerning the Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*)[101], wherein the award not complied with had been rendered in 1989 by an arbitral tribunal established under an Arbitration Agreement of 1985 between Guinea-Bissau and Senegal. Article 10(2) of that agreement indicated that 'The Award shall be final and binding upon the two States which shall be under a duty to take all necessary steps for its implementation.' Guinea-Bissau submitted to the ICJ *inter alia* that the award was null and void and that Senegal's pursuit of compliance was unjustified. The ICJ rejected this submission

[98] *Ibid* at 176.

[99] *Honduras v Nicaragua* [1960] ICJ Rep 192.

[100] *Ibid* at 217.

[101] *Guinea-Bissau v Senegal* [1991] ICJ Rep 53.

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and held that the arbitral award was "valid and binding for the parties, which had the obligation to apply it."[102]

Lastly, it is also worth mentioning in 1998, the Iran–US Claims Tribunal also held that "by definition, international arbitral awards, if final, are binding."[103]

B. Investor Solutions against State Non-Compliance with ISA Awards

A key feature of investor-state arbitration, much like international arbitration in general, is the perceived finality accorded to the resultant arbitral awards. This feature, amongst others, has allowed it to strengthen its legitimacy and position as the chosen mechanism for the settlement of foreign investment disputes. Finality in this context, however, has lately been described as 'a term of art', particularly in light of the difficulties faced by investors who, despite succeeding in the arbitration, are nonetheless at times not voluntarily compensated.[104]

Regardless of how valid the obligation to comply may be, some states nonetheless resist doing so upon facing an adverse ISA award being issued. From outright denouncement of the award to deliberately delaying payment while indicating a willingness to comply, there is a multitude of positions of non-compliance adoptable by state officials who may find it hard to "resist the temptation."[105]

When such behaviour is observed, the state incurs international responsibility as non-compliance would be considered as an act or omission in breach of an international obligation

[102] *Ibid*

[103] Iran v US, 34 Iran–US CTR 39 (1998) para 58.

[104] *Supra* note 60 (Sepúlveda-Amor & Lawry-White 2017) at 35.

[105] *Supra* note 47 (Foster 2008) at 669.

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that is attributable to that state i.e. an internationally wrongful act.[106] In the case of *MINE v Guinea*, the ad hoc committee opined that "non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions."[107]

i. Domestic Enforcement of ISA Awards

As indicated above, successfully gaining a favourable award does not ensure that the investor would also successfully gain "the fruits of any of their successful arbitral endeavours."[108] Successful enforcement of the award therefore remains a crucial yet lingering issue and effective enforceability before national courts is the "ultimate feature that would make arbitration a viable alternative to litigation."[109]

There currently exist two distinct enforcement regimes which govern ISA awards, regardless of which BIT gave rise to the arbitration. The first regime originates from the ICSID Convention and applies to awards also issued under the auspices of the same. The second such regime is provided for by the New York Convention which oversees all other awards, including awards resultant from *ad hoc* proceedings (which usually follow the UNCITRAL Arbitration Rules), awards administered by arbitration centres (such as the London Court of International

[106] International Law Commission, Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, ILC 2001/II (2), 26 (ILC Articles), arts 1–3.

[107] Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, 4 ICSID Reports 115/6 at 25.

[108] Bjorklund, A. K., 'State Immunity and the Enforcement of Investor-State Arbitral Awards', UGA International Law Colloquium March 20, 2009.

[109] *Supra* note 41 (Barra 2005).

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Arbitration and the Stockholm Chamber of Commerce) and also awards governed by the ICSID Additional Facility Rules.

A key difference between the two regimes pertains to the issue of domestic judicial review. Whereas awards governed by the New York Convention may be subject to scrutiny by national courts in light of Article V of the New York Convention and under the arbitration law of the 'seat' of the arbitration (i.e. the *lex fori*), ICSID awards are to be recognised as final judgements in the courts of ICSID member states and instead are only subject to grounds for annulment stipulated in Article 52 of the ICSID Convention.

i.a. Enforcement at the Courts of the Host State

When faced with the prospects of non-compliance by the host state, the investor would have to turn towards seeking judicial enforcement of the award at a national court. To the extent that the investor is certain to find assets belonging to the non-compliant state (against which the award may be enforced) in the latter's home territory, national courts present in the host state should be preferable for this purpose.

However, such courts may suffer from a lack of independence and may be susceptible to political interference (either formally or otherwise) that may render any efforts for enforcement as unfeasible and futile. For example, in response to the apparent hostility of the Argentine authorities towards the ICSID rulings issued against Argentina, the investors in *Azurix v*

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Argentina[110] and *CMS v Argentina*[111] (later acquired by Blue Ridge Investments) were reluctant to pursue enforcement of their awards at Argentine courts and instead chose to seek the same at multiple foreign venues.[112]

That said, if indeed the investor does pursue enforcement at the host state's courts and the latter refuses recognition and enforcement of the award (due to contrary precedents, prohibitory legislation or other legal barriers), such an act on behalf of the court may give rise to a new secondary claim under international law against the host state.

For example, paragraph 1136 of the NAFTA expressly acknowledges a state's right to initiate arbitration proceedings against a non-compliant host state which refuses to enforce an award against it.[113] Also, Article 19(8) of the 2005 Australia-Mexico BIT states that "if a disputing Contracting Party fails to abide by or comply with a final award, on delivery of a request by a Contracting Party whose Investor was a party to the arbitration, an arbitral tribunal under Article 21 [Settlement of Disputes between Contracting Parties] may be established. The requesting Contracting Party may seek in such proceedings:(a) a determination that the failure to abide by

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[110] *Azurix Corp v. The Argentine Republic*, Award (ICSID Case No ARB/01/12) 23 June 2006, 43 ILM 259.

[111] *CMS Gas Transmission Company v. The Argentine Republic*, Award (ICSID. Case No. ARB/01/8) 12 May 2005, 14 ICSID Reports 158.

[112] A former Attorney General of Argentina stated to the press that if an ICSID tribunal renders an award considered by Argentina unconstitutional, Argentine courts would be empowered to decide on its constitutionality. La Nación, "Rosatti busca restarles poder a los fallos del CIADI mediante una ley", dated Mar. 28, 2005, available at www.lanacion.com.ar/economia/nota.asp?nota_id=691070; "El Gobierno pediría a la Corte la nulidad del laudo del Ciadi", 17 May 2005, available at: http://buscador.lanacion.com.ar/not.asp?nota_id=704866&high=rosatti

[113] *Supra* note 68 (NAFTA).

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or comply with the final award is inconsistent with the obligations of this Agreement, and (b) a recommendation that the Contracting Party abide by or comply with the final award."[114]

In addition, refusal by the national courts of the non-compliant state to recognise and enforce the arbitral award would also represent an internationally wrongful act and consequently generate further international responsibility for the state (with the corollary obligation to 'cease' the breach and make reparation for any damage caused), as national courts are undisputedly said to constitute an organ of the state. More specifically, such actions may violate the guarantee against 'denial of justice' provided for within many investment treaties, often as a component of the fair and equitable treatment protection.[115]

However, given how to adjudicate such a claim would also be to effectively to act as an *ad hoc* international appellate body for national court decisions concerning the finality of arbitral awards, which could arguably be to assume an unwarranted role in the investment arbitration regime, tribunals have, to an extent, displayed a certain reluctance towards providing a forum for such claims.

Furthermore, for such claims that have so far been entertained, such reservation on the part of investor-state tribunals is reflected in the interpretative approaches adopted by them, which mainly differ on two key factors. The first factor, in relation to jurisdictional barriers, deals with

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[114] Article 19(8) of the 2005 Australia-Mexico BIT.

[115] See Wallace, Jr. D., 'Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico', In International Investment Law And Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties And Customary International Law 669, 675–677, 693–696 (Todd Weiler ed., 2005) (asserting that a denial of justice by a national court, or legislation making a judicial failure inevitable, violates the "fair and equitable treatment" obligation that is set forth in many investment treaties). See generally Jan Paulsson, Denial of Justice in International Law 6 (2005). Arbitration under investment treaties is discussed in further detail infra Part II.D.2.

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the question of whether the original unenforced award (or its underlying rights to obtain damages) may constitute as an investment that is protected under the relevant treaty.

The second key factor relates to the substantive protections and guarantees contained within the relevant treaty and invoked by the investor-claimant, wherein the tribunal must determine whether and to what extent such protections have been violated by host state judiciary's act of not recognising or enforcing the original award. To that end, while some tribunals have interpreted specific provisions more literally, others have adopted a more teleological approach and have imposed liability on host states for non-enforcement of an arbitral award by their national courts.

For example, in the 2009 case of *Saipem v. Bangladesh*,[116] wherein the Bangladeshi courts declared a revocation of the authority of an ICC tribunal that had previously been constituted under a commercial arbitration between an Italian investor and Petrobangla, a Bangladeshi public corporation. The ICC arbitration continued regardless of such revocation and resulted in a win for the foreign investor.

However, Petrobangla retorted by applying for the award to be set aside in the High Court Division of the Supreme Court of Bangladesh, which, on the basis that the ICC tribunals authority had already been revoked, declared that the award was 'non-existent' and therefore the question of it being set-aside or enforced did not arise. These events then led to the Italian investors filing an ISA claim, under the Italy-Bangladesh BIT.

While adjudicating the treaty claim, although the *Saipem* tribunal deliberately left open the question of whether the ICC award itself may be considered an investment under the applicable

[116] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07.

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BIT, it did opine that the original contract between the investor and Petrobangla constituted a protected investment and that since the ICC award crystallised the parties' rights and obligations under that contract, the tribunal could rightfully exercise jurisdiction over the matter at hand. With regard to the substantive claims of the foreign investor, although it displayed a fair amount of reticence towards doing so, the tribunal held that the actions of the Bangladeshi courts, particularly their failure to recognise the existence of an ICC arbitral award, amounted to an indirect expropriation.

Although not without criticism, the *Saipem* tribunal held that the "the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process"[117] and that in doing so, Bangladesh breached its obligations under the New York Convention. The tribunal also opined that "the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights."[118]

It is worth noting that the tribunal also highlighted the absence of assets belonging to Petrobangla outside of Bangladesh against which the ICC award could have been satisfied. It therefore, concluded that since the ICC Award could not be enforced outside Bangladesh, the actions of the Bangladeshi courts "substantially deprived Saipem of its rights and thus qualifies as a taking"[119]

While the investors in *Saipem* eventually emerged triumphant, one must yet bear in mind that pursuing such a secondary claim would only be viable if the resultant award would have

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[117] *Ibid* at 48.

[118] *Ibid* at 49.

[119] *Ibid* at 40.

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superior prospects of compliance or enforcement than the primary award already issued, such as the above observed escalation from a commercial arbitration against a single state entity to an investment treaty arbitration against the state as a whole. If such superior prospects are not palpable, obtaining a second award against the same state may be of little consequence.

i.b. Enforcement at the Courts of a Foreign State

When enforcement at the host state's local courts is not feasible, the investor is faced with the arduous task of conducting an international asset search aimed at identifying specific property belonging to the non-compliant state outside of its home territory, against which the unfulfilled award may be enforced. This of course is easier said than done. For example, in a 2008 survey relating to corporate attitudes towards recognition and enforcement of international arbitral awards against states, "61% of the 80 corporations surveyed declared to have encountered difficulties in enforcing arbitral awards, out of which 68% indicated that they had been unable to identify and access the assets of the State."[120]

The reasons for such difficulty may include the paucity of assets held by states (particularly developing ones) outside of their own territory and the instrumental usage of corporate entities with distinct legal identities by states to hold such assets. Once such assets are nevertheless identified, the award creditor would then have to commence enforcement proceedings in the courts where such assets are located, the first procedural step of which would be to have the arbitral award recognised or confirmed. This step is at times referred to as 'domestication' of

[120] Baltag, C., 'Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards against States', American Review of International Arbitration 19, 404-05, 2008.

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the international arbitral award. Having the award recognised would of course not by itself be sufficient for the award creditor to be compensated. Following recognition, the award creditor would also have to seek that the award be executed against the assets previously identified.

Despite asset identification and award recognition being challenging enough, award execution remains the most problematic aspect of enforcing an ISA award in a foreign court, particularly since states have "long been cautious about taking coercive measures against properties of fellow states and their agencies and instrumentalities"[121] and "will generally take such measures only under narrow circumstances."[122]

This is where the doctrine of sovereign immunity takes centre stage. More often than not, assets against which the enforcement of arbitral awards has been sought are held to be 'immune', despite the award itself being recognised, thus often leaving the investor with no further legal recourse.

Derived from the principle of sovereign equality, sovereign immunity is a foundational doctrine of international law which poses as a potential procedural bar to the not just the execution of ISA awards but any such legal pursuit against a sovereign state before the courts of another state.[123] It is important to note that sovereign immunity does not provide a substantive

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[121] *Supra* note 47 (Foster 2008) at 666.

[122] *Ibid*

[123] For a doctrinal exploration of sovereign immunity and its theoretical underpinnings, in light of state judicial practice during the early 20th century, see Lauterpacht, H., 'The Problem of Jurisdictional Immunities of Foreign States', British Year Book of International Law, Vol. 28, 220-272, 1951. For an account centring on pressing issues facing the practitioners rather than theoretical controversy of restrictive versus absolute doctrines, see Schreuer, C., 'State Immunity: Some Recent Developments', Cambridge University Press, 1993. For a discussion on the origins of absolute immunity, the subsequent development of restrictive immunity and other issues, based mainly on selected UK and US case law,

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argument in favour of non-compliance or a defence against international responsibility but only affords a barrier against forcible execution or recognition of an arbitral award.[124]

Therefore, immunity from jurisdiction (or recognition) and immunity from execution stand out as two distinct kinds of hurdles for an award creditor, the former kind being generally regarded as automatically waived by the state upon consenting or submitting to the jurisdiction of the arbitral tribunal.[125] A state may also waive its right to sovereign immunity from recognition by having acceded to ICSID Convention or to the New York Convention. For example, Article 54(1) of the ICSID Convention states that "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." [126]

The latter kind of hurdle for the award creditor (i.e. sovereign immunity from execution) however remains intact and is not also automatically waived.[127] For example, Article III of the

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see Bankas, E. K., 'The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts', Springer, 2005. For a comprehensive account of the developments within the topic, seen from both a theoretical and practical perspective, see Fox, H. & Webb, P., 'The Law of State Immunity', Oxford University Press, 2008.

[124] See *MINE v Guinea* (Ad Hoc Committee) as quoted in UNCTAD, 'Course on Dispute Settlement: International Center for Settlement of Investment Disputes - Binding Force and Enforcement', (2003) UN Doc UNCTAD/EDM/Misc.232/Add. 8.

[125] See Art 1(1), UNCITRAL Rules. See also, Art. 25 & 41, 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington DC, (henceforth, 'ICSID Convention').

[126] Article 54(1), ICSID Convention.

[127] See Fox, H., 'State Immunity and the New York Convention in Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention, in Practice', 829 Emmanuel Gaillard and Domenico Di Pietro eds., 2008.

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New York Convention expresses that that Contracting States recognize and enforce arbitral awards "in accordance with national rules of procedure"[128] which include the domestically-followed principles on immunity of execution.

Similarly, adhesion to the ICSID Convention does not amount to a waiver of immunity of execution either. Article 54(3) states that "execution of the award shall be governed by the laws concerning the execution of judgments in force in the State whose territories such execution is sought."[129] Also, Article 55 further clarifies that Article 54(1) does not intend to allow derogation from the application of domestic laws on sovereign immunity, stating that "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[130]

Award creditor states are therefore afforded a last bastion of defence against their assets being seized to satisfy the investor's award debt in the form of municipal sovereign immunity laws in the jurisdiction in which enforcement is sought. Such laws differ greatly and as a result, the pursuit of successful domestic enforcement for an investor is often a complex and unpredictable process.

There exist two approaches to sovereign immunity from execution of arbitral awards that are followed by national courts. Under the first, known as the doctrine of *absolute* immunity, the courts disallow any attempts to seize state assets whereas under the second, the doctrine of *restrict*ive immunity, courts allow for exceptional circumstances under which such seizure may

[128] See Art III, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 (henceforth, 'NY Convention').

[129] Article 54(3), ICSID Convention.

[130] Article 55, ICSID Convention.

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be permissible, generally depending upon the nature of the assets against which the arbitral award is intended to be executed.

Here, distinction is made between sovereign assets meant to serve governmental purposes (*jure imperii*) and those assets that only serve commercial purposes (*jure gestionis*). Whereas the former category of assets (such as diplomatic mission properties, military assets and central bank funds) are held to be immune from execution, the latter are generally not. The rationale behind maintaining this distinction lies in the importance for states to hold property abroad without the prospect of such property being seized, in order to effectively carry out their functions towards the public interest, which is afforded a certain superiority over the business interests of private investors.

However, this 'nature of funds' test gives rise to a key issue that augments the complexity of the enforcement process for an investor, for whom locating targetable assets can potentially be an insurmountable challenge, particularly since most states conduct their *jure gestionis* activities through separate legal entities such as public-sector corporations. As the following cases will demonstrate, the distinction between commercial and non-commercial assets is one that often tends to be blurry in the view of national courts.

In an early English law case of *Alcom Ltd v. Republic of Colombia*,[131] the House of Lords, applying the UK State Immunity Act 1978, against the background of customary international law current as in 1978, held that accounts containing funds used for both commercial and sovereign purposes were to be treated as immune from attachment "unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that

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[131] Alcom Ltd v. Republic of Colombia: HL 1984 [1984] AC 580, [1984] 2 WLR 750, [1984] 2 Lloyds Rep 24, [1984] 2 All ER 6.

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the bank account was earmarked by the foreign state solely (save for *de minimis* exceptions) for being drawn upon to settle liabilities incurred in commercial transactions."[132]

In another application of English law, in this instance involving the attempted execution of an ICSID award issued against the state of Kazakhstan,[133] the investors targeted assets of the National Bank of Kazakhstan held by a private bank in London and further assets invested in securities by the Kazakh sovereign wealth fund.

The English High Court ruled that, pursuant to Section 14(4) of the UK State Immunity Act 1978 and considering that the general purpose of the activities conducted by sovereign wealth funds and central banks where to accumulate value in the public interest, such assets were also subject to sovereign immunity and could not be utilised for the satisfaction of an ICSID award, even if such assets were being held by third parties on behalf of the state.

In an application of United States law, particularly the 1976 Foreign Sovereign Immunities Act (FSIA), the case of *Liberian Eastern Timber Corporation (LETCO) v. Liberia*, saw a French foreign investor unsuccessfully attempting to enforce an ICSID award it had prevailed in against the Government of Liberia, following an ISA pursuant to a concession agreement between the parties. The investor sought to execute the award against Liberian assets located within US territory and targeted two specific sets of assets in particular.

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[132] *Ibid*

[133] AIG Capital Partners Inc. and another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen's Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm). The award was issued under the case of AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6.

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With regard to the first set of assets, consisting of registration fees, tonnage fees and other taxes due from naval ships flying the Liberian flag, the United States District Court for the Southern District of New York accepted the argument presented by Liberia that the fees and taxes, although collectible under contract by U.S. corporations and citizens, constituted sovereign and not commercial assets under Liberian law. The Court therefore held that these assets were revenues that fell within one of the exceptions of Sec. 1610 of the FSIA, such as military property of foreign States.[134]

The second set of assets against which the investors attempted to enforce the ICSID award, this time at the United States District Court for the District of Columbia,[135] consisted of bank accounts held by the Liberian Embassy. Here too, the Court, adopting a narrow interpretation of what constituted commercial activity for the purposes of the FSIA, opined that, even though the bank accounts in question contained 'mixed funds (i.e. funds used partly for commercial and partly for sovereign purposes), they would still enjoy immunity from execution as attaching the such accounts would unduly expose non-commercial funds to execution, thereby jeopardising the sovereign activities of the Liberian Embassy.

In the 1998 case of *Sedelmayer v. Russia*,[136] the foreign investor, a German national, after successfully claiming for expropriation in an arbitration administered by the Stockholm Chamber of Commerce under the Russia-Germany BIT, was faced with an even more arduous

[134] LETCO v. Liberia, District Court, S.D.N.Y., 12 December 1986, 2 ICSID Reports 385, 388–09.

[135] LETCO v. Liberia, United States District Court, District of Columbia, 16 April 1987, 2 ICSID Reports 390.

[136] Mr. Franz Sedelmayer v. The Russian Federation, SCC, Arbitration Award dated 7 July 1998.

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task of locating foreign assets owned by Russia in multiple jurisdictions, in the hopes of successful enforcement.

However, while Russia's signature to the BIT was held to be constituting an effective waiver of its sovereign immunity from recognition of the award, such waiver was not considered to be encompass the execution of the same and consequently, most of the investor's multiple attempts (including more than twenty enforcement proceedings across an entire decade) at satisfying the award were left unsuccessful.[137]

For example, Sedelmayer attempted to execute the award against credit due to the Russian government by a German airline for use of Russian airspace.[138] In further instances, the investor targeted value-added tax (VAT) reimbursement claims due to the Russian embassy[139] and property belonging to the Russian House of Science and Culture in Berlin.[140] All three enforcement claims were ruled unfavourably by the German courts.

