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Bargaining in the Shadow of Awards

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Abstract

International investment disputes occupy a curious place in the research programme on compliance. On the one hand, there is a widespread presumption that respondent states generally pay the compensation that they are ordered to pay because not doing so risks more litigation or less investment. On the other hand, these disputes frequently continue long after awards are handed down, there are visible instances of non-payment and there is little evidence about if or how most disputes are actually resolved. Compliance with investor-state dispute settlement (ISDS) awards has also been difficult to study because much of what occurs after an arbitral decision falls outside traditional understandings of compliance processes. Therefore, in this article, we introduce a broader term – resolution – and look beyond payment at a wider landscape of post-award dynamics. We also introduce a framework to bring these dynamics into view. This framework places awards in the context of longer-term bargaining and articulates how bargaining is different when it occurs in the shadow of an award. We present three mechanisms through which awards can shape outcomes – as a legitimate outcome, as a coordinating focal point, or as a bargaining endowment – before arguing that the third mechanism is the most common in the context of ISDS.

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1 Introduction

International investment disputes occupy a curious place in the research programme on compliance. On the one hand, there is a widespread presumption that respondent states generally pay the compensation that they are ordered to pay in adverse awards because not doing so risks reputational consequences such as less foreign investment or further litigation using the system's transnational enforcement architecture. On the other hand, international investment disputes frequently continue long after awards are handed down, there are visible instances of non-payment and there is little available evidence about if or how most disputes are actually resolved.

It has long been difficult to study what happens after an investor-state dispute settlement (ISDS) award is handed down.[1] First, many post-award dynamics remain opaque or even confidential. Recent publications on compliance with ISDS awards have started to address these challenges by selecting tractable samples of the ISDS universe and collecting available evidence, including insights from counsel, claimants or state officials.[2] Another reason why compliance with ISDS awards has been difficult to study is because much of what occurs falls outside traditional understandings of compliance processes. This is a conceptual issue. The concept of compliance focuses scholars' attention narrowly, usually on payment, and thus misses the variety of strategies and events that occur in the process of resolving an international investment dispute.[3]

Therefore, in this article, we introduce a broader term – resolution – and look beyond payment at a wider landscape of post-award dynamics. It may be difficult to understand how or why a dispute was resolved without looking at domestic regulatory changes, contract renegotiations, pressure exerted through multilateral lending or other dynamics that are not formally related to compliance. To bring these dynamics into view and enable more research on what happens after ISDS awards, we introduce a bargaining framework.[4] The first step in our framework places awards in the context of longer-term bargaining. The second step articulates how bargaining

[1] We use the terms investor-state dispute settlement (ISDS) case and international investment dispute interchangeably, understanding both to include investor-state arbitrations in which jurisdiction comes from a treaty, foreign investment legislation or a contract. Due to data availability, the data in section 2.B is primarily from treaty-based arbitrations.

[2] Gaillard and Penushliski, 'State Compliance with Investment Awards', 35 *ICSID Review* (2020) 540; Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance', 13 *Journal of International Dispute Settlement* (2022) 179; Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach', 19 *Journal of International Economic Law* (2016) 681; Strain *et al.*, 'Compliance Politics and International Investment Disputes: A New Dataset', 27 *Journal of International Economic Law* (2024) 70.

[3] On the narrowness of compliance as a concept, see Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1(2) *Global Policy* (2010) 127 (arguing that a tight focus on compliance understates the impact of law and judicial decisions); Martin, 'Against Compliance', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Relations and International Law* (2012) 591 (arguing for a focus on state behaviour rather than compliance *per se*).

[4] This framework, and our article's title, are inspired by Robert Mnookin and Louis Kornhauser's classic contribution on bargaining in the shadow of the law. Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* (1979) 950.

is different when it occurs in the shadow of an award. We present three mechanisms through which awards can shape outcomes, before arguing that the third mechanism is most common.

There is much to be gained from broadening our expectations of how investment disputes may be resolved. Our framework enables researchers to see more of the dynamics occurring in practice and to appreciate the sophistication of actor strategies. The next section describes a variety of post-award dynamics, using both specific examples and aggregate data. The examples illustrate why we need a new framework to make sense of what is happening after ISDS awards. The third section develops the framework, a fourth section considers the role of enforcement architecture within a bargaining framework and a fifth section concludes.