Nonetheless, a decade after the award was issued, Sedelmayer found some success in attempting to execute the SCC award against a Russian-owned apartment complex in Cologne, which the Cologne Court of Appeals found to be used for commercial purposes and therefore not immune.[141] In addition, more recently, the investor gained a further victory targeting another

[137] For a comprehensive memoir of, what is often referred to as, the 'Sedelmayer Saga', see Sedelmayer, F.J. & Weisman, J., 'Welcome to Putingrad: The Incredible Account of the Only Man to Collect Money from Vladimir Putin', Welcome to Putingrad LLC, 2017.

[138] Franz J. Sedelmayer (Germany) v. Russian Federation, Deutsche Lufthansa AG (Germany), Bundesgerichtshof [Federal Supreme Court], 4 October 2005.

[139] Decision of Oct. 4, 2005, Federal Supreme Court, VII ZB 8/05 (Ger.).

[140] Decision of June 14, 2010, Court of Appeals, Berlin, 1 W 276/09 (Ger.).

[141] Decision of Mar. 18, 2008, Court of Appeals, Cologne, 22 U 98/07 (Ger.).

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real estate asset, this time in Sweden, where the Swedish Supreme Court allowed the former premises of the Russian trade delegation to be attached for satisfaction of *Sedelmayer* award.[142]

Therefore, while overcoming sovereign immunity from execution may not entirely be a lost cause, case such as *LETCO*, where the foreign investors were ultimately left with little to show for their efforts, are a reminder of how success in the arbitration is no guarantee that an investor receives due compensation, even if it manages to locate foreign assets held by the host state.

Understandably therefore, from an investor perspective, the current legal framework for the foreign enforcement of arbitral awards against sovereign states may appear to be inadequate and arguably, one-sided. Even when enforcement is pursued in a state which follows the doctrine of restrictive immunity, the sheer amount of resources and commitment required to effectively pursue enforcement makes the process notoriously complex and frustrating.

This issue has therefore brought into question the validity of international arbitration as a dispute resolution method against states and has even prompted scholars to term the doctrine of sovereign immunity as a "loophole in the efficient protection of investors."[143]

[142] Russian Federation v. Franz J. Sedelmayer, Decision of July 1, 2011, Supreme Court, Ö 170-10 (Sweden) (English translation), available at http://www.sccinstitute.com/ filearchive/4/41226/Case170_10ENG.pdf. See also, Kryvoi, Y., 'Chasing the Russian Federation', CIS Arbitration Forum, 2011, available at http://www.cisarbitration.com/2011/07/13/chasing-the-russian-federation, Sudakov, D., 'Sedelmayer: 'Russia Will Pay Me', Pravda Report, 2011, available at http://www.pravdareport.com/business/finance/08-07-2011/118432-Franz_Sedelmayer-0/.

[143] *Supra* note 47 (Schill 2011) at 250.

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ii. Alternative (Non-Judicial) Means of Inducing Compliance

As discussed above, the path towards domestic enforcement of ISA awards may prove to be tricky and exasperating. Such difficulties faced by award creditors have "fostered the development of mechanisms that go beyond the conventional exequatur"[144] and creditors are increasingly resorting to a variety of alternative, non-judicial means of inducing state compliance. Such means bypass the domestic legal mechanisms of the recalcitrant state and utilise methods that range from mere post-award settlement negotiations to more intrusive methods such as political or economic coercion aimed primarily at the executive branch of the non-compliant state.

When non-judicial means are employed, several new players (other than the home state of the investor) may be introduced into the fray, with the recalcitrant state aiming to maintain the status quo and the creditor seeking the terms of the award to be performed. These players may include, for one, the arbitral institution which administered the award which may, for example, make public representations to the noncompliant state, thereby causing reputational damage in the global market for FDI and guiding the state's calculus in favour of compliance. They may also include a specialised litigation or investment fund which may acquire the award as a distressed debt at a reduced value and pursue the enforcement through its own strategic means such as lobbying.

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[144] Viñuales, J. & Bentolila, D., 'The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States' (2012), in Boisson de Chazournes, L., M. Kohen and J. E. Viñuales (eds.), Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions (The Hague: Brill) (2012) at 2.

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This was observed in *CMS v. Argentina* and other related cases, wherein after Argentina refused to comply with the awards resultant from several long-running investment arbitration proceedings between foreign investors and Argentina, the American investors sought the assistance of the US government.

The *CMS* award was eventually assigned to Blue Ridge Investments, a Bank of America Corporation subsidiary investment fund which "displayed an aggressive strategy of diplomatic pressure, including the request of hearings before the United States Trade Representative (USTR) to exclude Argentina from the list of beneficiary countries under the Generalized System of Preferences (GSP) program or lobbying efforts of the US Congress to vote for the withdrawal of World Bank loans. With the effect that the USTR decided to recommend president Barack Obama to suspend trade benefits for Argentina".[145]

Several developed, largely capital-exporting states have adopted similar 'generalised system of preferences' that are designed to enhance trade relations with developing states and typically entail unilaterally lowering import tariffs for products from beneficiary states. The suspension of this programme may therefore severely constrict a non-compliant state's export market which in turn may have a further detrimental snowball effect towards the state's access to credit and foreign investment. Such usage of trade measures as to induce compliance with investment awards is often cited as a form of convergence of international trade law and investment law.

However, more commonly, non-judicial means entail diplomatic protection exerted by one state (typically the home state of the award creditor) towards the non-compliant state. Diplomatic protection is an element of customary international law whereby "a State espouses

[145] *Ibid* (Viñuales & Bentolila 2012) at 13.

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the claim of its national against another State and pursues it in its own name.” [146] Under Article 1 of the 2006 Draft Articles on Diplomatic Protection prepared by the International Law Commission (ILC), diplomatic protection consists of “the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”[147]

In more practical terms, diplomatic protection often necessarily follows the exhaustion of locally available remedies and commonly entails first carrying out informal lobbying using “whatever political leverage it holds in the international arena”[148] and exerting economic or political pressure which may include acts of retorsion or countermeasures such as suspending trade benefits, withholding payments or freezing assets belonging to the noncompliance state. Retorsion and direct negotiations may be followed by (or even combined with) voluntary formal dispute settlement such as before the ICJ or an arbitral panel such as one set up under Article 1136(5) of the NAFTA.

The characteristics and purpose of diplomatic protection have received early recognition within international jurisprudence. For example, in the 1924 case of *Mavrommatis Palestine Concessions*, the PCIJ stated that “it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary

[146] In 2006 the International Law Commission adopted Draft Articles on Diplomatic Protection. See Official Records of the General Assembly, Sixty-First Session, Supplement No. 10 (A/61/10).

[147] Art. 1 ILC Draft Articles on Diplomatic Protection 2006.

[148] *Supra* note 28 (Rosenberg 2013) at 516.

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channels by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf."[149]

Also, in its judgement of 1970 regarding the case of *Barcelona Traction, Light and Power Company*, the ICJ acknowledged that "a State could make a claim when investments by its nationals abroad, such investments being part of a State's national economic resources, were prejudicially affected in violation of the right of the State itself to have its nationals enjoy a certain treatment."[150]

The underlying rationale for states to opt for such measures is that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is, in reality, asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law."[151]

It is worth noting nonetheless that there is no guarantee that diplomatic protection would be an available solution for an award creditor as "the state of the injured national has full discretion as to whether to take up the claim on behalf of its injured national at all. It may waive, compromise, or discontinue the presentation of the claim irrespective of the wishes of the injured national. In exercising this discretion, the state often gives paramount consideration to the wider ramifications of the espousal of a diplomatic protection claim so far as it concerns the conduct of its foreign policy vis-à-vis the host state."[152]

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[149] *Mavrommatis Palestine Concessions (Greece v U.K)* 1924 Permanent Court of International Justice Reports Series A, No.2, 12.

[150] *Barcelona Traction, Light and Power Company, Ltd. (Belgium v Spain)* (New Application: 1962), 1970 at 77.

[151] *Supra* note 149 (*Greece v. Gr. Brit.*) at 12.

[152] Douglas, Z., 'The International Law of Investment Claims', Cambridge University Press at 17.

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For example, in *Sedelmayer v. Russia*,[153] despite the investor suffering several unsuccessful attempts at domestically enforcing a 1998 ISA award obtained against Russia and administered by the Stockholm Chamber of Commerce, his home state of Germany refused to espouse his claim.[154]

Interestingly, five years later, in *Petrobart Limited v. The Kyrgyz Republic*, when another SCC award, this time in favour of an entity registered in the British Overseas Territory of Gibraltar, was faced with the prospects of non-compliance, it was the Swedish government which, as the state hosting the international arbitration centre which administered the award in question, intervened and successfully pressured the Kyrgyz government to pay its dues.[155] The case highlights the extent to which some states may act in protection of their positive reputation as a destination for administering foreign investment disputes.

Ironically, while diplomatic protection has at times helped in securing finality for ISA disputes, it is because diplomatic protection was considered "unworkable as a way of protecting business interests in the context of contemporary economic life"[156] that investment arbitration gained popularity as a dispute settlement mechanism to begin with.

Indeed, under the ICSID Convention, diplomatic protection is explicitly excluded as an available dispute settlement mechanism to "avoid a multiplicity of claims and claimants and

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[153] *Supra* note 136 (Sedelmayer).

[154] Peterson, L. E., 'How Many States Are Not Paying Awards Under Investment Treaties?', Investment Arbitration Reporter, published May 7 2010.

[155] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003. Peterson, L. E., 'Lengthy Debt Collection Battle Ends, as Former Soviet State Pays Arbitral Award; Unusual Form of Diplomatic Assistance Seen', Investment Arbitration Reporter, 2011.

[156] Paulsson, J., 'Arbitration without Privity' 10 ICSID Review (1995) 232, 255.

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remove the dispute from the realm of politics and diplomacy"[157], except for when the matter relates to non-compliance with an arbitral award already issued. The negotiators of the ICSID Convention cleverly allowed for the exclusion of diplomatic protection to be circumscribed as "a necessary check on the shield provided to host States by their immunity of execution."[158]

Article 27 therefore stipulates that "no Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."[159]

The return to exercising diplomatic protection, though contrary to contemporary international investment law, is reminiscent of the traditional position under public international law i.e. that only other states, not private parties, have the capacity to bring claims against states. Though its efficacy is not uniform and dependent upon the individual capacity of a specific state, diplomatic protection nonetheless may provide a potential remedy for a frustrated award creditor with no other public international law remedies available.

C. Conclusion

The obligation to comply with ISA awards under public international law is undisputable and driven by both customary norms and clearly expressed treaty provisions. Non-compliance by a

[157] *Supra* note 144 (Viñuales & Bentolila 2012) at 21.

[158] Schreuer, C., 'Investment Protection and International Relations, The Law of International Relations – Liber Amicorum', in eds. A. Reinisch and U Kriebaum, Eleven International Publishing, 2007, 348.

[159] Article 27, ICSID Convention.

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recalcitrant state followed by difficulties in enforcement of the ISA award undermines the viability of international arbitration as the chosen dispute settlement procedure between foreign investors and host states. When pursuing judicial enforcement, choice of forum may be a significant factor determining success given the differing individual practices of various domestic judiciaries and their approach towards the doctrine of sovereign immunity. Whether used concurrently with or following judicial enforcement procedures, a wider palette of non-judicial means for inducing compliance may also be available to the award creditor.

Nonetheless, it is clear that non-judicial mechanisms may not necessarily be effective towards compensating the award creditor either, particularly if the home state is not capable (or even willing) to exert diplomatic pressure. After all, not all states can readily wield the significant economic and political pressure required to induce compliance by a recalcitrant state. The effectiveness of non-judicial means is therefore nationality-dependant and practitioners often advise clients to structure their foreign investments in accordance with such considerations.

Lastly, the above analysis emphasizes the importance of voluntary compliance within investment treaty regime, which is dealt with in the following chapter of this thesis using the field of international relations as a theoretical lens.

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Chapter III:

State Compliance with ISA Awards & International Relations (IR) Theory

The current chapter seeks to develop three testable causal hypotheses explaining state compliance with ISA awards by utilising IR theory (in particular, its three dominant approaches) as a conceptual framework for the empirical evaluations conducted in Chapter IV. It begins by introducing IR theory as a valid conceptual framework for international law and then delves into its entailing approaches of realism, liberalism and constructivism.

Each of the three approaches are first introduced with their initial development and wider position within the field of international relations, following which, their respective key variables, concepts and assumptions are discussed. Subsequently, the traditional explanations for state compliance with international law for each approach are respectively provided, followed by a more focused explanation of state compliance with ISA awards, as derived from the preceding analyses. Finally, these focused explanations for state compliance are crystallised in the form of testable causal hypotheses.

A. International Relations as a Conceptual Framework for International Law

Causal mechanisms for state compliance with adverse ISA awards, which entail understandings of both legal and non-legal considerations such as the political concerns of international decision-makers, have so far been theoretically underexplored in the literature. This absence of sufficiently specified theoretical accounts must therefore first be dealt with to better grasp their interrelations and establish a feasible conceptual framework.

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To do so, we turn to international relations theory which, as a modern social science that seeks to explain and predict phenomena within international politics, has enabled a significant amount of interdisciplinary work on questions pertinent for not just political scientists but also international lawyers.[160]

The usage of IR theory as a conceptual repository would initially require for an intermediate perspective to be adopted wherein causal hypotheses are derived from largely distinct (though at times overlapping) paradigms, each containing its own sets of assumptions and emphasized

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[160] Dunoff, J.L., & Pollack, M. A., 'Interdisciplinary Perspectives on International Law and International Relations - The State of the Art', Cambridge University Press, 2012; *Supra* note 51 (Slaughter, A.M., Tulumello, A.S. & Wood, S. 1998); Aalberts, T. and Venzke, I, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in d'Aspremont, J., Nollkaemper, A., Gazzini, T. & Wouter, W. (eds), 'International Law as a Profession', Cambridge University Press 2015; Abbott, K.W., 'Modem International Relations Theory: A Prospectus for International Lawyers', Yale Journal of International Law 14 1989, at 335. See also, Byers, M., 'The Role of Law in International Politics: Essays in International Relations and International Law', Oxford University Press, 2007; Reinisch, A., & Kriebaum, U., 'The Law of International Relations: Liber Amicorum Hanspeter Neuhold', Utrecht: Eleven International Pub, 2007; Lee, T.H., 'International Relations Theories and International Law', Fordham Law Legal Studies Research Paper No. 2606223, 2015. For an interdisciplinary discussion of compliance, see for example, Haas, P., 'Choosing to Comply: Theorizing from International Relations and Comparative Politics', in Shelton, D. (ed). 'Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System', Oxford University Press, 2003; Lutmar, C., Carneiro, C.L. & Mitchell, S.M., 'Formal Commitments and States' Interests: Compliance in International Relations', International Interactions, Vol. 42, Issue. 4, 2016; Raustiala, K. & Slaughter, A. M., 'International Law, International Relations and Compliance', Princeton Law & Public Affairs Paper No. 02-2, 2002; For a comparative empirical analysis of the issue, see Pollack, M., 'Who Supports International Law, and Why: The United States, the European Union, and the International Legal Order', International Journal of Constitutional Law, Volume 13, Issue 4, 2015 at 873–900.

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actors.[161] An analogy frequently provided considers these IR approaches to operate as coloured lenses which bring forward only certain events (or elements of a single event), which it considers relevant, to the forefront of the user's view.[162] Therefore, the same event while being ignored by proponents of a one theory, may yet be of vital importance to advocates of another.

Given this methodological strategy, this research therefore finds itself to be squarely within what has been to referred to as "the fifth and current interdisciplinary international law and international relation (IL/IR) stage of research on international law"[163] which generally consists of works that are "a joint enterprise of political scientists and legal scholars."[164] In this research phase, where a "reinvigoration of political science scholarship on international law"[165] has been

[161] For a discussion of such a derivation see for example *Supra* note 160 (Lee 2015).

[162] Holsti, O.R., 'Theories of International Relations', in Explaining the History of American Foreign Relations, edited by Hogan, M.J. and Paterson, T.G., Cambridge University Press, 2004; Holsti, O. R., 'Cognitive process approaches to decision-making: Foreign policy actors viewed psychologically. American Behavioural Scientist', 20(1), 11-32, 1976. See also, Buzan, B., 'The Timeless Wisdom of Realism?', in Smith, S., Booth, K., & Zalewski, M. (Eds.), International Theory: Positivism and Beyond. Cambridge: Cambridge University Press 1996, at 56; Smith, S., 'Introduction: Diversity and Disciplinarity in International Relations Theory', in Dunne, T., Kurki, M. & Smith, S. (eds) International Relations Theories. Oxford: Oxford University Press: 1-12 2007.

[163] Whytock, C. A., 'From International Law and International Relations to Law and World Politics', in 'Oxford Research Encyclopaedia of Politics: The Politics of Law & the Judiciary', ed. Thompson W. & Whittington, K.E., 2016.

[164] *Ibid* (Whytock 2016). See for example, Kelley, J. G., 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements', American Political Science Review, Vol. 3, No. 101, 2007 at 573-589.

[165] *Supra* note 163 (Whytock 2016) at 4.

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noted, treaty compliance has indeed previously appeared as a topic of interest[166], in addition to treaty design[167] and international courts[168].

Although contemporary IR theory has diversified enough to no longer be segregable into well-demarcated typologies, three major schools of thought are yet discernible based on key assumptions and emphasized variables. These approaches account for a significant amount of IR scholarship in present times and though the risk of oversimplifying them still stands, particularly since several 'hybrid' variants of these approaches have also emerged, the following section aims to briefly discuss these approaches individually and ultimately derive three competing causal hypotheses for state compliance with ISA awards.

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[166] A prominent example being *supra* note 54 (Simmons 2000).

[167] See for example, Koremenos, B., 'Contracting Around International Uncertainty', American Political Science Review, Vol. 99, No. 4, 2005 at 549-65; Finnemore, M. & Sikkink, K., 'International Norm Dynamics and Political Change', International Organization, Vol. 52, No. 4, 1998 at 887-917; Raustiala, K., 'Form and Substance in International Agreements', American Journal of International law, Vol. 99, No. 4, 2005 at 581-614; Sandholtz, W., 'Prohibiting Plunder: How Norms Change', Oxford University Press, 2007.

[168] Alter, K. J., 'The New Terrain of International Law: Courts, Politics, Rights', Princeton University Press, 2014; Helfer, L. R., & Slaughter, A. M., 'Toward a Theory of Effective Supranational Adjudication'. Yale Law Journal 107, 1997 at 273-392; Stone Sweet, A. & Thomas L. B. 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', American Political Science Review, Vol. 92, No. 1, 1998 at 63-81.

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B. Compliance as a State Choice & the three Dominant IR Approaches:

I.(a). Realism

The dominant IR theory since the conception of international relations as a discipline,[169] realism traces its origin as far back as ancient Greece to writings by Thucydides[170] and also considers works by Machiavelli, Rousseau and Hobbes to be early examples of work which supports its doctrine.[171] The treaties memorialising the Peace of Westphalia in the 17th century facilitated the emergence of Westphalian sovereignty and brought forward the nation-state as the principal actor in the international arena and therefore further contributed to realism solidifying its significance for IR scholars.[172] The onset of the Second World War gave further shape to how early realism manifested itself as criticisms put forth by scholars of the theory against interwar idealist thinking increasingly gained traction.[173]

[169] Steinberg, R. H., & Zasloff, J. M., 'Power and International Law', American Journal of International Law, 100, 64-73, 2006.

[170] The author of 'History of the Peloponnesian War' (dated (431–404) is considered to be the founding father of the realist school of political philosophy.

[171] Machiavelli, N. & Wootton, D., 'The Prince' Indianapolis: Hackett Publishing Company, 1995. See also, Boucher, D., 'Political Theories of International Relations: from Thucydides to the Present', Oxford University Press, 1998; Williams, M. C., 'Hobbes and International Relations: A Reconsideration', International Organizations, Volume 50 No. 2, 1996 at 213-236.

[172] Tischer, A., 'Peace of Westphalia (1648)', Oxford Bibliographies, 2015 from http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0073.xml. For a contrarian view, see Beaulac, S., 'The Westphalian Model in Defining International Law: Challenging the Myth', Australian Journal of Legal History, Vol. 9, 2004 available at http://www.austlii.edu.au/au/journals/AJLH/2004/9.html.

[173] The outburst of World War II was considered by realists as evidence of the 'cyclical' nature of international politics and the fallacy of idealist thinking. This contributed to Realism remaining prevalent among international relations since the formation of the discipline.

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Taking an overall view of the various strands of contemporary realist thinking, the structural conditions of realist vision of the world, on the whole, consist of four key tenets.[174] First, the international system is defined by anarchy as a result of no central authority being present to maintain order in the international system.[175] Thus, there does not exist any inherent structure of the international system to authoritatively to control and regulate interactions between states, nor can any such structure ever emerge effectively.

Secondly, as a result of the above world-view, realists perceive territorially-defined nation states as the main actors in international relations. Their sovereign and autonomous nature, both legally and geographically, allows them to, in the realist view, be the uniquely & solely relevant unitary players in international relations, who either act by their own consent or as a result of coercive diplomacy or ‘forceful persuasion’. Realism is therefore considered to be a ‘state-centric’ theory which does not afford international institutions and other non-state actors such as multinational corporations much influence over international affairs.

Thirdly, realists determine the only key goal of states to be survival, particularly against military threats from foreign states.[176] Most importantly, this assumption leads realist theory to hold states to not just be the principal international actors but also ones who are inherently rational and autonomous, with a primary goal of survival and a set of transitive preferences. It

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[174] Mearsheimer, J. J., ‘The False Promise of International Institutions’, International Security, Vol. 19-3, 1994 at 5-49.

[175] Waltz, K. N., ‘Theory of International Politics’, Waveland Press, 1979.

[176] Two classic examples of such assertion being Carr, E. H., ‘The Twenty Years' Crisis: 1919–1939: An Introduction to the Study of International Relations’, Palgrave Macmillan, 1939; Morgenthau, H., ‘Politics Among Nations: The Struggle for Power and Peace’, New York: McGraw-Hill, 1948.

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is worth mentioning that with ‘rational’, what is implied is that the state actor employs a cost-benefit analysis of alternative choices and decides on the basis of net national gain maximisation. Incentive and capacity, therefore, are decisive and brought to the forefront of the realist discourse.

Finally, in addition to being focused on their sovereignty, states are also considered to be competing amongst each other for power, particularly given the general mistrust and uncertainty surrounding an anarchic international system.

Here, power can be interpreted in multiple ways but usually takes the form of military or economic resources as the two are often the most effective material gauges of a state’s coercive capacity.[177] The continual efforts to amass power in the form of such resources in pursuit of self-interest therefore becomes a key determinant of inter-state relations and relative power itself, a key variable. This phenomenon, it is believed, explains the dominance of hegemonies or highly powerful states who possess the most military and economic clout and consequently, determine the direction in which the tides of international politics flow.

To summarise, realism dictates that, regardless of any domestic interests or co-operative international commitments to benevolent social ideals, the anarchic and uncertain nature of the international system requires, indeed dictates, that not only do states adopt a rational, self-interested *modus operandi* but also that in pursuit of such goals, they constantly seek to acquire and collect power to survive and advance their material interests relative to other states.

[177] Collins, A., ‘Contemporary Security Studies’, Oxford University Press 2013 at 4; Jackson, R., & Sørensen, G., ‘Introduction to International Relations: Theories and Approaches’, Oxford University Press 2012 at 213.

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Realism & International Law as 'Epiphenomenon'[178]

An unavoidable and problematic conclusion of the realist view of the international system[179] is that international law is simply irrelevant for state behaviour i.e. international law has negligible independent impact and does not, nor cannot, materially affect the choices made by states. Instead, states act only in accordance with their own rationally acquired preferences, react to coercions from relatively more powerful states instead of a sense of legal obligation and would behave in the same manner even in the absence of international law.

The existence of international law then is perceived more as a symptom than a cause of state behaviour, particularly since its content in treaty-form or within formal agreements is the result of, at times one-sided, negotiations between states of varying levels of economic and military

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[178] *Supra* note 12 (Kingsbury 1998) at 35.

[179] On the realist perspective on international law generally, see Dunne, T. & Schmidt, B., 'Realism' in Baylis, J., Smith, S. & Owens, P. (eds), 'The Globalization of World Politics', Oxford University Press, 2014, at 99; Steinberg, R.H., 'Wanted – Dead or Alive: Realism in International Law' in Dunoff, J. L. & Pollack, M. A. (eds), 'Interdisciplinary Perspectives on International Law and International Relations: The State of the Art', Cambridge University Press, 2013, 146–72; Donnelly, J., 'Realism', in Burchill, S. et al. (eds), 'Theories of International Relations', Palgrave, 2009, 31–56, at 31; Goldsmith, J. & Posner, E., 'The Limits of International Law', Oxford University Press, 2005 at 4–17, 26–38; Frankel, B., 'Restating the Realist Case' in Frankel, B. (ed.), 'Realism: Restatement and Renewal', Frank Cass, 1996 ix-xx, at xiv-xiv. See also Norman, G. & Trachtman, J. P., 'The Customary International Law Game', The American Journal of International Law, Vol. 99-3, 2005 pp. 541-580; Chinen, M.A., 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner', Michigan Journal of International Law, Vol. 23-143, 2001; Fon, V. & Parisi, F., 'Customary Law and Articulation Theories: An Economic Analysis', George Mason Law & Econ. Res. Paper No. 02-24, 2002; Swaine, E. T., 'Rational Custom' Duke Law Journal, Vol. 52, 2002 at 559; 1113 (1999). Posner, E. & Sykes, A., 'Economic Foundations of International Law', Harvard University Press 2013; Guzman, A., 'How International Law Works: A Rational Choice Theory', Oxford University Press, 2008. See also *supra* note 51 (Posner & Goldsmith 1999).

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resources, the more powerful of whom broadly establish and control the content and standards of international law. Therefore, power, particularly hegemonic power[180], as opposed to legal obligation, is the critical factor guiding the direction in which international relations proceed.[181]

That said, while international law may not be considered sacred by realists, it retains at the very least a stabilising role, particularly in light of how the doctrine of sovereign and diplomatic immunity functions against execution of judgements and foreign arbitral awards.[182]

Criticisms of the Realist Understanding

Despite the strong influence of realist theory over the 20th century IR discourse and its appealing ability to parsimoniously explain events such as the World Wars, such cynicism towards international law on the part of realist theory has not been without its share of criticism and critics have sought to articulate theories which contradict all of the four tenets of realism as discussed above.

For example, instead of placing the state as the sole actor of interest towards explaining international phenomena, critics have also placed emphasis on both sub-state actors (e.g.

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[180] For a discussion of hegemonic power within the context of international investment law, see Sornarajah, M., 'Resistance and Change in the International Law on Foreign Investment', Cambridge University Press, 2015.

[181] See Boyle, F. A., 'The Irrelevance of International Law', California Western International Law Journal, Vol. 10, 1980. See also, Bork, R. H., 'The Limits of International Law', National Interest, 18:3-10, 1990.

[182] Crawford, J., 'Execution of Judgments and Foreign Sovereign Immunity', American Journal of International Law, 75:4, 1981 at 820-869. See also Blane, A., 'Sovereign Immunity as a Bar to the Execution of International Arbitral Awards', NYU Journal of International Law & Politics, Vol. 41, No. 2, 2008 at 453.

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domestic political parties and industry lobbies) and non-state actors (e.g. international institutions and multinational corporations). Furthermore, the presumption of rationality on the part of states has been heavily questioned, particularly with the onset of the behavioural economics and its application in international law and relations.[183]

Such a dim view of international law and international institutions being irrelevant in a storm of overarching anarchy[184] is of course questionable, particularly in light of the modern successes of international law such as the creation of the World Trade Organisation (WTO) following the Uruguay Round negotiations which lasted several years to conclude and required immense amounts of resources from the participating states.[185] An argument may be that if indeed international law is irrelevant, one would not expect such efforts devoted to its creation to begin with, particularly when the substantive content of such international law holds the potential to severely curtail the economic dominance of certain players, thereby making it irrational for them to participate in it at all. Nor would one observe states taking recourse to the WTO when international trade rules to their detriment by other states.

Indeed, international dispute resolution in any context, would not be sought after by state players to the extent that it currently pursued, if the proposition of the irrelevance of international law truly held any weight. Take for example India's recent recourse to the International Court of Justice (ICJ) when an Indian national was sentenced to death in Pakistan

[183] van Aaken, A., 'Behavioural International Law and Economics', Harvard International Law Journal, Vol. 55 No. 2, 2014.

[184] *Supra* note 174 (Mearsheimer 1994).

[185] *Supra* note 3 (Guzman 2002) at 1837.

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for alleged espionage activities, in a military court, without being provided consular access.[186] When even in the most severe cases of inter-state conflict and mistrust we observe dispute resolution through international law being utilised, suggestions of the latter's irrelevance are questionable.

States also have a more general interest in maintaining the stability and effectiveness of the international legal system and contrary to realist theory, may comply with obligations that are materially loss-making in the short-term. Although as a counter-argument, one may also consider the functioning of the international legal system to itself be part of a state's compliance calculus as a potential long-term benefit, thereby bringing back the decision of compliance within the purview of rational decision-making.

Compliance with International Law under Realism

Given the above, realist explanations for state compliance with international law tend to be apologetic and sceptical of high compliance rates as evidence of an international legal obligation's causal capacity towards modifying state behaviour. This is primarily due to its vision of the international system as being decentralised and susceptible to hegemonic power[187] where any 'noble' intents established within the content of international agreements or within

[186] Miles, C. & Ranganathan, S., 'Some Thoughts on the Jadhav Case: Jurisdiction, Merits, and the Effect of a Presidential Communication', Blog of the European Journal of International Law, Published on May 12, 2017.

[187] *Supra* note 176 (Morgenthau 1948).

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treaties establishing international institutions are only meant to mask a harsher reality of power dynamics.[188]

Such 'coincidental' compliance where any "alleged correspondence between the rules and the interests of States"[189] is rendered a mere by-product of the present distribution of power, is understood to be determined not by the rules themselves but by material self-interests whose key variables are incentive and capacity. As a result, the distinction between binding and non-binding rules appears blurrier to realists since in either category a rule is only likely to be created if states already intend to behave in the manner prescribed by it.

While such ideas may translate into the investment treaty arbitration context in the form of the compliance resulting from the threat of sanctions and reputational damage resulting in decreased FDI levels, what cannot be readily adapted is the suggestion that states only enforce rules because they themselves codify them since, as discussed in Chapter II, such enforcement here may also be conducted through a foreign court outside of the non-compliant state despite the state to which the foreign court belongs not being a contracting party to the treaty governing the dispute and without such court considering the merits of the arbitral tribunal's decision.

Nonetheless, under realist theory, states are expected to decide whether or not to comply with an adverse ISA award essentially based around a cost-benefit analysis entailing the positive and negative effects of either choice. One key mechanism through which external power,

[188] See Oppenheim, L., 'International Law', Edited by Jennings R. & Watts, A. KCMG QC London: Longmans, Green. 2nd ed, 1912.

[189] *Supra* note 12 (Kingsbury 1998) at 351.

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particularly economic power, may influence such cost-benefit analysis towards compliance pertains to reputation.[190]

While on one hand, compliance may entail a cost in the form of payment of monetary damages, on the other hand, it also provides a benefit as, by adhering to its international obligations and compensating a foreign investor at the direction of an arbitral tribunal, states develop, or at the very least, maintain a positive reputation for acting in good faith. In turn, this positive reputation maintains its inflow of FDI or, more pragmatically, does not negatively affect the same as much as non-compliance would.

So, for example, if a state facing an adverse award is considering avoiding voluntary compliance, under a realist view, it would first compare the benefit from doing so, in the form of the singular amount of damages stipulated by the award that it would avoid paying, with the costs of the same. These costs have been understood has containing at least three components,[191] including the "benefits currently being provided by foreign firms, including tax revenues, technological transfers, employment",[192] "reputational loss in the eyes of foreign investors translating into loss of future investment"[193] and also loss of reputation with respect to other states as "potential treaty partners will view the country as a less reliable partner and will be less willing to enter into future agreements."[194]

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[190] *Supra* note 3 (Guzman 2002) at 1851.

[191] *Ibid*

[192] *Ibid*

[193] *Supra* note 3 (Guzman 2002) at 1852.

[194] *Ibid*

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When the monetary value of such expected costs outweighs the amount of damages stipulated by the award, the realist view would expect the state to always comply as not doing so would incur a net loss. This calculus therefore preserves the incentive for compliance. However, only as long as the variables so allow. After all, certain states may not possess any positive FDI outlooks or positive reputation amongst fellow states to begin with or the amount of damages for which they are liable may simply be high enough so as to surpass the total costs. In such cases then, the same calculus, which previously induced compliance, would rationally implore states to choose otherwise.

A second, more direct, mechanism through which external powers may further influence a state's cost-benefit analysis and direct its decision towards compliance pertains to sanctions. As discussed in Chapter II, sanctions form part of the various non-judicial means of inducing compliance at the disposal of the investor and typically include measures relating to trade and international loans. Sanctions may have a relatively stronger entry into a state's compliance calculus, given their relatively more immediate and tangible repercussions. Also, depending upon which state or group of states exert such sanctions, they may also be more severe than the reputational repercussions discussed above.

More importantly, when both mechanisms are active concurrently, a strong rational case in favour of compliance emerges and only exceptionally high-value awards may be expected to not be complied with. That said, in the Argentina cases, despite facing significantly steep adverse awards during a period of economic and political crises, including a shortage of foreign reserves, in the face of multiple trade and financial sanctions brought forward most prominently

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by the United States but also supported by other states,[195] the Argentine government was nonetheless eventually compelled to comply. The Argentine case therefore exemplifies the potency of realist factors towards influencing state decisions towards compliance, especially when backed by major economic powers.

I.(b). Rationalist Institutionalism

An additional dimension to the realist view is brought forward by a group of theories which, although do not reject many of the assumptions of realism such as states being the primary and rational unitary agents in an anarchical system,[196] have eventually challenged one of its key conclusions i.e. that international co-operation can be a rational possibility driven by self-interest. Institutionalist theories, as they are referred to, employ empirical studies and economic techniques such as game theory to model the functions that international institutions may serve towards facilitating cooperation and compliance amongst states.[197]

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[195] See for example, MercoPress, 'UK Will Block IADB and World Bank Loans to Argentina because of Financial 'Misconduct', MercoPress Online, 2013, available at: http://en.mercopress.com/2013/02/14/uk-will-block-iadb-and-world-bank-loans-toargentina-because-of-financial-misconduct; Hornbeck, J. F., 'Argentina's Defaulted Sovereign Debt: Dealing with the 'Holdouts'', Report No. R41029, Congressional Research Service, 2013, at 11–12, available at: https://www.fas.org/sgp/crs/row/R41029.pdf

[196] Keohane, R., 'After Hegemony: Cooperation and Discord in the World Political Economy', Princeton University Press, 1989. See also Keohane, R., 'International Institutions and State Power: Essays in International Relations Theory', Westview Press, 1989.

[197] See for example, Axelrod, R. & Keohane, R. O., 'Achieving Cooperation under Anarchy: Strategies and Institutions', World Politics, Volume 38, Issue 1, 1985 at pp. 226-254. See also, Zürn, M., 'Problematic Social Situations and International Institutions: On the Use of Game Theory in International Politics', in Pfetsch, F. R. (Ed.), 'International Relations and Pan-Europe: Theoretical Approaches and Empirical Findings', Inaugural Pan-European Conference in International Relations, Heidelberg, Germany, September 16-22, 1992, 1993 pp. 63-84.

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Institutions, defined as "a set of rules, norms, practices and decision-making procedures that shape expectations"[198], if empowered and centralised enough to monitor compliance and disseminate compliance-related information, tend to facilitate compliance firstly by establishing norms of behaviour in the form of 'focal points'[199] (which allow states to more reliably select compliant courses of action), and secondly by reducing the transaction costs of employing sanctions against non-compliance.

If states are aware that non-compliance would not go unnoticed and that sanctions could be more credibly and feasibly applied, their compliance calculus would bear heavier towards compliance more often. Although in some contexts, "sanctions or even threats to impose sanctions seldom constitute the most important determinant of observed levels of compliance with institutionalized rights and rules"[200], institutions nonetheless increase the expected cost of non-compliance and "enhance the utility of a good reputation."[201]

An important model of compliance with international law which draws upon both realist and institutionalist IR theories highlights the compliance-inducing effects of repeated interactions organised through institutions on state behaviour.[202] Repeated interactions via institutions of

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[198] Slaughter, A. M, 'International Relations, Principal Theories', Max Planck Encyclopaedia of Public International Law, 2011 at page 2 para 10.

[199] *Ibid* at page 3, para 12. See also *Supra* note 179 (Guzman 2008), Trachtman, J., 'The Economic Structure of the Law of International Organizations' Chicago Journal of International Law, Vol. 15-1, 2014. Trachtman, J., 'The Economic Structure of International Law', Harvard University Press, 2008.

[200] Young, O. R., 'International Governance: Protecting the Environment in a Stateless Society', Cornell University Press, 1994, p. 195.

[201] *Supra* note 198 (Slaughter 2011) at page 2, para 10.

[202] *Supra* note 3 (Guzman 2002) at 1823.

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other states also contribute towards altering a state's perception of the legitimacy of rules requiring compliance, which in turn shifts that state's rational incentive in favour of compliance.[203]

By reducing transaction costs, institutionalist theory thus manages to capture the material interests of states and channel them towards compliance, thereby demonstrably undoing some of the realist critiques of the international system i.e. that uncertainty and mistrust are too prevalent for cooperation and compliance to rationally occur. Within the context of compliance with ISA awards, the several international arbitral institutions that neutrally administer investor-state disputes may, at least ostensibly, be considered to not just hold a position that is well-placed to disseminate compliance-related information (thereby providing a platform for the 'naming and shaming' of non-compliant states), but also hold an inherent incentive to ensure compliance with award rendered under their auspices as non-compliance also negatively affects their own reputation in the 'arbitration market' as well.

Hypothesis I:

State compliance with ISA awards occurs in the presence of the external pressure from more powerful states outweighing the value of the award and in the presence of an arbitral institution administering the dispute.

[203] *Supra* note 12 (Kingsbury 1998) at 352.

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II. Liberalism

In comparison to realist or institutionalist theories, Liberalism, coined after the 'liberal philosophy' originating in work of Immanuel Kant[204] & Adam Smith,[205] provides a more probing albeit less generisable vision of international cooperation and state compliance with international law. To the extent that the former two branches consider states to be acting in self-interest within an anarchic system, liberal theories concur. However, where they diverge is on the assumption of states being autonomous and unitary.

Instead, state preferences are viewed here as dependent upon the independent preferences of either individual sub-state actors or alliances of actors which gathers enough power to tilt the international decision-maker's balance in its favour, thereby disaggregating the state and linking the individual and the subnational entity to the "increasingly dense matrix of transnational interactions involving (components of) other States, inter-governmental institutions, corporations, and a whole range of cross-border groups and networks that are slowly evolving into a transnational civil society."[206]

The standard liberal IR view maintains the assumption of rational choice on its central actors, except it also posits that unless the state is disaggregated, any causal explanation for its

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[204] Doyle, M. W., 'Kant, Liberal Legacies and Foreign Affairs', Philosophy and Public Affairs, Vol. 12-4, 1983 at 323-353.

[205] Smith's principal contribution to the liberal tradition being his role as the great spokesman of the *laissez-faire* principle and the minimalist state that together posit that human nature is essentially benevolent and that individual self-interest can be harnessed by society to promote aggregate social welfare. See Campbell, R.H. & Skinner, A.S., 'An Inquiry into the Nature and Causes of the Wealth of Nations [1776]', Oxford University Press, 1976.

[206] *Supra* note 12 (Kingsbury 1998) at 371.

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behaviour on the international scale would remain incomplete.[207] States are therefore no longer 'black boxes' as their domestic characteristics, which under the previous rational visions were ineffective and inferior to aggregate state capability, now gain primary relevance.

This sense of plurality is a quality that allows domestic characteristics such as regime type[208] to be treated as independent variables and requires an emphasis on both domestic political and legal[209] processes which provide the channels through which competing interests may be mobilised and subsequently translated into state decisions. As a result, liberal IR theory is often also interested in political ideology as a guiding force for and indicator of aggregate preferences.[210]

One criticism of the liberal framework of analysis for causally examining state decisions on the international front using domestic politics is that unlike realism or institutionalism which provide more functional ideas that are more readily adaptable to diverse contexts, such

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[207] See for example, Moravcsik, A., 'Taking Preferences Seriously: A Liberal Theory of International Politics', International Organization, Volume 51, Issue 4, 1997 at 513-553; Putnam, R. D., 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', International Organization, Vol 42-3, 427-460, 1988; de Mesquita, B., 'Principles of International Politics, Thousand Oaks Sage, 2014; Waltz, K., 'Man, the State, and War: A Theoretical Analysis', Columbia University Press, 1959.

[208] Slaughter, A.M., 'International Law in a World of Liberal States', European Journal of International Law, Volume 6, 1995 at 503.

[209] Von Stein, J., 'Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law', British Journal of Political Science, Vol. 46-3, 2016 at 655-679. See also Moore, D.H., 'Constitutional Commitment to International Law Compliance', Virginia Law Review, Volume 102, 2016 at 367.

[210] Howard, M., 'Ideology and International Relations', Review of International Studies, Vol. 15-1 1989, at 1–10. See also Tsygankov, A.P, 'National ideology and IR theory: Three Incarnations of the 'Russian Idea'', European Journal of International Relations, Vol 16-4, 2010 at 663–686.

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explanations are relatively complex, context-dependent and hence less generisable into overarching mechanisms which can provide a coherent and truly general IR theory.

Nonetheless, liberally-oriented works have amassed a rich body of literature[211] which although remains undecided on the specific underlying mechanism, puts forth a highly developed argument of democratic peace i.e. that states with more mature and liberal democratic systems are likelier to be more cooperative, law-abiding and respectful of international judicial authorities[212] First imagined by Enlightenment thinker Immanuel Kant [213], the conclusion is bolstered by the paucity of observed inter-democratic state conflicts and squarely points towards the potential role of regime type as an explanatory variable for compliance.

Compliance with International Law under Liberalism

One mechanism by which democratic regimes lead to better compliance to international rules centres around their dependency on the domestic rule of law for the proper functioning of internal democratic processes and institutions which then travels over to international fora as

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[211] See Cristol, J., 'Liberalism', Oxford Bibliographies in International Relations, 2011 available at http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0060.xml.

[212] Doyle, M., 'Liberalism and World Politics', American Political Science Review, Volume 80, Issue 4, 1986 at 1151-1169; Raymond, G.A., 'Democracies, Disputes and Third-Party Intermediaries', Journal of Conflict Resolution, Vol. 38-1, 1994 at 24-42.

[213] See Kant, E., 'Perpetual Peace: A Philosophical Essay, 1795', London, S. Sonnenschein, 1903.