2 What Happens after an ISDS Award?

A *Illustrating the Breadth of Processes and Outcomes*

The processes and outcomes that follow an ISDS award are varied and interesting. For instance, in 1997, a tribunal from the International Centre for Settlement of Investment Disputes (ICSID) ordered Zaire to pay US$9 million to American Manufacturing and Trading (AMT), plus 7.5 per cent interest per annum, after finding that rioting that led to property damage violated the US-Zaire investment treaty.[5] The claimant made efforts to enforce the award, then Zaire, renamed the Democratic Republic of Congo, sought revision of the award at ICSID, possibly motivated by a desire to thwart enforcement against state assets.[6] In June 2000, the revision tribunal issued an order taking note of the discontinuance of the revision proceedings.[7] A few months earlier, the Congolese government made two agreements, which together resolved the dispute with AMT. In the first agreement, Congo agreed to pay compensation for this dispute and an additional contract-based one. In the second agreement, the Congolese Ministries of Finance and Petroleum entered into an agreement with three foreign oil and gas corporations, which committed to pay AMT directly and to paying the amount stipulated in the first settlement agreement. In exchange, the three new investors received tax credits and relief from other tax obligations.[8]

The extent to which these settlement agreements were honoured is unknown, in part because they were struck during the Second Congo War, which raged from

[5] ICSID, *American Manufacturing & Trading, Inc., v. Republic of Zaire – Award*, 21 February 1997, ICSID Case no. ARB/93/1. The Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Promotion and Protection of Investment 1984 (1989).

[6] 'Looking Back: In AMT v Zaire, Arbitrators Differ as to Relevance of BIT Provision for Non-Combat Losses at Hands of Armed Forces', *Investment Arbitration Reporter* (2017), available at www.iareporter.com/articles/looking-back-in-amt-v-zaire-arbitrators-differ-as-to-relevance-of-bit-provision-for-non-combat-losses-at-hands-of-armed-forces-damages-valuation-is-opaque/.

[7] This document is unavailable, but the reason for discontinuance was a settlement agreement.

[8] Congolese Ministries of Petrol and Finance, 'Decret no. 263 Portant Approbation de L'Avenant no. 7 a la Convenvion Conclue le 09 aout 1969 Regissant la Recherche et l'Exploitation des Hydrocarbures dans la Partie Maritime de la Republique Democratique du Congo', 10 October 1999, paras. 4.2–4.4.

1998 to 2003. Throughout the post-award bargaining, AMT continued to invest in Congo, and the company continues to work with the Congolese government today.[9] If scholars approach these dynamics assuming payment equals compliance, then it is difficult to say if this behaviour constitutes compliance or not. On the one hand, Congo did not pay anything, but, on the other hand, AMT was satisfied with the way in which the dispute was resolved.

Recent outcomes can be equally difficult to understand in terms of compliance or non-compliance. For instance, in 2019, an ICSID tribunal ordered Pakistan to pay US$5.9 billion to the claimants in Tethyan Copper.[10] Tethyan Copper had applied for a mining licence in 2011, but the province of Balochistan denied the application; later, in 2011, Tethyan filed a request for arbitration at ICSID under the Australia-Pakistan investment treaty, in addition to filing for the International Chamber of Commerce's arbitration and for domestic court proceedings that ended in the Pakistani Supreme Court.[11] After the ICSID award, Pakistan began annulment proceedings and made an application for revision of the award. After a conditional stay of enforcement was granted and then terminated due to Pakistan not meeting the conditions, the claimants began enforcement proceedings in multiple jurisdictions. While the legal proceedings continued, ultimately it was 'several rounds of negotiations' over three years between the parties that resolved the dispute.[12] In March 2022, settlement agreements were announced that reconstituted the project with a new ownership structure.[13] The agreements were contingent on the project receiving all relevant licences from the government; after these licences were received, all parties announced that the ICSID award 'has been resolved'.[14]

As in *AMT v. Zaire*, there was no payment outright from Pakistan, yet the claimants announced the award had been resolved. Many post-award dynamics seem to have contributed to the resolution. First, the size of the award constrained Pakistan's options. Paying US$6 billion out of the national budget was not seen as a realistic option; the award was larger than Pakistan's annual education or health budget, larger

[9] As of 2023, American Manufacturing and Trading (AMT) is one company within the HY Group, and Hassan Yahfoufi (president of AMT during the dispute) remains president of HY Group (see https://www.h-ygroup.com/about). Congolese Cabinet documents from 2018 show AMT working with the government.

[10] ICSID, *Tethyan Copper Company Pty Ltd., v. Islamic Republic of Pakistan – Award*, 12 July 2019, ICSID Case no. ARB/12/1.