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well[214], as a result of the "enmeshment"[215] of international obligations within domestic politics. Therefore, a higher rule of law within a state's characteristics is an indication of greater likelihood of the state's willingness to comply with international law.216 However, it is worth mentioning that this mechanism may not be generalised to also imply that 'democratisation' of a regime would necessarily lead to improved compliance.217

Another more prominent and distinctly rational mechanism rests specifically "on the observation that the leader of a liberal democracy may be constrained by the influence of international legal obligations on domestic groups, who are likely to cite such rules or rulings to influence their own government's policy."[218]

Such constraints in the form of political costs ultimately determine state choices and bear heavier on the state when the legal obligation in question relates to second-order compliance[219] to the extent that "domestic pressure is of utmost importance for states' international dispute

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[214] Dixon, W.J., 'Democracy and the Management of International Conflict', Journal of Conflict Resolution Vol. 37-1, 1993 at 42-68. See also Dixon, W.J., 'Democracy and the Peaceful Settlement of International Conflict', American Political Science Review, Volume 88-1, 1994 at 14-32.

[215] Keohane, R., 'Compliance with International Commitments: Politics within a Framework of Law', American Society of International Law Proceedings, Volume 86, 1992 at 176-80.

[216] *Supra* note 30 (Simmons 1998) at 75-93.

[217] Jacobson, H.K. & Brown E.W., 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collective Project', Global Governance, Vol. 1, No. 2, 1995 at 119-148.

[218] *Supra* note 30 (Simmons 1998) at 84.

[219] Fisher, R., 'Improving Compliance with International Law', University of Virginia Press, Procedural Aspects of International Law Series, Vol. 14, 1981 at 370.

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settlement behaviour."[220] These constraints often originate from the preferences of non-governmental organisations[221] or local firms[222] and opposition parties which however only receive sufficient leeway to function and create alliances effectively within open democratic states. For example, the farming lobby in certain states "are particularly well organized to create pressure when their economic interests are at stake."[223] The mechanism therefore places emphasis on the form of government adopted by a state and the level of accountability maintained by that form over state leadership.

Examples of state leadership being constrained in favour of compliance in such a manner have previously been witnessed in the areas of human rights[224] and international environmental law.[225] Within the context of state compliance with ISA awards, however, unlike the two fields mentioned above, for the majority of its existence, public awareness of state activity in ISA had

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[220] Zangl, B., 'Conditions for Compliance: US Dispute Settlement Behaviour under the GATT/WTO System', LMU Munich, Geschwister-Scholl-Institut, 2012, available at https://www.dvpw.de/fileadmin/docs/Kongress2012/Paperroom/2012IB-Zangl.pdf

[221] See Ahmed, S. & Potter, D.M., 'NGOs in International Politics', Kumarian Press, 2006.

[222] Milner, H.V., 'Resisting Protectionism: Global Industries and the Politics of International Trade', Princeton University Press, 1989.

[223] Paarlberg, R., 'Agricultural Policy Reform and the Uruguay Round: Synergistic Linkage in a Two-Level Game', International Organization, 51, 1997, 413-444. See also, Bednafiíková, Z. & Jílková, J., 'Why is the Agricultural Lobby in the European Union Member States So Effective?', Ekonomie-Management, 2012. See also, Crisp, J., 'Farming lobby to MEPs: We Will Quit EU if Emissions Capped', Euractiv.com, October 2015.

[224] See Sikkink, K., 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe', Ch.6 in Goldstein, J. & Keohane, R.O. (eds).,'Ideas & Foreign Policy: Beliefs, Institutions, and Political Change', Cornell University Press, 1993.

[225] *Supra* note 217 – Brown & Jacobson (1995).

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been scarce and only recently has it grown enough to muster any real counter-narrative attempts by domestic individuals and non-state actors to exert their preferences on state policy on ISA.[226]

Such exertions of political pressure, at times taking the form of public protests, while may have been visibly hostile to the conclusion of agreements providing for ISA and state involvement in ISA, have been significantly less so, if not completely absent, towards compliance with ISA awards already issued. That said, a "heightened role of public opinion and open political controversy can also work against compliance."[227]

This lack of public awareness and the resultant curtailment of domestic 'extra-governmental' constraints render the initial mechanism much less complex. Compliance now remains as being dependant on the rational interests of the state's executive branch (most prominently the chief executive) under whose responsibilities the negotiation and conclusion of investment agreements squarely falls. The key to determining the direction in which state choice on compliance turns therefore then lies in the level of accountability of the state leadership provided through institutional constraints embodied in the system of government, such as presidential or parliamentary.

The former type, particularly a full presidential system wherein the president is not elected by an assembly, is characterised by weaker institutional accountability and a tendency towards accommodating authoritarian leaders who are less "accustomed to constitutional constraints on their power in a domestic context are more likely to reject principled legal limits on their

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[226] See for example, Zalan, E., 'Stop TTIP' activists Hand EU 3mn Signatures', EU Observer, 2015 available at euobserver.com/institutional/130587. See also, Eberhardt P. & Olivet C., 'Civil Society Groups Say No to Investors Suing States in RCEP', Bilaterals, published on 3rd August 2016.

[227] *Supra* note 217 – Brown & Jacobson (1995)

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international behaviour."[228] For such state leaders, a reputation for abiding by international law may be of less value than "a reputation for unflinching protection of vital interests."[229]

Most alarmingly, robust evidence has been produced that 'personalist' authoritarian regimes lacking institutional constraints, which have been long-present in certain geographic regions and are observably on the rise[230], are "more likely than democracies to enter into international agreement but are less likely than democracies to comply with the agreements they sign." [231]

Within the context of compliance with ISA awards, an archetype of such resistance by a national chief executive within a presidential system with strong authoritarian tendencies is President Vladimir Putin of the Russian Federation. Although, the now infamous, *Yukos* case eventually resulted in a legal victory for the Russian state,[232] prior to the rulings setting aside the $50bn award, Russia displayed an openly hostile attitude towards the verdict issued by the Permanent Court of Arbitration (PCA).[233]

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[228] *Supra* note 30 (Simmons 1998) at 84. See also, *Supra* note 212 (Doyle 1986), *Supra* note 212 Raymond (1994) & *Supra* note 214 (Dixon 1993).

[229] *Supra* note 12 – Kingsbury at 352. See also de Mesquita, B., 'The Dictator's Handbook: Why Bad Behaviour Is Almost Always Good Politics', New York, NY: Public Affairs, 2011.

[230] Taussig, T., 'The Rise of Personalist Rule', The Brookings Institution, 2017 available at www.brookings.edu/blog/order-from-chaos/2017/03/23/the-rise-of-personalist-rule/

[231] Chyzh, O., 'Can you Trust a Dictator: A Strategic Model of Authoritarian Regimes: Signing and Compliance with International Treaties', Conflict Management and Peace Science, Vol. 31-1, 2014 at 3–27.

[232] Buckley, N., 'Russia wins legal victory over Yukos damages', Financial Times, available at https://www.ft.com/content/2a23a352-06ce-11e6-a70d-4e39ac32c284

[233] The Economist, 'Now Try Collecting: In Business Disputes Taken to Arbitration, Winning Is Just the Start', available at https://www.economist.com/news/business/21610284-business-disputes-taken-arbitration-winning-just-start-now-try-collecting.

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This defiance on Russia's part towards the *Yukos* award (and its related rulings) may be, at least partly, understood as originating from (or at the very least being domestically justifiable by) the nationalist political agenda of the party to which President Putin belongs.[234] Nationalism, as an inward-looking political ideology driving and prioritising domestic interests, therefore further augments the likelihood of non-compliance with international rulings such as ISA awards and provides a second key domestic dimension to model of compliance derived from liberal theory.

Lastly, this thesis asserts that a third domestic dimension, relating to the nature of the state act, measure or deliberate omission which gave rise to the investor's claim under international law, may further be considered for the purpose of assessing a state's propensity to comply with an adverse ISA award. This dimension, coined here as the compliance 'gravity' of a case, is an

[234] See Nevzlin, L., 'What does the Yukos Affair man for Russia', Carnegie Endowment for International Peace, available at http://carnegieendowment.org/2005/07/12/what-does-yukos-affair-mean-for-russia-event-796; Shevtsova, L., 'Implications of the Yukos Scandal for Russian Domestic Politics', Carnegie Endowment for International Peace, available at http://carnegieendowment.org/2003/09/16/implications-of-yukos-scandal-for-russian-domestic-politics-event-643; Klussman, U., 'Russia's Yukos Trial: Is Anti-Semitism at the Heart of Mikhail Khodorkovsky's Prosecution?', Der Spiegel, 2005, available at http://www.spiegel.de/international/russia-s-yukos-trial-is-anti-semitism-at-the-heart-of-mikhail-khodorkovsky-s-prosecution-a-353670.html. See more generally, Law, R., 'Soviet Nationalism Is Still Driving Russian Politics', The Atlantic, 2011, available at https://www.theatlantic.com/international/archive/2011/12/soviet-nationalism-is-still-driving-russian-politics/250391/, Lipman, M., 'Putin's Nationalist Strategy', The New Yorker, 2014, available at https://www.newyorker.com/news/news-desk/putins-nationalist-strategy, Foer, F., 'It's Putin's World: How the Russian president became the ideological hero of nationalists everywhere, The Atlantic, 2017, available at https://www.theatlantic.com/magazine/archive/2017/03/its-putins-world/513848/, Clover, C., 'The Return of Russian Nationalism', The Financial Times, 2017, available at https://www.ft.com/content/edb595d8-aeba-11e7-beba-5521c713abf4.

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index measuring the directness, severity (such as the threat or use of force or violence) and political sensitivity (such as relating to issues of high importance to the domestic public, for example, national security) the state act or omission that gave rise to the investor's claim and ruled unlawful by the arbitral tribunal in any given case.

Each of the three components of the index are characteristics of the exercise of a chief executive's domestic authority, which, eventually, is deemed unlawful under international law by an arbitral tribunal. Therefore, for a state's chief executive, to comply with the resultant award would not just be an admittance of subordination of his or her domestic authority to the authority of the ISA tribunal, but also an acceptance of the constraint thus placed.

More importantly, particularly for authoritarian presidents who belong to nationalist political parties, compliance with an ISA award where the unlawful act was direct, severe and politically sensitive (such as forced seizure of farmland owned by investors of a specific ethnicity only for the purpose of redistribution to historically disenfranchised population of a different race[235]) would have greater negative ramifications on a chief executive's domestic standing, than for complying with an award for which the act was generally applied, non-violent and relatively benign politically, such as a general imposition of national quotas for isoglucose production.[236]

It is argued that the compliance 'gravity' of a case, originating from the act which led to the arbitral claim, by bearing weight in favour of non-compliance, works in direct opposition to the 'compliance pull' phenomenon, which emanates from the legal obligation set forth in the final award.

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[235] See Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6.

[236] See Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2

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Interestingly, the above assertion finds some agreement in realist theory, where, in relation to reputational theory, it has previously been argued that "all else equal, it is reasonable to expect that the compliance pull of international law will be the weakest when the stakes at issue are large. This is so because reputational effects have limited power. The likelihood that reputational effects will be sufficient to ensure compliance grows smaller as the stakes grow larger"[237] Also, in relation to direct sanctions, it has also previously been argued that "the efficiency of retaliatory measures (which are significant for compliance in numerous situations) depends on the weight attached by a party to the consequences of these retaliatory measures."[238]

Based on the above, the following hypothesis is constructed:

Hypothesis II:

State compliance with ISA awards occurs in an absence of a presidential system, an absence of a nationalist political agenda and an absence of compliance gravity.

III. Constructivism

Considered as a reactionary challenge to the rational frameworks setup by the dominant IR traditions of realism, institutionalism & later liberalism, constructivist thinking adopts a set of

[237] *Supra* note 3 (Guzman 2002) at 1883.

[238] *Supra* note 52 (Hirsch 2016) at 702.

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assumptions which take a departure from static rationality as a guiding force towards an alternative explanation of the international system as a function of socially constructed intangible values, norms and identities. In addition to being a competing IR theory then, constructivism is therefore also a separate ontology wherein objectively measurable material values are rejected as a means of explaining state behaviour[239] and replaced by collectively shared, subjective social meanings holding their own inherent values.[240]

This focus on societal contexts and subjective beliefs leads to endogenously constructed state identities and beliefs that "belie the simplistic notions of rationality."[241] States here are considered to follow a 'logic of appropriateness' where "rationality is heavily mediated by

[239] Baylis, J., Smith, S. & Owens, P., 'The Globalization of World Politics: An Introduction to International Relations', Oxford University Press, 2013.

[240] Wendt, A., 'Social Theory of International Politics', Cambridge Studies in International Relations No. 67, Cambridge University Press, 2000; Barnett, M., 'Social Constructivism' in Baylis, J., Smith, S. and Owens, P. (eds), 'The Globalization of World Politics', 6th ed. (Oxford: Oxford University Press, 2014) 155–68; Adler, E., 'Cognitive Evolution: A Dynamic Approach for the Study of International Relations and Their Progress' in Emanuel Adler and Beverly Crawford (eds), Progress in Post-war International Relations, New York: Columbia University Press, 1991, 43–88, at 44; Finnemore, M., 'Constructing Norms of Humanitarian Intervention' in Peter J Katzenstein (ed.), The Culture of National Security: Norms and Identity in World Politics, New York: Columbia University Press, 1996, 153–85; Guzzini, S. 'A Reconstruction of Constructivism in International Relations', European Journal of International Relations, 6-2, 147, 2000; Brunee, J. & Toope, S. J., 'International Law and Constructivism', Columbia Journal of Transnational Law 39-19, 2000. For a sociological perspective of international arbitration, see Dezalay, Y. & Garth, B., 'Dealing in Virtue', with a foreword by Pierre Bourdieu, The University of Chicago Press, 1996; Gaillard, E., 'Sociology of International Arbitration', Arbitration International, Volume 31-1, 2015, 1–17. For a sociological perspective of international investment law generally, see Hirsch, M., 'The Sociology of International Investment Law' in The Foundations of International Investment Law: Bringing Theory into Practice (Z. Douglas, J. Pauwelyn, and J.E. Viñuales, eds., Oxford University Press, 2014.

[241] *Supra* note 198 (Slaughter 2011) at 21.

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social norms"[242] as opposed to a 'logic of consequences' where states only follow paths towards maximising material interests. Social norms, as standards "of appropriate behaviour for actors with a given identity"[243], may also be created internationally[244] and are "not static but are developing constantly."[245]

It is also imperative to note that motivations that guide state behaviour to coincide with social norms are said to run 'deeper' than those which rational mechanisms elaborate and are said to "have a grip on the mind."[246] Therefore socially constructed notions such as 'fairness', 'authority' and 'legitimacy' are afforded more influential roles in international affairs under the constructivist view and are hence said to be crucial determinants of state identity and hence choices.

Furthermore, a quintessential question, previously alluded to in the introductory chapter, relates to the innate power of international law to have normative, belief-shaping effects on a state beyond its immediate material interests, the latter being as far as rational thinkers have been willing to concede.[247]

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[242] *Ibid* (Slaughter 2011) at 22.

[243] *Supra* note 167 (Finnemore & Sikkink 1998) at 891.

[244] An emerging example being humanitarian interventions. See Francioni, F. & Bakker, C., 'Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali', Transworld: The Transatlantic Relationship & the Future Global Governance, Working Paper 15, 2013. See also, Eaton, J., 'An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect' Michigan Journal of International Law, Vol. 32-4, 2011 at 765-804.

[245] Jackson, R. & Sørensen, G., 'Introduction to International Relations: Theories & Approaches', Oxford University Press, 2012 at 209.

[246] Elster, J., 'The Cement of Society: A Study of Social Order', Cambridge University Press, 1989 at pp. 100.

[247] *Supra* note 12 (Kingsbury 1998) at 353.

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Compliance with International Law under Constructivism

However, more relevant towards the issue of compliance is the potential normative effect implicitly contained within the legal obligation of compliance with international law which itself is said implore rule-consistent behaviour from states. Whereas obligation "encompasses incentives to comply with behavioural prescriptions which stem for a general sense of duty"[248], norms here take shape as "prescriptions or action in situations of choice, carrying a sense of obligation, a sense that they ought to be followed."[249] In addition, it has been established that "individuals are much more likely to conform their behaviour to norms to which they have an internal volitional commitment, and that such commitments are correlated with perceptions that the relevant rule is fair."[250]

This inward-looking moral sense of legal obligation is generally said to be, under natural law theory, a "peculiar force beyond them all, affects the will in a moral way, and inspires it inwardly with such a particular sense, as compels it to pass censure itself on its own actions, and to judge itself worthy of suffering evil, if it proceed not according to the rule prescribed."[251]

Furthermore, the normative power of legal obligation, which is an essential element of the compliance mechanism under constructivist IR theory, is also discussed in international legal theory as the notion of a 'compliance pull' where the legal obligation itself draws in states

[248] *Supra* note 10 (Young 1979) at 23.

[249] Chayes, A. & Chayes, A.H., 'The New Sovereignty: Compliance with International Regulatory Agreements', Harvard University Press, 1998 at 113.

[250] *Supra* note 12 (Kingsbury 1998) at 355, with reference to Tyler, T.R., 'Why People Obey the Law', Princeton University Press, 1990.

[251] von Pufendorf, S. F., 'Of the Law of Nature and Nations: Eight Books', translated by Kennett, B. (4th ed.), The Lawbook Exchange London, Book I..VI.5, 1729.

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towards compliance by means of their perceptions of procedural legitimacy and fairness.[252] Indeed, *pacta sunt servanda* stands as perhaps the single most fundamental norm of international law and deeply engrained within the many domestic judicial systems.

Within the context of state compliance with ISA awards, the varied effect of norms has been partially underwhelming until recently due to the relatively low awareness of the issue within the wider public and the resultant greater influence afforded to norms attributable to state executives. That limitation aside, as a contrary effect, there does also exist a temporal dimension of state compliance which has been augmented by this initial elongated phase of low public awareness and which may play a causal role towards explaining state compliance with ISA awards.

This dimension relates to the constructivist idea of norms holding the capacity of being 'routinized'[253] and compliance occurring 'habitually' as a result of states not conducting any recalculation of costs and benefits in the interest of stability and avoidance of transaction costs. More importantly, this phenomenon is visibly true for bureaucracies for whom "rules constitute an essential feature" and within which "routinized compliance with rules is a deeply ingrained norm." [254]

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[252] Franck, T.M., 'Fairness in International Law & Institutions', New York University, 1998.

[253] See Cardenas, S., 'Conflict and Compliance: State Responses to International Human Rights Pressure', University of Pennsylvania Press, 2011. See also Craik, N., 'The International Law of Environmental Impact Assessment – Process, Substance & Integration', Cambridge University Press, 2008.

[254] *Supra* note 10 (Young 1979) at 39. More generally, see Mayntz, R., 'Legitimacy and Compliance in Transnational Governance, MPIfG Working Paper, No. 10/5, 2010. Discussing the works of Max Weber, Mayntz argues that Weber considered habit to be the ''most frequent base of individual behaviour''.

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The existence of such further dimensions impacting state behaviour on an intersubjective level is considered as evidence of the limitations of instrumentalist visions of compliance with international law prevalent within both the rational and the liberal narratives. By focusing on such normative dimensions, constructivist accounts tend to be more optimistic about state compliance and interstate cooperation in general.

Based on the above discussion, an appropriate constructivist hypothesis for a causal mechanism of state compliance would entail **c**ompliance occurring when the international legal norm related to foreign investment protection is internalised as a domestic social norm, the domestic rule of law existing as an intact social norm and the authority of the ISA tribunal being recognised as legitimate by the state and as a result ISA awards compliance being routinized.

Hypothesis III:

State compliance with ISA awards occurs in the presence of a demonstrated acceptance of legitimate authority of the ISA tribunal and the domestic presence of legal and social norms favouring the rule of law and foreign investment protection.

C. Conclusion

IR theory primarily seeks to explain and predict international outcomes of interest. This in turn allows international law scholarship a deeper understanding of whether and how international law can modify and regulate state behaviour, if at all. An attempt has therefore

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been made here summarise how the three dominant IR theories would explain compliance with ISA awards as one species of international outcomes.

Navigating such vastly clashing perspectives of IR theory on state compliance, one can easily imagine the tendency of proponents of individual theories to be increasingly trenchant and stiff in their understanding, which itself would be dependent upon one's subjective worldview. Nonetheless, despite the considerable theoretical differences in interpretation, emphasis and explanations that realists, liberals and constructivists may hold, there also exists certain areas of overlap where otherwise conflicting theories may find common ground.

For example, in addition to aligning rationally-formed incentives, international institutions may also facilitate compliance by exposing member states to a culture of 'world society' which may have an independent effect of itself on state behaviour such as policy adoption, implementation and compliance. International institutions can therefore "reconstruct state identities and their underlying value structures by relying on the transforming power of a variety of social processes."[255] This effect has been especially observed in the international environmental law context where "legitimation of scientific discourse and associations, the activism of international NGOs, international treaties, and the rise of IGOs all normatively contributed to the international environmental regime"[256] and "affiliations with IGOs or

[255] Downs, G.W., 'Constructing Effective Environmental Regimes', Annual Review of Political Science, Vol. 3, 2000 at 26.

[256] Meyer, John W., Frank, D.J., Hironaka, A., Schofer, E. & Tuma, N.B., 'The Structuring of a World Environmental Regime, 1870–1990', International Organization, Vol. 51-4, 1997 at 623–9.

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exposure to international environmental NGOs significantly increased the odds of ratifying environmental treaties."[257]

It would therefore be inappropriate to readily draw strict demarcations between IR theories, despite the compelling arguments and fierce contestations amongst them, and perhaps even more inappropriate to consider any one theory to be a universal truth that prevails over its 'rivals' in all contexts. Instead, as attempted here, a more holistic usage of IR theory, including its various assumptions and epistemologies, would be more fitting towards the analysis of international outcomes which unavoidably have complex, multi-causal roots.

Nonetheless, the above chapter, using insights from the dominant approaches of IR theory, provides this thesis with three key hypotheses. The first, derived from realism and rationalist institutionalism, looks outward and revolves around external power and cost-benefit analyses. The second, derived from liberalism, faces inward and focuses on the institutional constraints of the state chief executive, political ideology and the internal exercise of his or her domestic authority. Finally, our third hypothesis, derived from constructivism, centres on ubiquitous and intangible elements such as norms, values and legitimacy.

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[257] Frank, D.J., 'The Social Bases of Environmental Treaty Ratification, 1900–1990', Sociological Inquiry, Volume 69-4, 1999 at 523–550.

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Chapter IV:

State Compliance with ISA Awards: A Qualitative Comparative Analysis

A. Introduction

While voluntary compliance underpins the legitimacy of the ISA system it remains causally underexplored in the literature. Final awards issued by ISA tribunals are the product of an uncertain, expensive and usually lengthy process. Their successful domestic enforcement is not always a straightforward or likely outcome[258] and arguably an even more precarious affair for the investor claimant than obtaining the favourable award itself, the infamous *Yukos* cases against the Russian Federation being a prime example of such a colossal struggle.[259] Also, although sanctions for non-compliance are not entirely unprecedented, those which carry teeth are relatively weak.

Nonetheless, so far, a high rate of voluntary state compliance, most often simply entailing payment of monetary damages, has been observed. Though is it worth noting that with regard to awards for costs in investment arbitration, 37% of successful state respondents and 19% of

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[258] Though exceptionally swift cases of enforcement exist as well. For example, in the 2016 case of *Crystallex International Corp. v. Venezuela*, a US $1.202 billion award was successfully recognized and enforced (with interest and an additional $20,000 for costs) at the Ontario Superior Court of Justice in Canada within months of it being issued by the tribunal.

[259] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227. See St George, H., 'Muddy Waters in the Yukos Case', EU Reporter, published December 2016, available at https://www.eureporter.co/frontpage/2016/12/05/muddy-waters-in-the-yukos-case. See also, Burgstaller, M. & Gouiffes, L., 'Enforcing Awards Against States - Is It Becoming More Difficult?', Energy Disputes: Global Trends & Perspectives, Hogan Lovells LLP, June 2017, available at http://ehoganlovells.com/rv/ff00316ace8c43d67e13377b4d4cb9a793d9d6df.

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successful investor claimants "were paid nothing at all."[260] This poses an interesting question as to the causal factor (or constellation of factors) behind this ardent compliance with ISA awards, all the more so given how ISA belongs within the realm of international law, wherein judicial bodies "still lack purse and sword, but are more loosely linked to the executive branches and other actors on which they ultimately depend for the efficacy of their judgments."[261]

As a point of reference for secondary compliance from related fields, within international commercial arbitration, although few empirical studies have examined the issue comprehensively, estimates are that 90% of ICC arbitration awards are complied with voluntarily.[262] In a recent survey by the Institute for Transnational Arbitration, "forty-four percent of participants answered that 'very few' (10 percent or less) of their commercial arbitration awards were subject to judicial enforcement, while 27 percent answered that 'some' (10 to 40 percent) were."[263]

Also, from a sample of court decisions reported in the ICCA Yearbook Commercial Arbitration, "in approximately 10% of the reported cases involving the New York Convention, a court has refused enforcement of a foreign arbitral award."[264] Within other fields, rates of secondary compliance have also been reasonably positive though not quite as

[260] Gill, J. & Hodgson, M., 'Costs Awards—Who Pays?', Global Arbitration Review, 10(4) 2015.

[261] Huneeus, A., 'Compliance with International Court Judgments and Decisions', Oxford Handbook of International Adjudication, 2013; Karen J. Alter, Cesare Romano and Yuval Shany, eds., 2013.

[262] Lalive, P., 'Enforcing Awards', in 60 Years of ICC Arbitration: A Look at the Future 315 (ICC Publishing S.A. 1984), at 318-319

[263] See Robles, C., 'The 2014 Survey: How Well Are Arbitral Awards Enforced in Practice?', 29(2) News & Notes from the Institute for Transnational Arbitration 5-5, 2014.

[264] van den Berg, A. J., 'Refusals of Enforcement Under the New York Convention of 1958: The Unfortunate Few', 10 ICC Int'l Ct. Arb. Bull. 75 (Special Supp. 1999), at 75;

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comprehensively.[265] In the past, it has also been argued that the WTO dispute settlement process "failed to achieve compliance" because it had yet to "earn the general perception of legitimacy, both substantive and procedural."[266]

In the hope to provide not just theoretically sophisticated interdisciplinary work but also an "empirical testing ground"[267] for itself, this chapter aims to venture beyond descriptive analysis or thought experimentation and subjects the various competing IR theories of compliance with ISA awards to empirical analysis using a methodological tool borrowed from the social sciences i.e. Qualitative Comparative Analysis ("QCA").

It is submitted that doing so would help develop more nuanced propositions explaining compliance, illuminate interrelations between competing IR theories within the context at hand and reveal any causal links present between the selected variables and state behaviour.

The chapter begins with a discussion of previous QCA applications examining state compliance with international law, as a means of justifying the choice of method and establishing its appropriateness towards the research goal. It then provides a brief introduction the method generally, including its philosophical foundations, its distinction (as a 'set-theoretic' method) from more commonly utilised, probability-based approaches of statistical correlation and its place within the wider spectrum of empirical research methodologies.

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[265] Mitchell, R.B., 'Compliance with International Treaties: Lessons from Intentional Oil Pollution', 37 ENV'T 10, 1995; Schwebel, S.M., Commentary, in Compliance with Judgments of International Courts 39, 39, M.K. Bulterman & M. Kuijer eds., 1996.

[266] Brimeyer, B. L., 'Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations', 10 Minn. J. Global Trade 133, 2001.

[267] *Supra* note 160 (Raustiala & Slaughter 2002) at 538.

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The key steps in the QCA methodological process are then detailed, including the establishment of the outcome of interest, the case-selection criteria and finally the condition selection criteria which is developed in the form of models constructed from the three hypotheses derived in the previous chapter III. Each model provides a single world-view of a state propensity to comply with ISA awards and consists of the respective hypotheses, key assumptions and the condition variables which are then operationalised and coded with medium-N empirical data.

The models are then tested using QCA and the results thus produced are initially provided for all states and then for only developing countries. Finally, the chapter concludes the thesis with a discussion on the causal inferences drawn from the QCA and their contributions for our current understanding of state compliance with ISA awards along with the implications they may have on future research.

B. Compliance with International Law – Previous QCA Applications

QCA literature is no stranger to studies of compliance with international law and a fair amount of studies have previously considered diverse areas of state compliance. These studies are testament to the suitability of QCA to the context at hand. For example, in a QCA examining conditions under which "candidate countries of South East Europe (SEE) plausibly comply with EU legislation, three factors were found to relate systematically with pre-accession compliance

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in SEE countries, namely EU membership credibility, low political constrains and government resonance."[268]

Another application of QCA in EU law considered high post-accession compliance rates of the post-Soviet states that joined the EU in 2004 to pose a puzzle and "at odds with the dominant explanations of compliance with international rules."[269]

Considering UN arms embargo violations on the supplier side, another QCA study captured causal conjunctions and highlighted conditions under which these states present a higher propensity to violate an UN arms embargo, particularly highlighting the importance of the domestic rule of law.[270]

Within the context of effective state cooperation with international criminal courts and tribunals, a QCA identified six conditions as causally relevant for cooperation with the International Criminal Court and the Yugoslav Tribunal using an original dataset of 34 cases related to the cooperation of Kenya, Uganda, Serbia and Croatia.[271]

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[268] Dorian, J., 'Compliance with EU Legislation in the Pre-accession Countries of South East Europe (2005–2011): A Fuzzy-set Qualitative Comparative Analysis', Journal of European Integration Vol. 38-1, 2016.

[269] Sedelmeier, U., 'Compliance after Conditionality: Why Are the European Union's New Member States So Good?', No. 22, May 2016, "Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond" (MAXCAP), European Commission., 2016.

[270] Bareis, L., 'UN Arms Embargo Violations – It Takes Two to Tango. A QCA Perspective', COMPASSS: Working Paper Series, 2011.

[271] Jakušová, E., 'Explaining State Cooperation with the International Criminal Courts and Tribunals', University of Strathclyde. School of Government & Public Policy, Doctoral Thesis, 2016.

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QCA has also previously been applied to compliance with ICJ rulings, wherein "absence of preliminary objections, the presence of similarity & the presence of border delimitation disputes" where concluded to be jointly sufficient conditions for compliance. [272]

A prominent example of QCA applied in the field of international trade law investigated the conditions under "which the United States, in cases of a trade dispute, use and accept GATT/WTO dispute settlement procedures and what are the conditions under which it tends to disregard these procedures."[273] Though strictly speaking, the analysis considered adherence to a norm rather than a legal obligation, the results are still of interest and highlighted the importance of domestic interest group pressure as a driver of "US trade policy in general and its GATT/WTO dispute settlement behaviour more specifically."[274]

C. A Brief Introduction to Qualitative Comparative Analysis (QCA)

With its theoretical foundations going as far back as to the works of the 18th century Scottish philosopher David Hume[275] and the 19th century English philosopher John Stuart Mill[276] (along

[272] Mori, D., 'Compliance with Judgments of the International Court of Justice: A Qualitative Comparative Analysis', Annual Meeting of the Law and Society Association, 2012.

[273] *Supra* note 220 (Zangl 2012) at 3.

[274] *Supra* note 207 (Moravcsik 1997) at 528–531.

[275] Hume, D., 'An Enquiry Concerning Human Understanding (1772)' Chapter on Cause and Effect, Hackett Publishing, 1993.

[276] Mill, J. S., 'The Collected Works of John Stuart Mill, Volume VII - A System of Logic Ratiocinative and Inductive Part I [1843]: Of the Four Methods of Experimental Inquiry', Chapter VIII, Book III on Induction, University of Toronto Press, 2006. See also Ducheyne, S., 'J.S. Mill's Canons of Induction: From True Causes to Provisional Ones, History and Philosophy of Logic', History and Philosophy of Logic, Volume 29, 2008.

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with other seminal works on inductive reasoning and logic[277]), QCA, as a set of distinct 'set-theoretic' empirical methods, is a relatively new approach[278] that is well suited for the analysis of causal complexity and embraces pluralism in its worldview of causation.[279]

Set-theoretic methods, such as QCA, invoke set-relations and perceive relations between social phenomena as 'set and subset' relations, thereby allowing for an explicit framing of arguments in similar terms using, for example, membership scores of sets & subsets. It is argued that this feature will prove useful towards explaining how compliance behaviour is influenced as such arguments are then interpretable in terms of sufficiency, necessity and ultimately, also causality.[280] Set-theoretic methods can therefore provide a powerful toolkit for untangling causal complexity which, under this context, would greatly enhance our insight into compliance behaviour.

QCA, being the most formalised and complete of set-theoretic methods, primarily aims at causal interpretation and does so by usage of the 'principles of logical minimization', a process by which empirical information is expressed "in a more parsimonious yet logically equivalent

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[277] See Mackie, J. L., 'Causes and Conditions', American Philosophical Quarterly_ 2 (4):245 – 264, 1965. See also Quine, W.V., 'The Problem of Simplifying Truth Functions', American Mathematical Monthly 59 (8):521-31, 1952. & McCluskey, E.J., 'Minimization of Boolean Functions', Bell Systems Technical Journal 35 (6):1417-44, 1956.

[278] The earliest version of QCA being first propounded 1987. See Ragin, C., 'The Comparative Method. Moving Beyond Qualitative and Quantitative Strategies', University of California Press, 1987

[279] Reiss, J., 'Causation in the Social Sciences: Evidence, Inference, and Purpose', Philosophy of the Social Sciences' 39-20, 2009.

[280] See *supra* note 278 (Ragin 1987). See also Ragin, C., 'Redesigning Social Inquiry: Set Relations in Social Research', University of Chicago Press, 2008. See also, Goertz, G. & Mahoney, J., 'A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences', Princeton University Press, 2012.

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manner by looking for commonalities and differences among cases that share the same outcome."[281]

By permitting the introduction of simplifying assumptions in a way that maintains a clear connection to the underlying cases, QCA retains a contextual sensitivity to interactions among variables and allows one to capture causal conjunctions, even in small-to-intermediate-N studies.

On the other hand, QCA also incorporates the systematic analysis and fixed rules characteristic of quantitative methods, thus adding rigor and strengthening its replicability and transparency. This allows QCA to successfully address a frequent complaint against traditional case-oriented research that it tends to be weak on external validity i.e. it often incorporates too much of the specific context of the case into the causal accounts to permit inferences to other cases.

Unlike traditional probability-based quantitative methods such as regression analyses however, QCA uses formal logic, set relations and Boolean algebra to compare cases and identify necessary and sufficient conditions for an outcome, as opposed to assuming discrete effects of single variables and using correlations to infer causation. It is therefore well-suited for narrowing in on specific, mutually non-exclusive causal mechanisms for the same outcome.

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[281] Schneider, C. & Wagemann, C., 'Set-Theoretic Methods for the Social Sciences: A Guide to Qualitative Comparative Analysis', Cambridge University Press, 2012. See also, Rihoux, B. & Ragin, C., 'Configurational Comparative Methods. Qualitative Comparative Analysis (QCA) and Related Techniques', Thousand Oaks and Sage London, 2008.

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QCA therefore emerges as a powerful 'middle-ground' option between purely qualitative and purely quantitative methods as it shares aspects of both, as reflected by the method's French name, *Analyse Quali-Quantitative Comparée*. It is worth noting, however, that within the spectrum of empirical research-methods (Fig. 1), QCA is considered closer to the qualitative end given its emphasis on specific case knowledge:

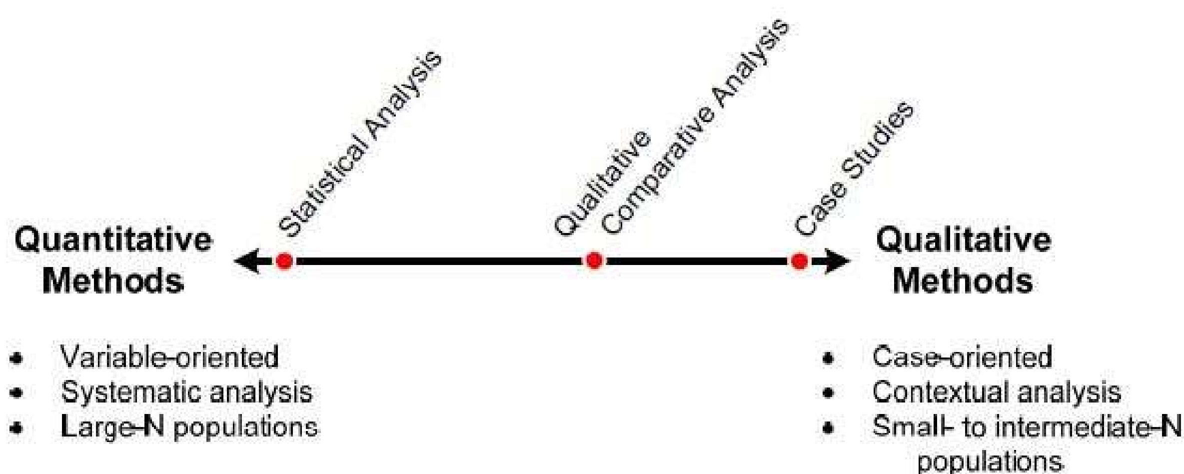

Fig. 1 Research Methods Spectrum[282]

The results of a recent bibliometric analysis of the three variants of QCA show "an increasing trend in the use of fsQCA at the expense of csQCA due to the advantages offered by the former regarding the inclusion of conditions with a degree of membership in the set."[283] Overall the usage of QCA has witnessed an exponential growth in small to intermediate-N studies and its

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[282] Gross, M. E., 'Aligning Public-Private Partnership Contracts with Public Objectives for Transportation Infrastructure', PhD Dissertation, Virginia Polytechnic Institute and State University, 2010, as based on the description in Rihoux and Ragin (2009).

[283] Roig-Tierno, N., Gonzalez-Cruz, T.F. & Llopis-Martinez, J., 'An Overview of Qualitative Comparative Analysis: A Bibliometric Analysis', Journal of Innovation & Knowledge, 2, 2017 at 15–23.

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acceptance within the scientific field is evidenced by "the number of published articles using this methodology in indexed and high impact journals."[284]

Nonetheless, QCA has relatively remained underutilised in empirical legal studies, with political science, public policy, international relations, sociology, business and management studies being the most widely seen fields having adopted the technique. Also, within QCA itself there exists several variants of the technique (evolved or developed through happenstance and not altogether organised) of which the initial formulation is crisp-set QCA or 'csQCA') which requires the conversion of qualitative data into strictly dichotomous variables, with individual characteristics quantified into binary categories as values of 1 (when the attribute is present) or 0 (when it is absent).

Concerns about the resulting loss of information led to the subsequent development of multi-value QCA (mvQCA) and fuzzy-set QCA (fsQCA) variants, which respectively accommodate stepped and continuous gradations of non-binary variables, such as cost and time which cannot simply be labelled as 'present' (1) or 'absent' (0). As illustrated in Figure 2, each of these approaches has domains for which it is best suited and their selection depends on the research question, the need to preserve data 'richness' and number of cases to be considered.

[284] *Ibid*

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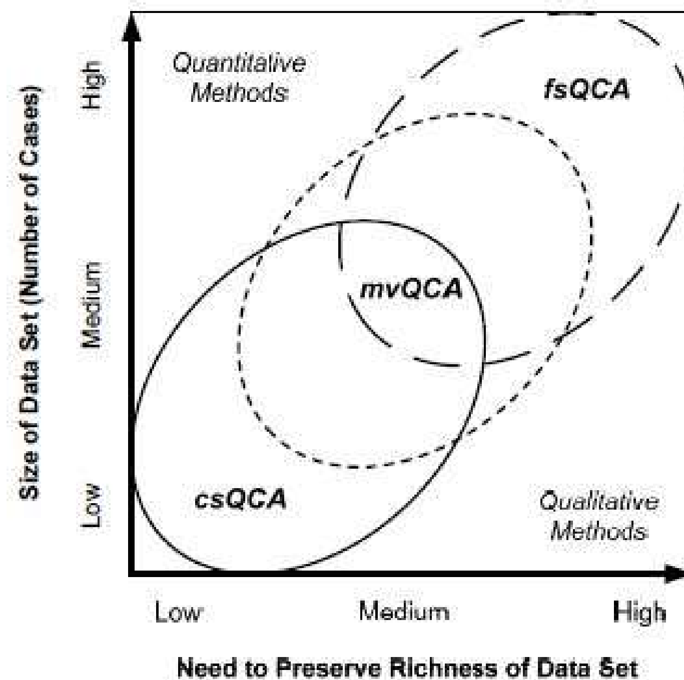

Fig. 2 QCA Variants[285]

This thesis adopts the fsQCA *equivalent* of a recent innovation of QCA known as Coincidence Analysis (CNA). CNA is a distinct method of causal data analysis first introduced in 2009 which implements the same regularity theory of causation as standard QCA.[286] Similar to standard QCA, CNA also compares cases & applies rules of logical inference to search for

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[285] Herrmann, A. M. & Cronqvist, L., 'When Dichotomisation Becomes a Problem for the Analysis of Middle-Sized Datasets', International Journal of Social Research Methodology Vol. 12-1, 2009.

[286] Baumgartner, M., 'Inferring Causal Complexity', Sociological Methods & Research, 38, 2009 at 71–101; Baumgartner, M., 'Uncovering Deterministic Causal Structures: A Boolean Approach', Synthese 170, 2009 at 71–96; Baumgartner, M. & Epple, R., 'A Coincidence Analysis of a Causal Chain: The Swiss Minaret Vote', Sociological Methods & Research, 43 (2), 2014 at 280-312. Thiem, A., 'Using Qualitative Comparative Analysis for Identifying Causal Chains in Configurational Data: A Methodological Commentary on Baumgartner and Epple', Sociological Methods & Research 44 (4):723-36, 2015.

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rigorously minimized sufficient and necessary conditions, identify complex causal dependencies & determine causal effects of combinations of factors where more than one causal path leads to the same outcome.[287]

Contrary to standard QCA however, CNA can treat any number of factors in a processed data-set as the outcomes and it does not eliminate redundancies from sufficient and necessary conditions by means of the Quine-McCluskey optimization algorithm[288] but instead by means of a procedural core that is custom-built for causal modelling. As a direct consequence of these differences, CNA is better suitable towards identifying causal chain structures than standard QCA.