[11] The International Chamber of Commerce's arbitration came to light when the Pakistani Supreme Court scrutinized the settlement agreement. 'Following Approval by Pakistan's Supreme Court, Parties Finalise Settlement of Tethyan Copper Dispute', *Investment Arbitration Reporter* (2022), available at www.iareporter.com/articles/following-approval-by-pakistans-supreme-court-parties-finalise-settlement-of-tethyan-copper-dispute/. Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments 1998 (1998).

[12] 'Historic Day for People of Balochistan Today: PM', *Prime Minister's Office Islamic Republic of Pakistan* (20 March 2022), available at www.pmo.gov.pk/news_details.php?news_id=1195.

[13] 'Pakistan and Balochistan Agree in Principle to Restart Reko Diq Project', *Barrick* (20 March 2022), available at www.barrick.com/English/news/news-details/2022/barrick-pakistan-and-balochistan-agree-in-principle-to-restart-reko-diq-project/default.aspx.

[14] 'News Release: Antofagasta Exits Reko Diq Project in Pakistan', *Antofagasta Plc* (15 December 2022), available at www.antofagasta.co.uk/investors/news/2022/antofagasta-exits-reko-diq-project-in-pakistan/.

than a 2019 loan package from the International Monetary Fund and roughly the size of Pakistan's entire foreign exchange reserves. The award's size meant that resolving the dispute through legal means was unlikely, despite the enforcement architecture standing behind ISDS awards. While legal proceedings continued, the main arena shifted to negotiations: the prime minster 'set up a committee to steer the negotiations', and in these settlement negotiations, both 'the Federal and Provincial Governments were assisted by international advisers'.[15] Second, options for resolution were shaped by the claimant's motivation – the claimants remained mining companies and wanted licences.[16] Other actors or motivations may have been involved too. For instance, Pakistan was in a position of supplication to the International Monetary Fund, and when the settlement agreement was announced, the Canadian high commissioner accompanied mining company representatives to meet the prime minister.[17]

The involvement of home states in reaching a settlement is usually confidential, but on the rare occasions when these dynamics become public, they demonstrate the potential for interplay between legal and non-legal means in the post-award phase.[18] For instance, in *Petrobart v. Kyrgyzstan*, the respondent state first attempted to set aside the award, and after that failed and 'after the Swedish government intervened on behalf of Petrobart', Kyrgyzstan paid.[19] Sometimes, there is evidence of home state involvement in other phases as well. For example, three early ICSID cases were filed amid ongoing negotiations between Jamaica and American corporations, which were mediated by the US government. The corporations filed claims at ICSID, according to internal US government documents, 'only as a way to improve their bargaining position in the ongoing negotiations, not with the intention of resolving the dispute on the legal field'.[20] The ICSID cases were 'eventually discontinued in favour of the settlement reached through negotiations but remained throughout the negotiations as a threat'.[21]

Actors and events seemingly unconnected to the award can alter when or how much states pay too. In *Occidental v. Ecuador II*, which was originally US$2.38 billion and then lowered to US$1.06 billion by an annulment committee, Daniel Peat shows that the missing link in speeding up the payment schedule was a US$2 billion Chinese policy bank loan to Ecuador.[22] The loan needed to pass through New York to

[15] 'Historic Day for People of Balochistan Today', *supra* note 13.

[16] 'Pakistan Welcomes Venture's Willingness for Negotiated Settlement after Reko Diq Mine Ruling', *Reuters* (14 July 2019), available at www.reuters.com/article/us-pakistan-mine/pakistan-welcomes-ventures-willingness-for-negotiated-settlement-after-reko-diq-mine-ruling-idUSKCN1U908U.

[17] 'Historic Day for People of Balochistan Today', *supra* note 13.

[18] When scholars access internal documents, home state involvement in investment disputes appears more frequent. See Gertz, Srividya and Poulsen 'Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?', 107(C) *World Development* (2018) 239.

[19] 'Looking Back: In *Petrobart v. Kyrgyz Republic* Dispute, A Sales Contract Does Not Constitute an Investment under the Kyrgyz Foreign Investment Law, But It Later Finds Protection under the Energy Charter Treaty', *Investment Arbitration Reporter* (2017), available at www.iareporter.com/articles/looking-back-in-petrobart-v-kyrgyz-republic-dispute-a-sales-contract-does-not-constitute-an-investment-under-the-kyrgyz-foreign-investment-law-but-it-later-finds-protection-under-the-energy-charte/.

[20] T. St. John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (2018), at 103.

[21] *Ibid.*, at 215.