D. Outcome of Interest – ‘Measuring’ Compliance with an ISA Award

Part of QCA’s ‘set-theoretic’ nature means that it utilises data calibrated into measures of set membership scores ranging from 0 to 1, a score of 1 signifying full membership, 0 signifying full non-membership & 0.5 signifying maximum ambiguity. This serves as a neutral statement of fact that a certain outcome did or did not occur rather than a success or failure of any particular theories under consideration. With our outcome to be causally explained here being state compliance with an ISA award, a ‘fuzzified’ compliance score for a particular case is coded using the following scheme:

- For compliance without delay – 1
- For compliance with delay of less than 24 months – 0.8

[287] Baumgartner, M., & Thiem, A., ‘Identifying Complex Causal Dependencies in Configurational Data with Coincidence Analysis’, The R Journal 7 (1), 2015.

[288] *Supra* note 277 (Quine 1952 & McCluskey 1956).

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- For compliance with delay of more than 24 months – 0.6
- For non-compliance (regardless of follow-on proceedings) – 0

The assumption made here is that the initiation of follow-on proceedings ('FOP') by a losing state after the issuance of the final award, being a 'delay' in compliance, is considered as inefficient, 'strategic' behaviour and therefore, full membership of the set of 'compliant' states is only assigned to cases where the award was complied with without any follow-on proceedings. Membership scores of either 0.8 or 0.6 (depending on how severe the amount of delay is) are assigned to cases where compliance eventually occurred, with 0 being assigned to awards not complied with, regardless of whether or not any FOP were initiated by the state. As apparent from the above, the focus here is on voluntary behaviour and the efficiency of the ISA system, where time and resource consumption is ideally minimised.

It is important to mention that although delays during FOP may also be caused by the investor and the specific amount of delay may not always be within the control of the state, it is usually in the interest of the state respondent, who is defending a claim, to extend the process and cause procedural delays in order to possibly induce a reduced settlement (or to simply frustrate the claimant until its resources are depleted) through, for example frivolous arbitrator challenges.

As a result, delayed compliance warrants a deduction of 'points' in the form of membership score. It should be noted however, that in some cases, the usage of FOP may not necessarily be simply a strategic manoeuvre but instead in good faith and legally well-justified. Indeed, many annulment committees and domestic courts have strongly opined against the original ISA awards brought forward to them as being erroneous decisions made on faulty interpretations.

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E. Case Selection Criteria

This QCA first considers all possible ISA cases published on the official UNCTAD Investment Dispute Settlement Navigator database[289] across an extensive time period covering 1990-2015**.** Therefore, a sufficient heterogeneity is initially allowed towards collecting the greatest possible variety of configurations of condition and outcome values, thereby maximising the richness of the resultant solutions. This is because QCA's logic itself is deterministic and not probabilistic, focusing on the combinations of conditions observed, as opposed to the quantity.

As a second filter**,** certain conditions are applied to enhance the homogeneity of the cases. These include considering only final awards for damages decided in favour of the investor and borne our arbitrations arising from investment treaties (not 'one-off' commercial contracts such as oil-for-credit agreements) that were not set-aside by a national court or annulled by an ICSID ad hoc committee (neither partially nor entirely). Also, cases where the award (or key details of it) were not made public (for e.g. *Gamesa. v. Syria*) are further excluded. Lastly, cases pertaining to the same set of facts and circumstances which provide for a single decision between compliance and non-compliance for the state (for example, the slew of cases against Argentina) are consolidated and treated as a single case.

Applying these criteria to the selected database leads to a selection of 66 cases, 41 of which have developing states as respondents.

[289] Investment Dispute Settlement Navigator, Investment Policy Hub, UNCTAD, available at http://investmentpolicyhub.unctad.org/ISDS.

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F. Condition Selection Criteria – Three Models of Compliance

Just as any comparative or statistical method aimed at causal inferences, QCA too relies on received theoretical and substantive knowledge of the phenomenon being investigated. Here, the theoretical accounts of state compliance utilised for this purpose are sourced from IR theory, as discussed in the foregoing chapter.

In particular, the hypotheses crystallised from the IR theories are operationalised into specific conditions (three conditions for each of the three hypotheses) represented by empirical legal, economic and political data. Of these conditions, a single condition or, what is likelier, a constellation of multiple conditions will be identified to provide a more satisfactory explanation for state compliance with ISA awards.

Given how multiple sets of conditions or 'models' are tested within the same analysis, this QCA can be said to follow the 'perspective approach' of selecting conditions.[290] The three models, including their key underlying assumptions, emphasized variables and explanatory propositions, are discussed below. The propositions are stated in the convention commonly followed in QCA practice, wherein the presence of a condition or outcome is denoted in uppercase letters and conversely, absence is denoted by lowercase letters. Also, under Boolean algebra, "*" denotes a logical "and", whereas "+" signifies a logical "or".

[290] Amenta, E. & Poulsen, J.D., 'Where to Begin: A Survey of Five Approaches to Selecting Independent Variables for Qualitative Comparative Analysis', Sociological Methods & Research, Sage, Vol 23, Issue 1, 1994.

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I. Rational Actor Model

a. Hypothesis

> "State compliance with ISA awards occurs in the presence of the external pressure from more powerful states outweighing the value of the award and in the presence of an arbitral institution administering the dispute.

b. Key Assumptions

The state exists as a unitary rational actor in full control of its economy and aiming to maximise net national gain. Compliance therefore occurs as a function of incentives & capacity.

c. Condition Variables:

i. Relative Burden ('RLTVB')

This denotes the 'relative burden' score of the amount of damages on the respective state's government and is the value produced by dividing the amount of damages to be paid with the respective state's total reserves in current USD for the respective year in which the award was issued.

ii. Economic Dominance ('ECODOM')

This provides a ratio between the home state and respondent state's GDP per capita and denotes the economic 'dominance' of the home state over the respondent state. It therefore

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represents the likelihood or potential for acts of retorsion such as trade sanctions in the event of non-compliance, the effectiveness of diplomatic pressure and also the potential for loss of future FDI.

iii. Perceived Institutional Pressure ('INSTPRES')

This denotes the institutional pressure to comply with an award as perceived by the state and is estimated as so:

1) For cases administered by the ICSID – 1
2) For cases administered by the SCC – 0.67
3) For cases administered by the PCA, DIA, CRCICA or the LCIA – 0.33
4) For cases not administered by an institution – 0

As apparent from the above, ICSID awards, given the status of the ICSID as a World Bank entity, are assigned greater membership scores of the set of cases with institutional pressure to comply exerted on the state.

The World Bank, being a key provider of international finance and technical assistance, potentially wields substantial leverage over its client states.[291] Therefore, given the institutional links between the ICSID and other World Bank entities such as the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), assertions have previously been made that such links could induce compliance with ICSID awards.[292]

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[291] Shams, H., 'The World Bank and Investment Protection: A Question of Accountability', Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects, in eds. Norbert Horn and Stefan Michael Kröll, Kluwer Law International, 2004, 111-1142.

[292] *Supra* note 62 (Schreuer 2009) at 1107-8.

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However, it is important to note that the World Bank Operational Manual does not specifically list non-compliance with arbitral awards as a motive to withhold loans or assistance. It is therefore not entirely clear whether (and to what extent) indeed the ICSID's status as an affiliate of the World Bank creates an "institutional gravitas that creates an incentive for sovereigns to comply with ICSID awards, lest they have difficulty securing future World Bank financing."[293]

Nonetheless, the existence of a perception held by states that serious financial repercussions may result from non-compliance with ICSID awards is what is integral here, as is reflected in the membership scores listed above.

Cases administered by the SCC are assigned second highest membership, given the Swedish government's exertion of diplomatic pressure to have an SCC award complied with in the case of *Petrobart v Kyrgyztan*., despite Sweden not being the investor's home state.

Neutral private institutions such as the ICC are assigned 0.33 since at the very least, they may potentially play some role in the enforcement of arbitral awards by reminding award debtors of their obligation to comply or by facilitating settlement negotiations.
Lastly, a score of 0 is assigned where cases were *ad hoc* and not administered by any institution.

d. Proposition

reltvb*ECODOM*INSTPRES => COMPLIANCE

[293] Frank, S.D., 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law', Pacific McGeorge Global Business & Development Law Journal 19, 2007 at 372.

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II. Domestic Authority Model

a. Hypothesis

State compliance with ISA awards occurs in an absence of a presidential system, an absence of a nationalist political agenda and an absence of compliance gravity.

b. Key Assumptions

The individual utility function of decision maker(s) may differ from net national gain. Compliance is dependent on the sub-state political power structure & ideology. Public awareness of the issue is low.

c. Condition Variables:

i. Presidential System ('PRES')

This denotes the system of government or electoral rule prevalent in the respondent state in the year the award was issued, the key distinction being made between parliamentary or assembly elected systems (being marked as 0) and presidential systems (marked as 1). Data for this variable is sourced from the 'Database of Political Institutions' published by the World Bank. [294]

[294] Keefer, P., 'Database of Political Institutions: Changes and Variable Definitions', Development Research Group, The World Bank, December 2012.

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It is worth noting that the authors of this database have complied this data with an emphasis on whether the chief executive is elected directly by the public or by parliament, the former being defined as presidential and the latter as parliamentary. Systems where the chief executive is unelected (or elected by an electoral college whose only function is to elect the president), and where the assembly cannot easily recall the chief executive are also marked as presidential.

Also, for systems which have both a prime minister and a president, if the president has strong veto powers or the power to appoint/dismiss the prime minister (and/or other ministers) or the power to dissolve the parliament, such systems are also marked as presidential. The emphasis is therefore on the amount of power and control afforded to the chief executive by the domestic constitutional rules and the resultant incentives created for his/her position.

ii. Nationalism (‘NAT’)

This denotes whether or not the party to which the chief executive of the respondent state has a nationalist political agenda. For example, if the primary component of the party’s platform is the creation or defence of a national or ethnic identity. In cases where the executive is independent, the executive’s personal orientation is recorded. Data for this variable is also sourced from the ‘Database of Political Institutions’ published by the World Bank.

iii. Compliance Gravity (‘COMPLGRAV’)

The compliance ‘gravity’ of a case is an index measuring the directness, severity and political sensitivity of the state act or omission that gave rise to the investor’s claim and ruled unlawful by the arbitral tribunal in each respective case. It is derived by aggregating the presence/absence of the violations of two standards commonly provided for within investment treaties (here,

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'direct expropriation' & 'full protection & security') along with whether or not the act was politically sensitive in nature such as one related to national security.

It is argued that such a score may measure the anti-compliance 'gravity' experienced by a state, working against the 'compliance pull' of an adverse award. Under this assertion, therefore, a state is assigned a 'heavy' score of 1 (i.e. full membership of the set of cases where such 'gravity' takes effect) where the act was a direct expropriation (therefore direct) which threatened the security of the investor's investment (and so was relatively severe in nature) and also took place as a result of political pressure or related to a matter that was particularly sensitive politically.

d. Proposition:

pres*nat*complgrav => COMPLIANCE

<u>III. Social Norms Model</u>

a. Hypothesis

State compliance with ISA awards occurs in the presence of a demonstrated acceptance of legitimate authority of the ISA tribunal and the domestic presence of legal and social norms favouring the rule of law and foreign investment protection.

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b. Key Assumptions:

Intersubjective beliefs & ideas guide state decisions. Legitimacy may be 'routinized'. The relation between norms & behaviour may be non-linear. Compliance is normative, not instrumentalist and can reinforce itself.

c. Condition Variables:

i. Compliance Record ('COMPLREC')

The compliance record of a state for a particular case indicated that state's perception of the arbitral tribunal's authority being 'legitimate'. It is coded according to the following scheme:

1) If all previous adverse awards complied with – 1
2) If no previous adverse awards issued against state – 0.6
3) If at least one previous adverse award not voluntarily complied with – 0

Full membership of this set is therefore awarded only where the state has not only previously experienced at least one adverse award but has also complied with such an award(s) on all occasions.

ii. Treaty Ratification ('RATIF')

This denotes a respondent state's aggregate position on both the ICSID Convention and the NY Convention, with greater weightage given to the former, in the year the respective award was issued. Scores are assigned according to the following scheme:

1) For ratifying both the ICSID & the NY Convention – 1

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2) For ratifying the ICSID but not the NY Convention – 0.67
3) For only signing the ICSID Convention but ratifying the NY Convention – 0.67
4) For ratifying the NY but not the ICSID Convention – 0.33
5) For denouncing the ICSID Convention but ratifying the NY Convention – 0.33
6) For ratifying neither the ICSID nor the NY Convention – 0

The assumption here is that if state representatives sign and ratify an international treaty (and in the case of dualist systems, their state's national legislature subsequently transforms the international law into domestic law), the event represents not just an acceptance of the international rules but also a domestic internalisation of the related international legal norms.

iii. Rule of Law ('ROL2')

This denotes the 'Rule of Law' score for each respondent state in the respective year of the award being issued, as compiled under the World Bank Group's 2016 'World Governance Indicators' database. It represents the national cultural attitudes towards legal authority.

d. Proposition:

COMPLREC*RATIF*ROL2 => COMPLIANCE

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G. QCA Results

Numerical data for the foregoing conditions is compiled and tabulated for each of the selected cases, along with the respective outcomes. This configuration table is then 'fuzzified' i.e. the scores are converted to a scale of 0 to 1 using thresholds determined by the cluster analysis function on the TOSMANA software, wherein structural gaps within the data distribution are detected and utilised for threshold selection.[295]

The data is then inputted onto the data analysis software 'R' and minimised using the CNA package, resulting in logical formulae which summarize the causal patterns in the data and identify constellations of necessary and sufficient conditions for the compliance as the outcome variable. Such formulae or 'causal pathways' are expressed in Boolean terms where "*" denotes a logical "AND" relation & "+" signifies a logical "OR" relation.

CNA results (in the form of an 'atomic solution formula') are first produced for the entire population and then for only developing states. All results produced below score high in the robustness tests used in QCA (i.e. consistency and coverage) and are therefore causally interpretable to a sufficient degree of reliability.

I. Compliance as the Outcome - All States

Considering all sixty-six cases (consisting of both developing and developed respondent states) produces the following five constellations of conditions that lead to compliance:

[295] Cronqvist, L., 'Presentation of TOSMANA: Adding Multi-Value Variables and Visual Aids to QCA', COMPASSS Working Paper No. 2004-20, 2004.

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	outcome	condition	consistency	coverage	complexity
1	COMPLIANCE	COMPLREC + pres <-> COMPLIANCE	0.863	0.911	2
2	COMPLIANCE	COMPLREC + reltvb2*complgrav + RELTVB2*nat <-> COMPLIANCE	0.832	0.918	5
3	COMPLIANCE	COMPLREC + RELTVB2*nat + complgrav*nat <-> COMPLIANCE	0.831	0.919	5
4	COMPLIANCE	COMPLREC + RELTVB2*complgrav + complgrav*nat <-> COMPLIANCE	0.831	0.917	5
5	COMPLIANCE	COMPLREC + complgrav*nat + complgrav*ECODOM2*NAT <-> COMPLIANCE	0.830	0.913	6

II. Compliance as the Outcome – Only Developing States

Considering only the 42 cases with developing states as respondents produces the following single constellation of conditions that lead to compliance:

	outcome	condition	consistency	coverage	complexity
1	COMPLIANCE	COMPLREC + pres + reltvb2*rol2*NAT <-> COMPLIANCE	0.822	0.904	5

H. Conclusion – Key Causal Inferences

Several of the hypothesised variables appear in the results of the above investigation. In the first set of results, while 'ratification' & 'institutional pressure' do not appear at all, the 'compliance record' of a state emerges as a condition sufficient by itself to lead to compliance in every empirical model, a characteristic that indicates an exceptionally potent explanatory value.

With regard to the second set of results specifically focusing on developing states only, the singular model provides significantly less ambiguity than the previous set where multiple models are produced. Here, while 'compliance record' and 'presidential system' emerge as sufficient conditions for compliance to occur, once again, 'ratification' & 'institutional pressure' do not appear at all. Also, low 'relative burden' serves as a compliance-friendly

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condition which counters the effects of nationalist ideology and low rule of law i.e. it 'enables' compliance in spite of the presence of these two 'anti-compliance' factors.

Rational actor models have, by themselves, been insufficient to explain for state compliance so far and hence betray the classical understanding of state compliance wherein the state is a unitary actor and national interests (defined purely in rational terms) dictate international behaviour. Furthermore, the failure of institutional pressure to appear in any solution reflects the limited role that most international arbitration institutions have so far taken in matters of compliance. This may be regrettable for this who opine that encouraging transparency about the outcomes and enforcement of cases may be "the best way to ensure that states will abide by adverse arbitral awards."[296]

Within the social norms model, the absence of treaty ratification also provides an interesting result. One possible explanation of this may be that state governments may at times be disingenuous in their ratification of international treaties and only do so to appease domestic constituencies and "satisfy the public face of international law."[297] Also, in an analysis of the international laws of war, it was observed that ratification was found to be not affecting the behaviour of non-democracies and not democratic states.[298]

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[296] Joubin-Bret, A., 'Is There a Need for Sanctions in International Investment Arbitration', 106 Am. Soc'y Int'l L. Proc. 130, 134 2012.

[297] See Alder, J. & Lugten, G., 'Frozen Fish Block: How Committed are North Atlantic States to Accountability, Conservation and Management of Fisheries?', 26 Marine Pol'y 345 2002. See also, Smith-Cannoy, H., 'Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism', Georgetown University Press, 2012; Goodman, R. & Jinks, D., 'Incomplete Internalization and Compliance with Human Rights Law', The European Journal of International Law Vol. 19-4, 2009; Hathaway, O. A., 'Do Human Rights Treaties Make a Difference?', Yale Law Journal Vol. 111- 8, 2002.

[298] Morrow, J.D., 'When Do States Follow the Laws of War?', American Political Science Review 101: 559–72, 2007.

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With regard to the significance of 'compliance record', the coding scheme of the variable places emphasis on the past behaviour to determine whether the state has accepted the legitimacy and authority of the tribunal[299]. This potency of past patterns of compliance as a particularly significant factor explaining compliance has also previously been observed (in addition to regionalism) in a study analysing the UN Security Council's Resolution 1373 to combat international terrorism.[300]

On the other hand, it must be noted that compliance record singularly cannot and does not explain why compliance occurs on the first occasion where a state encounters an adverse award given how, on that occasion, there would not exist any record of past behaviour. As a result, it could perhaps be argued that the compliance record is in reality an 'empty' variable and that whichever forces were at play on this first occasion simply continued to take effect for subsequent adverse awards. Such an argument would relate to the general difficulty of uncovering the internal dimension of rule-consistent behaviour using social science methods which often can rely only on externally observable data as proxies for normative effects.

However, adherents of the managerial approach towards compliance with international law and international legal theorists who emphasize the internal role of habit and volitional commitment in state compliance decisions may yet disagree. In their seminal work on the issue, Chayes and Chayes contend that states have a propensity to comply with their international

[299] For the argument that generally, compliance represents a demonstrated acceptance of legitimacy, see Tyler, T., 'Why People Obey the Law', Princeton University Press, 2006. See also Follesdal, A., 'Legitimacy Deficits beyond the State: Diagnoses and Cures', in A. Hurrelmann, S. Schneider &J. Steffek (eds), Legitimacy in an Age of Global Politics. Palgrave: 211-228.

[300] Stiles, K.W. & Thayne, A., 'Compliance with International Law, International Law on Terrorism at the United Nations', Cooperation and Conflict, Vol. 41, No. 2, 153-76, SAGE 2006.

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commitments and one of the factors from which this propensity stems is that compliance may be "efficient from an internal, decisional point of view. Once a complex bureaucracy is directed to comply, explicit calculation of costs and benefits for every decision is itself costly."[301]

Thirdly, domestic authority model factors also emerge as sufficient and are decisive for compliance to be observed in cases with high 'relative burden', including the nature of the act which led to the ISA claim. However, where domestic factors are 'unfriendly', the relative burden of the award in turn becomes key, especially for developing states. For example, compare data for the Argentina cases ('CMSARG') with *Desert Line v. Yemen* ('DESYEM') wherein low relative burden is the only differentiating factor which may explain the differing compliance scores.

	COMPLIANCE	RELTVB2	ECODOM2	INSTPRES	COMPLREC	RATIF	ROL2	COMPLGRAV	PRES	NAT
CMSARG	0.6	1.0	0.80	1	0.6	1	0.03	0.33	1	1
DESYEM	1	0.0	0.93	1	0.6	0.67	0.01	0.33	1	1

This 'compliance-friendly' nature of conditions pertaining to liberal IR theory can be highlighted by comparing the data from the two cases of *Bernardus v. Zimbabwe* ('BERZIM') & *British Caribbean Bank v. Belize* ('BRIBEL'). As presented below, only domestic authority model conditions can explain the compliance scores of the two cases. The conditions from the other two models would misleadingly point one towards the contrary conclusion on the compliance outcome:

	COMPLIANCE	RELTVB2	ECODOM2	INSTPRES	COMPLREC	RATIF	ROL2	COMPLGRAV	PRES	NAT
BERZIM	0	0.65	1	1	0.6	1	0.00	0.67	1	1
BRIBEL	1	1.00	0.45	0.33	0.6	0	0.03	0	0	0

[301] *Supra* note 160 (Raustiala & Slaughter 2002) at 542; *Supra* note 249 (Chayes and Chayes 1998).

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A clear assertion can therefore be made that the dominant unitary actor model (which is frequently utilised to explain compliance behaviour) conceals important causal mechanisms leading to compliance. Such an assertion has previously been made in an analysis of whether and when the United States government complies with WTO rulings where the results demonstrated that "understanding the domestic supply of compliance is a critical, if neglected, aspect of international law theory."[302] However, future research may explore precisely how these mechanisms operate, both individually and in tandem, within the context of ISA awards and how insights from other diverse fields may be transferable to the same.

The final chapter of this thesis utilised competing IR theories as a reservoir for identifying conditions and constructing three distinct models of compliance with ISA awards which were then empirically tested with the aim of explaining compliance as witnessed so far. In addition to developing a previously lacking dataset of ISA awards compliance, the research also illuminates the interrelation between diverse types of conditions and identifies the precise configurations of conditions which are associated with compliance.

While the multi-causal approach adopted here provides us with a richer understanding of compliance, it nonetheless also holds potential for overlaps between conditions belonging to different models. For example, conditions such as ratification may be held to be relevant by proponents of both liberal and constructivist theory. Such overlaps contain their own set of difficulties and disentangling them would require in-depth case studies.[303]

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[302] Brewster, R. & Chilton, A., 'Supplying Compliance: Why and When the United States Complies with WTO Rulings', 39 Yale Journal of International Law 201-246, 2014.

[303] See for example *supra* note 52 (Hirsch 2016) which conducts an in-depth case study and reveals how multiple causal factors played differing role during separate phases of non-compliance and subsequent compliance by Argentina.

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Nonetheless, what is beyond doubt, is that mono-causal explanations for state compliance with ISA awards are bound to be inadequate and misleading, especially given the proliferation of differing approaches to IR theory. The thesis therefore also calls for an integrative approach towards understanding causal factors behind state compliance with international law generally.

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Annexure

A. Raw Dataset

SNo	CName	CCode	RespStat	AwrdYr	FDecYr		AwrdVal	TotRes	ReltvB		Paid	FOP	AddlMnts	ComplScore	
1	AAPL v. Sri Lanka	AAPSRI	Sri Lanka	1990	1990		0.46	447030482.60	10		Yes	N	0	1	
2	Saar Papier v. Poland (I)	SAAPOL1	Poland	1995	1995		1.60	14957024389.53	1		Yes	N	0	1	
3	AMT v. Zaire	AMTZAI	Congo DRC	1997	1997		9.00	82500000.00	1091		Yes	N	0	1	
4	FEDAX v. Venezuela	FEDVEN	Venezuela	1998	1998		0.60	14728842116.44	0		Yes	N	0	1	
5	Sedelmayer v. Russia	SEDRUS	Russia	1998	2005		2.30	182272104531.92	0		No	Y - NC	84	0	
6	Biedermann v. Kazakhstan	BIEKAZ	Kazakhstan	1999	1999		8.90	2000928289.27	44		Yes	N	0	1	
7	Metalclad v. Mexico	METMEX	Mexico	2000	2000		16.70	35577279664.73	5		Yes	Y - NC	8	0.8	
8	Swembalt v. Latvia	SWELAT	Latvia	2000	2003		2.50	1536170567.90	16		Yes	Y - NC	26	0.6	
9	Mafezzini v. Spain	MAFSPA	Spain	2000	2000		0.15	35607625797.66	0		Yes	N	-	1	
10	CMS v. Argentina	CMSARG	Argentina	2001	2002		459.00	10492424597.80	437		Yes	Y - AC	12	0.8	
11	Wena Hotels v. Egypt	WENEGY	Egypt	2000	2002		8.00	14076054208.64	6		Yes	Y - AC	13	0.8	
12	Middle East Cement v. Egypt	MIDEGY	Egypt	2002	2002		2.20	14076054208.64	2		Yes	N	-	1	
13	Pope & Talbot v. Canada	POPCAN	Canada	2002	2002		0.46	37189380242.49	0		Yes	N	-	1	
14	Feldman v. Mexico	FELMEX	Mexico	2002	2005		0.74	74109706514.81	0		Yes	Y - NC	49	0.6	
15	Myers v. Canada	MYECAN	Canada	2002	2004		3.80	34476392654.58	1		Yes	Y - NC	13	0.8	
16	CME v. Czech Republic	CMECZE	Czech Republic	2003	2003		270.00	26955067755.65	100		Yes	Y - NC	2	0.8	
17	Tecmed v. Mexico	TECMEX	Mexico	2003	2003		5.50	59026700137.80	1		Yes	N	-	1	
18	AIG v. Kazakhstan	AIGKAZ	Kazakhstan	2003	2003		6.00	4962118089.54	12		No	N	-	0	
19	Nykomb v. Latvia	NYKLAT	Latvia	2003	2003		2.90	1536170567.90	19		Yes	N	-	1	
20	MTD v. Chile	MTDCHI	Chile	2004	2007		5.80	16843397675.91	3		Yes	Y - AC	34	0.6	
21	Occidental v. Ecuador (I)	OCCECU1	Ecuador	2004	2007		71.50	3520673052.30	203		Yes	Y - NC	36	0.6	
22	CSOB. v. Slovak Republic	CSOSLO	Slovak Republic	2004	2004		867.80	14911965834.75	582		Yes	N	-	1	
23	France Telecom v. Lebanon	FRALEB	Lebanon	2005	2005		266.00	16617970749.34	160		Yes	Y - NC	8	0.8	
24	Petrobart v. Kyrgyz Republic	PETKYR	Kyrgyz Republic	2005	2007		1.10	1176500809.60	9		No	Y - NC	22	0	
25	Cargill v. Poland	CARPOL	Poland	2008	2008		16.30	62183606786.18	3		Yes	N	-	1	
26	Bogdanov v. Moldova (I)	BOGMOL1	Moldova	2005	2005		0.05	597448067.54	1		Yes	N	-	1	
27	ADC v. Hungary	ADCHUN	Hungary	2006	2006		76.00	21589904273.21	35		Yes	N	-	1	
28	PSEG v. Turkey	PSETUR	Turkey	2007	2007		9.00	76496127756.79	1		Yes	N	-	1	
29	Pren Nreka v. Czech Republic	PRECZE	Czech Republic	2007	2008		1.50	37021635006.92	0		Yes	Y - NC	19	0.6	
30	Eastern Sugar v. Czech Republic	EASCZE	Czech Republic	2007	2007		33.70	34907225420.56	10		Yes	N	-	1	
31	OKO v. Estonia	OKOEST	Estonia	2007	2007		17.70	3269362367.55	54		Yes	N	-	1	
32	ADM v. Mexico	ADMMEX	Mexico	2007	2007		33.50	87208176853.52	4		Yes	N	-	1	
33	Desert Line v. Yemen	DESYEM	Yemen	2008	2008		18.80	8154861549.13	23		Yes	N	-	1	
34	Ares and MetalGeo v. Georgia	AREGEO	Georgia	2008	2008		3.50	1480157562.63	24		No	N	-	0	
35	Rumeli v. Kazakhstan	RUMKAZ	Kazakhstan	2008	2010		125.00	28264707688.57	44		No	Y - AC	19	0	
36	Duke Energy v. Ecuador	DUKECU	Ecuador	2008	2008		5.60	4472854645.71	13		Yes	N	-	1	
37	Bernardus v. Zimbabwe	BERZIM	Zimbabwe	2009	2009		10.60	821890908.75	129		No	N	-	0	
38	Siag v. Egypt	SIAEGY	Egypt	2009	2010		74.55	37028502251.59	20		Yes	Y - B	13	0.8	
39	Saipem v. Bangladesh	SAIBAN	Bangladesh	2009	2009		6.30	10341543632.81	6		Yes	N	-	1	
40	Walter Bau v. Thailand	WALTHA	Thailand	2009	2012		41.10	181481264213.51	2		Yes	Y - NC	24	0.6	
41	Corn Products v. Mexico	CORMEX	Mexico	2009	2009		58.00	99888813655.77	6		Yes	N	-	1	
42	Sistem v. Kyrgyz Republic	SISKYR	Kyrgyz Republic	2009	2012		8.50	2066679072.64	41		No	Y - NC	34	0	
43	Cargill v. Mexico	CARMEX	Mexico	2009	2012		77.30	167075785814.64	5		Yes	Y - NC	31	0.6	
44	Kardassopoulos & Fuchs v. Georgia	KARGEO	Georgia	2010	2011		15.10	2818191708.52	54		No	Y - AC	21	0	
45	Bogdanov v. Moldova (III)	BOGMOL3	Moldova	2010	2010		0.03	1717685351.47	0		Yes	N	-	1	
46	Gemplus & Talsud v. Mexico	GEMMEX	Mexico	2010	2010		10.90	120583999941.19	1		Yes	N	-	1	
47	Alpha Projektholding v. Ukraine	ALPUKR	Ukraine	2010	2010		2.90	34571298903.55	1		Yes	N	-	1	
48	Lemire v. Ukraine (II)	LEMUKR2	Ukraine	2011	2013		8.70	20413622007.58	4		Yes	Y - AC	42	0.6	
49	Remington v. Ukraine	REMUKR	Ukraine	2011	2012		4.50	24552796497.35	2		Yes	Y - NC	12	0.8	
50	Tza Yap Shum v. Peru	TZAPER	Peru	2011	2015		0.78	61594854089.30	0		Yes	Y - AC	43	0.6	
51	Chevron v. Ecuador (I)	CHEECU1	Ecuador	2011	2014		77.70	3941357328.44	197		Yes	Y - NC	37	0.6	
52	White Industries v. India	WHIIND	India	2011	2011		4.10	298739485811.37	0		Yes	N	-	1	
53	SGS v. Paraguay	SGSPAR	Paraguay	2012	2014		39.00	6986587125.88	56		Yes	Y - AC	27	0.6	
54	Servier v. Poland	SERPOL	Poland	2012	2012		5.00	108902203765.19	0		Yes	N	-	1	
55	Inmaris Perestroika v. Ukraine	INMUKR	Ukraine	2012	2012		3.80	24552796497.35	2		Yes	N	-	1	
56	Marion Unglaube v. Costa Rica	MARCOS	Costa Rica	2012	2012		4.00	6856696362.70	6		Yes	N	-	1	
57	Swisslion v. Macedonia	SWIMAC	Macedonia	2012	2012		0.43	2891478810.73	1		Yes	N	-	1	
58	Goetz v. Burundi (II)	GOEBUR2	Burundi	2012	2012		1.20	308757022.97	39		Yes	N	-	1	
59	RDV v. Guatemala	RDVGUA	Guatemala	2012	2012		11.30	6693770289.81	17		Yes	N	-	1	
60	Al-Kharafi v. Libya and others	ALKLIB	Libya	2013	2014		935.00	93615460032.95	100		Yes	Y - NC	19	0.6	
61	Arif v. Moldova	ARIMOL	Moldova	2013	2013		2.70	2820638989.44	10		Yes	N	-	1	
62	Abengoa v. Mexico	ABEMEX	Mexico	2013	2013		40.30	180200037031.89	2		Yes	N	-	1	
63	Guaracachi v. Bolivia	GUABOL	Bolivia	2014	2014		28.90	15129278397.27	19		Yes	N	-	1	
64	EDF v. Hungary	EDFHUN	Hungary	2014	2015		132.60	33124288275.81	40		Yes	Y - NC	10	0.8	
65	British Caribbean Bank v. Belize	BRIBEL	Belize	2014	2014		25.20	486876895.22	518		Yes	N	-	1	
66	Awdi v. Romania	AWDROM	Romania	2015	2015		8.60	38700983235.88	2		Yes	N	-	1	

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SNo	CName	CCode	FrstAwrd	FrstAdvAwrd	PrevNonCmpl	ComplRecord		DirExp	FPS	PolMot	ComplGravity
1	AAPL v. Sri Lanka	AAPSRI	Yes	-	-	0.6		0	1	1	0.67
2	Saar Papier v. Poland (I)	SAAPOL1	Yes	-	-	0.6		0	0	1	0.33
3	AMT v. Zaire	AMTZAI	Yes	-	-	0.6		0	1	0	0.33
4	FEDAX v. Venezuela	FEDVEN	Yes	-	-	0.6		0	0	0	0
5	Sedelmayer v. Russia	SEDRUS	No	No	Yes	0		1	0	1	0.67
6	Biedermann v. Kazakhstan	BIEKAZ	Yes	-	-	0.6		0	0	0	0
7	Metalclad v. Mexico	METMEX	Yes	-	-	0.6		0	1	1	0.67
8	Swembalt v. Latvia	SWELAT	Yes	-	-	0.6		0	0	0	0
9	Mafezzini v. Spain	MAFSPA	Yes	-	-	0.6		0	0	0	0
10	CMS v. Argentina	CMSARG	Yes	-	-	0.6		1	1	1	1
11	Wena Hotels v. Egypt	WENEGY	Yes	-	-	0.6		0	1	1	0.67
12	Middle East Cement v. Egypt	MIDEGY	No	No	No	1		0	0	0	0
13	Pope & Talbot v. Canada	POPCAN	No	Yes	-	0.6		0	0	0	0
14	Feldman v. Mexico	FELMEX	No	No	No	1		0	0	0	0
15	Myers v. Canada	MYECAN	No	No	No	1		0	0	0	0
16	CME v. Czech Republic	CMECZE	Yes	-	-	0.6		0	1	0	0.33
17	Tecmed v. Mexico	TECMEX	No	No	No	1		0	0	1	0.33
18	AIG v. Kazakhstan	AIGKAZ	No	No	No	1		0	0	1	0.33
19	Nykomb v. Latvia	NYKLAT	No	No	No	1		0	0	0	0
20	MTD v. Chile	MTDCHI	No	Yes	-	0.6		0	0	0	0
21	Occidental v. Ecuador (I)	OCCECU1	No	No	No	1		0	0	0	0
22	CSOB. v. Slovak Republic	CSOSLO	Yes	-	-	0.6		0	1	0	0.33
23	France Telecom v. Lebanon	FRALEB	Yes	-	-	0.6		0	0	0	0
24	Petrobart v. Kyrgyz Republic	PETKYR	Yes	-	-	0.6		0	0	1	0.33
25	Cargill v. Poland	CARPOL	No	No	No	1		0	0	1	0.33
26	Bogdanov v. Moldova (I)	BOGMOL1	No	Yes	-	0.6		0	0	0	0
27	ADC v. Hungary	ADCHUN	No	Yes	-	0.6		1	0	1	0.67
28	PSEG v. Turkey	PSETUR	Yes	-	-	0.6		0	0	0	0
29	Pren Nreka v. Czech Republic	PRECZE	No	No	No	1		0	0	0	0
30	Eastern Sugar v. Czech Republic	EASCZE	No	No	No	1		0	0	1	0.33
31	OKO v. Estonia	OKOEST	No	Yes	-	0.6		0	0	0	0
32	ADM v. Mexico	ADMMEX	No	No	No	1		0	0	0	0
33	Desert Line v. Yemen	DESYEM	Yes	-	-	0.6		0	0	1	0.33
34	Ares and MetalGeo v. Georgia	AREGEO	Yes	-	-	0.6		0	0	1	0.33
35	Rumeli v. Kazakhstan	RUMKAZ	No	No	Yes	0		0	0	1	0.33
36	Duke Energy v. Ecuador	DUKECU	No	No	No	1		0	0	0	0
37	Bernardus v. Zimbabwe	BERZIM	Yes	-	-	0.6		1	0	1	0.67
38	Siag v. Egypt	SIAEGY	No	No	No	1		1	1	1	1
39	Saipem v. Bangladesh	SAIBAN	Yes	-	-	0.6		0	0	1	0.33
40	Walter Bau v. Thailand	WALTHA	Yes	-	-	0.6		0	0	1	0.33
41	Corn Products v. Mexico	CORMEX	No	No	No	1		0	0	0	0
42	Sistem v. Kyrgyz Republic	SISKYR	No	No	Yes	0		0	0	1	0.33
43	Cargill v. Mexico	CARMEX	No	No	No	1		0	0	0	0
44	Kardassopoulos & Fuchs v. Georgia	KARGEO	No	No	Yes	0		1	0	1	0.67
45	Bogdanov v. Moldova (III)	BOGMOL3	No	No	No	1		0	1	0	0.33
46	Gemplus & Talsud v. Mexico	GEMMEX	No	No	No	1		0	0	1	0.33
47	Alpha Projektholding v. Ukraine	ALPUKR	No	Yes	-	0.6		0	0	0	0
48	Lemire v. Ukraine (II)	LEMUKR2	No	No	No	1		0	0	1	0.33
49	Remington v. Ukraine	REMUKR	No	No	No	1		0	0	1	0.33
50	Tza Yap Shum v. Peru	TZAPER	No	Yes	-	0.6		0	0	0	0
51	Chevron v. Ecuador (I)	CHEECU1	No	No	No	1		0	0	1	0.33
52	White Industries v. India	WHIIND	Yes	-	-	0.6		0	0	1	0.33
53	SGS v. Paraguay	SGSPAR	No	Yes	-	0.6		0	0	0	0
54	Servier v. Poland	SERPOL	No	No	No	1		0	0	1	0.33
55	Inmaris Perestroika v. Ukraine	INMUKR	No	No	No	1		0	0	0	0
56	Marion Unglaube v. Costa Rica	MARCOS	No	Yes	-	0.6		0	0	1	0.33
57	Swisslion v. Macedonia	SWIMAC	No	No	No	1		0	0	0	0
58	Goetz v. Burundi (II)	GOEBUR2	No	No	No	1		0	1	0	0.33
59	RDV v. Guatemala	RDVGUA	Yes	-	-	0.6		0	0	0	0
60	Al-Kharafi v. Libya and others	ALKLIB	No	No	Yes	0		0	0	0	0
61	Arif v. Moldova	ARIMOL	No	No	No	1		0	0	0	0
62	Abengoa v. Mexico	ABEMEX	No	No	No	1		0	0	1	0.33
63	Guaracachi v. Bolivia	GUABOL	No	No	No	1		1	0	0	0.33
64	EDF v. Hungary	EDFHUN	No	No	No	1		0	0	1	0.33
65	British Caribbean Bank v. Belize	BRIBEL	No	No	No	1		0	0	1	0.33
66	Awdi v. Romania	AWDROM	No	No	Yes	0		0	0	1	0.33

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SNo	CName	CCode	HomeState	HomeState GDP/c (c	RespState GDP/c (	EcoDom	Institution	InstPrsre
1	AAPL v. Sri Lanka	AAPSRI	UK	19095	470	41	ICSID	1
2	Saar Papier v. Poland (I)	SAAPOL1	Germany	31730	3683	9	-	0
3	AMT v. Zaire	AMTZAI	USA	31573	137	231	ICSID	1
4	FEDAX v. Venezuela	FEDVEN	Netherlands	27534	3876	7	ICSID	1
5	Sedelmayer v. Russia	SEDRUS	Germany	34697	3771	9	SCC	0.67
6	Biedermann v. Kazakhstan	BIEKAZ	USA	34621	1130	31	SCC	0.67
7	Metalclad v. Mexico	METMEX	USA	36450	6650	5	ICSID	1
8	Swembalt v. Latvia	SWELAT	Sweden	36961	5135	7	DIA	0.33
9	Mafezzini v. Spain	MAFSPA	Argentina	7669	14788	1	ICSID	1
10	CMS v. Argentina	CMSARG	USA	38166	2579	15	ICSID	1
11	Wena Hotels v. Egypt	WENEGY	UK	29603	1239	24	ICSID	1
12	Middle East Cement v. Egypt	MIDEGY	Greece	14110	1239	11	ICSID	1
13	Pope & Talbot v. Canada	POPCAN	USA	38166	24168	2	-	0
14	Feldman v. Mexico	FELMEX	USA	44308	7894	6	ICSID	1
15	Myers v. Canada	MYECAN	USA	41922	31980	1	-	0
16	CME v. Czech Republic	CMECZE	Netherlands	35245	9741	4	-	0
17	Tecmed v. Mexico	TECMEX	Spain	21496	6673	3	ICSID	1
18	AIG v. Kazakhstan	AIGKAZ	USA	39677	2068	19	ICSID	1
19	Nykomb v. Latvia	NYKLAT	Sweden	36961	5135	7	SCC	0.67
20	MTD v. Chile	MTDCHI	Malaysia	7241	10514	1	ICSID	1
21	Occidental v. Ecuador (I)	OCCECU1	USA	48062	3591	13	LCIA	0.33
22	CSOB. v. Slovak Republic	CSOSLO	Czech Republic	11668	10655	1	ICSID	1
23	France Telecom v. Lebanon	FRALEB	France	34880	5339	7	-	0
24	Petrobart v. Kyrgyz Republic	PETKYR	UK	49949	722	69	SCC	0.67
25	Cargill v. Poland	CARPOL	USA	48401	14001	3	-	0
26	Bogdanov v. Moldova (I)	BOGMOL1	Russia	5323	831	6	SCC	0.67
27	ADC v. Hungary	ADCHUN	Cyprus	40387	11399	4	ICSID	1
28	PSEG v. Turkey	PSETUR	USA	48062	9309	5	ICSID	1
29	Pren Nreka v. Czech Republic	PRECZE	Croatia	15894	22649	1	-	0
30	Eastern Sugar v. Czech Republic	EASCZE	Netherlands	51241	18334	3	SCC	0.67
31	OKO v. Estonia	OKOEST	Finland, Germany	41815	16586	3	ICSID	1
32	ADM v. Mexico	ADMMEX	USA	48062	9223	5	ICSID	1
33	Desert Line v. Yemen	DESYEM	Oman	22963	1206	19	ICSID	1
34	Ares and MetalGeo v. Georgia	AREGEO	Italy	40640	3175	13	ICSID	1
35	Rumeli v. Kazakhstan	RUMKAZ	Turkey	10111	9071	1	ICSID	1
36	Duke Energy v. Ecuador	DUKECU	USA	48401	4275	11	ICSID	1
37	Bernardus v. Zimbabwe	BERZIM	Netherlands	51900	594	87	ICSID	1
38	Siag v. Egypt	SIAEGY	Italy	35852	2668	13	ICSID	1
39	Saipem v. Bangladesh	SAIBAN	Italy	36977	684	54	ICSID	1
40	Walter Bau v. Thailand	WALTHA	Germany	44065	5915	7	-	0
41	Corn Products v. Mexico	CORMEX	USA	47002	7661	6	ICSID	1
42	Sistem v. Kyrgyz Republic	SISKYR	Turkey	10539	1178	9	ICSID	1
43	Cargill v. Mexico	CARMEX	USA	51433	9721	5	ICSID	1
44	Kardassopoulos & Fuchs v. Georgia	KARGEO	Greece, Israel	33657	3725	9	ICSID	1
45	Bogdanov v. Moldova (III)	BOGMOL3	Russia	10675	1632	7	SCC	0.67
46	Gemplus & Talsud v. Mexico	GEMMEX	France	40706	8861	5	ICSID	1
47	Alpha Projektholding v. Ukraine	ALPUKR	Austria	46660	2965	16	ICSID	1
48	Lemire v. Ukraine (II)	LEMUKR2	USA	52750	4030	13	ICSID	1
49	Remington v. Ukraine	REMUKR	Gibraltar	41538	3855	11	SCC	0.67
50	Tza Yap Shum v. Peru	TZAPER	China	8028	6027	1	ICSID	1
51	Chevron v. Ecuador (I)	CHEECU1	USA	54540	6432	8	PCA	0.33
52	White Industries v. India	WHIIND	Australia	62217	1461	43	-	0
53	SGS v. Paraguay	SGSPAR	Switzerland	85815	4713	18	ICSID	1
54	Servier v. Poland	SERPOL	France	40838	13145	3	PCA	0.33
55	Inmaris Perestroika v. Ukraine	INMUKR	Germany	44065	3855	11	ICSID	1
56	Marion Unglaube v. Costa Rica	MARCOS	Germany	44065	9985	4	ICSID	1
57	Swisslion v. Macedonia	SWIMAC	Switzerland	83164	4710	18	ICSID	1
58	Goetz v. Burundi (II)	GOEBUR2	Belgium	44741	244	183	ICSID	1
59	RDV v. Guatemala	RDVGUA	USA	51433	3279	16	ICSID	1
60	Al-Kharafi v. Libya and others	ALKLIB	Kuwait	43332	5518	8	CRCICA	0.33
61	Arif v. Moldova	ARIMOL	France	42571	2244	19	ICSID	1
62	Abengoa v. Mexico	ABEMEX	Spain	29371	10199	3	ICSID	1
63	Guaracachi v. Bolivia	GUABOL	UK, USA	54540	3124	17	PCA	0.33
64	EDF v. Hungary	EDFHUN	France	36206	12364	3	PCA	0.33
65	British Caribbean Bank v. Belize	BRIBEL	United Kingdom	46412	4884	10	PCA	0.33
66	Awdi v. Romania	AWDROM	USA	56116	8973	6	ICSID	1

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SNo	CName	CCode	ICSID Conv	NY Conv	ConvRatif	RoL	President	Nat
1	AAPL v. Sri Lanka	AAPSRI	Ratified	Ratified	1	57	1	0
2	Saar Papier v. Poland (I)	SAAPOL1	No	Ratified	0.33	66	1	0
3	AMT v. Zaire	AMTZAI	Ratified	No	0.67	0.5	1	0
4	FEDAX v. Venezuela	FEDVEN	Ratified	Ratified	1	23	1	0
5	Sedelmayer v. Russia	SEDRUS	Sign Only	Ratified	0.67	21	1	0
6	Biedermann v. Kazakhstan	BIEKAZ	Sign Only	Ratified	0.67	16	1	0
7	Metalclad v. Mexico	METMEX	No	Ratified	0.33	38	1	0
8	Swembalt v. Latvia	SWELAT	Ratified	Ratified	1	66	0	0
9	Mafezzini v. Spain	MAFSPA	Ratified	Ratified	1	91	0	0
10	CMS v. Argentina	CMSARG	Ratified	Ratified	1	25	1	1
11	Wena Hotels v. Egypt	WENEGY	Ratified	Ratified	1	55	0	0
12	Middle East Cement v. Egypt	MIDEGY	Ratified	Ratified	1	55	0	0
13	Pope & Talbot v. Canada	POPCAN	No	Ratified	0.33	95	0	0
14	Feldman v. Mexico	FELMEX	No	Ratified	0.33	40	1	0
15	Myers v. Canada	MYECAN	No	Ratified	0.33	94	0	0
16	CME v. Czech Republic	CMECZE	Ratified	Ratified	1	76	0	0
17	Tecmed v. Mexico	TECMEX	No	Ratified	0.33	42	1	0
18	AIG v. Kazakhstan	AIGKAZ	Ratified	Ratified	1	16	1	0
19	Nykomb v. Latvia	NYKLAT	Ratified	Ratified	1	66	0	0
20	MTD v. Chile	MTDCHI	Ratified	Ratified	1	88	1	0
21	Occidental v. Ecuador (I)	OCCECU1	Ratified	Ratified	1	13	1	0
22	CSOB. v. Slovak Republic	CSOSLO	Ratified	Ratified	1	65	0	0
23	France Telecom v. Lebanon	FRALEB	Ratified	Ratified	1	44	0	0
24	Petrobart v. Kyrgyz Republic	PETKYR	Sign Only	Ratified	0.67	8	1	0
25	Cargill v. Poland	CARPOL	No	Ratified	0.33	66	1	0
26	Bogdanov v. Moldova (I)	BOGMOL1	Ratified	Ratified	1	41	0	0
27	ADC v. Hungary	ADCHUN	Ratified	Ratified	1	80	0	0
28	PSEG v. Turkey	PSETUR	Ratified	Ratified	1	55	0	0
29	Pren Nreka v. Czech Republic	PRECZE	Ratified	Ratified	1	77	0	0
30	Eastern Sugar v. Czech Republic	EASCZE	Ratified	Ratified	1	76	0	0
31	OKO v. Estonia	OKOEST	Ratified	Ratified	1	84	0	0
32	ADM v. Mexico	ADMMEX	No	Ratified	0.33	36	1	0
33	Desert Line v. Yemen	DESYEM	Ratified	No	0.67	18	1	1
34	Ares and MetalGeo v. Georgia	AREGEO	Ratified	Ratified	1	49	1	0
35	Rumeli v. Kazakhstan	RUMKAZ	Ratified	Ratified	1	33	1	0
36	Duke Energy v. Ecuador	DUKECU	Ratified	Ratified	1	10	1	0
37	Bernardus v. Zimbabwe	BERZIM	Ratified	Ratified	1	1	1	1
38	Siag v. Egypt	SIAEGY	Ratified	Ratified	1	51	1	0
39	Saipem v. Bangladesh	SAIBAN	Ratified	Ratified	1	25	0	0
40	Walter Bau v. Thailand	WALTHA	Sign Only	Ratified	0.67	51	0	0
41	Corn Products v. Mexico	CORMEX	No	Ratified	0.33	34	1	0
42	Sistem v. Kyrgyz Republic	SISKYR	Sign Only	Ratified	0.67	12	1	0
43	Cargill v. Mexico	CARMEX	No	Ratified	0.33	35	1	0
44	Kardassopoulos & Fuchs v. Georgia	KARGEO	Ratified	Ratified	1	52	1	0
45	Bogdanov v. Moldova (III)	BOGMOL3	Ratified	Ratified	1	42	0	0
46	Gemplus & Talsud v. Mexico	GEMMEX	No	Ratified	0.33	34	1	0
47	Alpha Projektholding v. Ukraine	ALPUKR	Ratified	Ratified	1	25	1	0
48	Lemire v. Ukraine (II)	LEMUKR2	Ratified	Ratified	1	23	1	0
49	Remington v. Ukraine	REMUKR	Ratified	Ratified	1	25	1	0
50	Tza Yap Shum v. Peru	TZAPER	Ratified	Ratified	1	35	1	1
51	Chevron v. Ecuador (I)	CHEECU1	Denounced	Ratified	0.33	13	1	0
52	White Industries v. India	WHIIND	No	Ratified	0.33	52	0	0
53	SGS v. Paraguay	SGSPAR	Ratified	Ratified	1	28	1	0
54	Servier v. Poland	SERPOL	No	Ratified	0.33	72	1	0
55	Inmaris Perestroika v. Ukraine	INMUKR	Ratified	Ratified	1	25	1	0
56	Marion Unglaube v. Costa Rica	MARCOS	Ratified	Ratified	1	65	1	0
57	Swisslion v. Macedonia	SWIMAC	Ratified	Ratified	1	48	0	1
58	Goetz v. Burundi (II)	GOEBUR2	Ratified	No	0.67	15	1	1
59	RDV v. Guatemala	RDVGUA	Ratified	Ratified	1	15	1	0
60	Al-Kharafi v. Libya and others	ALKLIB	No	No	0	3	1	1
61	Arif v. Moldova	ARIMOL	Ratified	Ratified	1	43	0	0
62	Abengoa v. Mexico	ABEMEX	No	Ratified	0.33	35	1	0
63	Guaracachi v. Bolivia	GUABOL	Denounced	Ratified	0.33	13	1	0
64	EDF v. Hungary	EDFHUN	Ratified	Ratified	1	71	0	0
65	British Caribbean Bank v. Belize	BRIBEL	No	No	0	25	0	0
66	Awdi v. Romania	AWDROM	Ratified	Ratified	1	61	0	0

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B. Calibrated Dataset (All States)

	COMPLIAN	RELTVB2	COMPLRE	COMPLGR	ECODOM2	INSTPRES	RATIF	ROL2	PRES	NAT
AAPSRI	1	0.016191	0.6	0.67	0.999878	1	1	0.448526	1	0
SAAPOL1	1	0.009304	0.6	0.33	0.375682	0	0.33	0.710154	1	0
AMTZAI	1	0.999995	0.6	0.33	1	1	0.67	0.002367	1	0
FEDVEN	1	0.008942	0.6	0	0.255906	1	1	0.023677	1	0
SEDRUS	0	0.008792	0	0.67	0.426916	0.67	0.67	0.019342	1	0
BIEKAZ	1	0.116393	0.6	0	0.997704	0.67	0.67	0.01163	1	0
METMEX	0.8	0.01157	0.6	0.67	0.159278	1	0.33	0.102515	1	0
SWELAT	0.6	0.02313	0.6	0	0.262977	0.33	1	0.710154	0	0
MAFSPA	1	0.008744	0.6	0	0.029622	1	1	0.983643	0	0
CMSARG	0.8	0.98747	0.6	1	0.804291	1	1	0.028954	1	1
WENEGY	0.8	0.01228	0.6	0.67	0.983534	1	1	0.398132	0	0
MIDEGY	1	0.009583	1	0	0.600915	1	1	0.398132	0	0
POPCAN	1	0.008787	0.6	0	0.043148	0	0.33	0.990133	0	0
FELMEX	0.6	0.008776	1	0	0.16579	1	0.33	0.123147	1	0
MYECAN	0.8	0.009321	1	0	0.039226	0	0.33	0.988801	0	0
CMECZE	0.8	0.56749	0.6	0.33	0.08721	0	1	0.898103	0	0
TECMEX	1	0.009226	1	0.33	0.07618	1	0.33	0.14725	1	0
AIGKAZ	0	0.01803	1	0.33	0.937376	1	1	0.01163	1	0
NYKLAT	1	0.027003	1	0	0.262977	0.67	1	0.710154	0	0
MTDCHI	0.6	0.010732	0.6	0	0.031475	1	1	0.976167	1	0
OCCECU1	0.6	0.820726	1	0	0.730118	0.33	1	0.008557	1	0
CSOSLO	1	0.997809	0.6	0.33	0.036415	1	1	0.683113	0	0
FRALEB	0.8	0.730847	0.6	0	0.218036	0	1	0.175129	0	0
PETKYR	0	0.015304	0.6	0.33	1	0.67	0.67	0.005122	1	0
CARPOL	1	0.010215	1	0.33	0.082634	0	0.33	0.710154	1	0
BOGMOL1	1	0.009176	0.6	0	0.209988	0.67	1	0.134744	0	0
ADCHUN	1	0.069681	0.6	0.67	0.084894	1	1	0.936339	0	0
PSETUR	1	0.009366	0.6	0	0.144132	1	1	0.398132	0	0
PRECZE	0.6	0.008942	1	0	0.031587	0	1	0.909236	0	0
EASCZE	1	0.015582	1	0.33	0.065763	0.67	1	0.898103	0	0
OKOEST	1	0.191643	0.6	0	0.059915	1	1	0.960852	0	0
ADMMEX	1	0.010994	1	0	0.146417	1	0.33	0.085005	1	0
DESYEM	1	0.034531	0.6	0.33	0.934912	1	0.67	0.014261	1	1
AREGEO	0	0.035769	0.6	0.33	0.695179	1	1	0.262476	1	0
RUMKAZ	0	0.114776	0	0.33	0.036544	1	1	0.063795	1	0
DUKECU	1	0.018499	1	0	0.595962	1	1	0.006291	1	0
BERZIM	0	0.650516	0.6	0.67	1	1	1	0.002492	1	1
SIAEGY	0.8	0.029075	1	1	0.733585	1	1	0.304384	1	0
SAIBAN	1	0.012586	0.6	0.33	0.999998	1	1	0.028954	0	0
WALTHA	0.6	0.009996	0.6	0.33	0.281195	0	0.67	0.304384	0	0
CORMEX	1	0.012376	1	0	0.194553	1	0.33	0.070251	1	0
SISKYR	0	0.097015	0	0.33	0.40457	1	0.67	0.007723	1	0
CARMEX	0.6	0.011529	1	0	0.150136	1	0.33	0.077306	1	0
KARGEO	0	0.186421	0	0.67	0.412574	1	1	0.32669	1	0
BOGMOL3	1	0.008813	1	0.33	0.218664	0.67	1	0.14725	0	0
GEMMEX	1	0.00921	1	0.33	0.120132	1	0.33	0.070251	1	0
ALPUKR	1	0.009176	0.6	0	0.844238	1	1	0.028954	1	0
LEMUKR2	0.6	0.011275	1	0.33	0.712966	1	1	0.023677	1	0
REMUKR	0.8	0.009741	1	0.33	0.556439	0.67	1	0.028954	1	0
TZAPER	0.6	0.008792	0.6	0	0.039504	1	1	0.077306	1	1
CHEECU1	0.6	0.809849	1	0.33	0.363676	0.33	0.33	0.008557	1	0
WHIIND	1	0.008797	0.6	0.33	0.999932	0	0.33	0.32669	0	0
SGSPAR	0.6	0.207977	0.6	0	0.918143	1	1	0.039063	1	0
SERPOL	1	0.008969	1	0.33	0.07338	0.33	0.33	0.840807	1	0
INMUKR	1	0.009578	1	0	0.603736	1	1	0.028954	1	0
MARCOS	1	0.012391	0.6	0.33	0.113304	1	1	0.683113	1	0
SWIMAC	1	0.009543	1	0	0.905119	1	1	0.242973	0	1
GOEBUR2	1	0.08562	1	0.33	1	1	0.67	0.0105	1	1
RDVGUA	1	0.023984	0.6	0	0.842293	1	1	0.0105	1	0
ALKLIB	0.6	0.566625	0	0	0.311886	0.33	0	0.003062	1	1
ARIMOL	1	0.015507	1	0	0.933464	1	1	0.160701	0	0
ABEMEX	1	0.009984	1	0.33	0.067827	1	0.33	0.077306	1	0
GUABOL	1	0.027357	1	0.33	0.899939	0.33	0.33	0.008557	1	0
EDFHUN	0.8	0.091309	1	0.33	0.069	0.33	1	0.822916	0	0
BRIBEL	1	0.995226	1	0.33	0.454123	0.33	0	0.028954	0	0
AWDROM	1	0.009972	0	0.33	0.200976	1	1	0.563662	0	0

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C. Calibrated Dataset (Developing States)

	COMPLIAN	RELTVB2	COMPLRE	COMPLGR	ECODOM2	INSTPRES	RATIF	ROL2	PRES	NAT
AAPSRI	1	0.016191	0.6	0.67	0.999878	1	1	0.448526	1	0
AMTZAI	1	0.999995	0.6	0.33	1	1	0.67	0.002367	1	0
FEDVEN	1	0.008942	0.6	0	0.255906	1	1	0.023677	1	0
BIEKAZ	1	0.116393	0.6	0	0.997704	0.67	0.67	0.01163	1	0
METMEX	0.8	0.01157	0.6	0.67	0.159278	1	0.33	0.102515	1	0
CMSARG	0.6	0.98747	0.6	1	0.804291	1	1	0.028954	1	1
WENEGY	0.8	0.01228	0.6	0.67	0.983534	1	1	0.398132	0	0
MIDEGY	1	0.009583	1	0	0.600915	1	1	0.398132	0	0
FELMEX	0.6	0.008776	1	0	0.16579	1	0.33	0.123147	1	0
TECMEX	1	0.009226	1	0.33	0.07618	1	0.33	0.14725	1	0
AIGKAZ	0	0.01803	1	0.33	0.937376	1	1	0.01163	1	0
MTDCHI	0.6	0.010732	0.6	0	0.031475	1	1	0.976167	1	0
OCCECU1	0.6	0.820726	1	0	0.730118	0.33	1	0.008557	1	0
FRALEB	0.8	0.730847	0.6	0	0.218036	0	1	0.175129	0	0
PETKYR	0	0.015304	0.6	0.33	1	0.67	0.67	0.005122	1	0
PSETUR	1	0.009366	0.6	0	0.144132	1	1	0.398132	0	0
ADMMEX	1	0.010994	1	0	0.146417	1	0.33	0.085005	1	0
DESYEM	1	0.034531	0.6	0.33	0.934912	1	0.67	0.014261	1	1
AREGEO	0	0.035769	0.6	0.33	0.695179	1	1	0.262476	1	0
RUMKAZ	0	0.114776	0	0.33	0.036544	1	1	0.063795	1	0
DUKECU	1	0.018499	1	0	0.595962	1	1	0.006291	1	0
BERZIM	0	0.650516	0.6	0.67	1	1	1	0.002492	1	1
SIAEGY	0.8	0.029075	1	1	0.733585	1	1	0.304384	1	0
SAIBAN	1	0.012586	0.6	0.33	0.999998	1	1	0.028954	0	0
WALTHA	0.6	0.009996	0.6	0.33	0.281195	0	0.67	0.304384	0	0
CORMEX	1	0.012376	1	0	0.194553	1	0.33	0.070251	1	0
SISKYR	0	0.097015	0	0.33	0.40457	1	0.67	0.007723	1	0
CARMEX	0.6	0.011529	1	0	0.150136	1	0.33	0.077306	1	0
KARGEO	0	0.186421	0	0.67	0.412574	1	1	0.32669	1	0
GEMMEX	1	0.00921	1	0.33	0.120132	1	0.33	0.070251	1	0
TZAPER	0.6	0.008792	0.6	0	0.039504	1	1	0.077306	1	1
CHEECU1	0.6	0.809849	1	0.33	0.363676	0.33	0.33	0.008557	1	0
WHIIND	1	0.008797	0.6	0.33	0.999932	0	0.33	0.32669	0	0
SGSPAR	0.6	0.207977	0.6	0	0.918143	1	1	0.039063	1	0
MARCOS	1	0.012391	0.6	0.33	0.113304	1	1	0.683113	1	0
GOEBUR2	1	0.08562	1	0.33	1	1	0.67	0.0105	1	1
RDVGUA	1	0.023984	0.6	0	0.842293	1	1	0.0105	1	0
ALKLIB	0.6	0.566625	0	0	0.311886	0.33	0	0.003062	1	1
ABEMEX	1	0.009984	1	0.33	0.067827	1	0.33	0.077306	1	0
GUABOL	1	0.027357	1	0.33	0.899939	0.33	0.33	0.008557	1	0
BRIBEL	1	0.995226	1	0.33	0.454123	0.33	0	0.028954	0	0

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D. CNA Script (Used in RStudio)

```
library(QCApro)
library(cna)

##All States - Compliance##

misra1 <- read.csv("C:/Users/manum/Documents/myfuzzycompldataLEANER-All.csv")
rownames(misra1) <- misra1[,1]
misra1[,"X"] <- NULL

ana1 <- fscna(misra1, ordering = list("COMPLIANCE"), strict =T,con=.83, cov=.9)
asf(ana1)
msc(ana1)

eQMC(misra1, outcome = "COMPLIANCE", details =T, incl.cut1=.9)
fscna(misra1, ordering = list("COMPLIANCE"), strict =T, con=.83, cov=.9)



##Developing States - Compliance##

misra3 <- read.csv("C:/Users/manum/Documents/myfuzzycompldataLEANER-Developing.csv")
rownames(misra3) <- misra3[,1]
misra3[,"X"] <- NULL

ana3 <- fscna(misra3, ordering = list("COMPLIANCE"), strict =T,con=.81, cov=.9)
asf(ana3)
msc(ana3)

eQMC(misra3, outcome = "COMPLIANCE", details =T, incl.cut1=.9)
fscna(misra3, ordering = list("COMPLIANCE"), strict =T, con=.81, cov=.9
```

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