[22] D. Peat, 'Confronting Rashomon: What Interviews Can Tell Us About Compliance' (2023) (draft on file with the authors).

enter Ecuador, and officials feared that Occidental might be able to execute the award against the loan as it passed through New York.[23]

Loans were also a factor in Argentina's 2013 decision to pay parts of five adverse ISDS awards via a settlement agreement. In research conducted using different methods, Moshe Hirsch and Peat both found that the enforcement architecture played only a minimal role in Argentina's decision.[24] Instead, a range of factors shaped officials' decision-making, including the USA and UK blocking Argentina from new multilateral development bank loans, the US government suspending Argentina's preferential trade status, access to bond markets, sentiment within the Argentine legislature and attitudes of politicians.[25] Argentina's 2013 settlement is also interesting due to the form that payment took. Argentina agreed to pay US$677 million, around 75 per cent of the original award amount, and paid in Argentine bonds, not the mode specified in the awards.[26]

It is not unusual for the amount and means of payment to be different from what was ordered in the award. Sometimes, the disputing parties agree that a different amount will resolve the dispute and be considered as full compensation. For example, in *Bear Creek v. Peru*, the claimant wrote that it accepted the amount of compensation received as full, despite being paid a different amount and in a different currency than the award orders.[27] At other times, states pay in instalments, with or without having agreed to this with the claimant. Whereas states may have a standard budget line to pay awards from domestic or international courts, such as the European Court of Human Rights, most states do not have a standing budget for ISDS awards, which also tend to be much larger, so payment can be difficult to arrange internally. Officials need to request large sums of money to pay foreign investors during budget negotiations in which there are many competing priorities. Peat describes this process using interviews with Ecuadorian officials who told him they 'have to sort out how to pay, basically, which is always an issue, it is always an issue because there is never enough money … that is why Ecuador as a state always takes so long in paying or at least pays little by little'.[28]

B *Aggregate Public Data on Post-award Processes*

The examples discussed above suggest that there is interesting variation regarding what happens after ISDS awards. This impression is supported by aggregate data, which show that protracted bargaining with multiple parties and both legal and non-legal means is not exceptional. However, confidentiality and missing data limit how confidently conclusions can be drawn from aggregate data because all attempts to gather such data face two challenges. First, there is no public information about what

[23] *Ibid.*
[24] Hirsch, *supra* note 3; Peat, *supra* note 3.
[25] Hirsch, *supra* note 3, at 699–700; Peat, *supra* note 3.
[26] Peat, *supra* note 3, at 194, n. 98.
[27] Bear Creek Mining Corporation, Consolidated Financial Statements, 31 December 2018, at 22.
[28] Peat, *supra* note 23.

happened after some awards. Second, certain post-award processes are more likely to create public records than others; if aggregate numbers of a particular phenomenon are low, it is not necessarily evidence that this phenomenon is not occurring. Important dynamics, such as home state involvement, can occur without generating public information.

Confidentiality and missing data mean that, even the first institutional report on compliance with ISDS awards – a 2024 ICSID working paper – obscures more than it illuminates. The ICSID Secretariat 'does not monitor compliance with or post-award settlement of Awards', so its study relies on publicly available information and information requested from award creditors or their counsel.[29] The report presents statistics about 111 damages awards, without identifying the names of those awards. At least 62 awards are excluded due to missing information or pending enforcement proceedings.[30] The report implicitly defines compliance as claimant satisfaction but does not disclose what actions were taken for satisfaction: the reader does not know if a state paid 10 per cent of an award or 100 per cent, or if an award creditor was satisfied by new regulation or licences, as in the *Tethyan Copper* case.[31] The lack of transparency makes it impossible to use the ICSID report in the context of empirical research.

Therefore, we present descriptive statistics from our own data collection as well as three prior studies, which all report similar trends despite using different samples and methods. We collected publicly available data on what happened after 232 treaty-based damages awards, in which states were ordered to pay compensation to a claimant, and found no public information about what happened after 75 awards.[32] This is a similar level of missingness to previous attempts. Emmanuel Gaillard and Ilija Penushliski looked at what happened after 170 ISDS awards against the 32 most-sued states, using both public information and their own involvement in cases, and found no information about 51 cases.[33] Yuliya Chernykh and colleagues examined what happened after 46 awards against the least-sued states and found no information on 24 cases.[34] In 2022, Nikos Lavranos began publishing annual reports on compliance with ISDS awards, and each report includes a prominent disclaimer that information on many post-award processes remains unavailable.[35]

It is still possible to identify trends for awards with available information, however. The first trend is that payment can be identified after roughly half of awards. Gaillard and Penushliski could identify payment after 85 out of the 170 awards. This led them to conclude that the 'prognosis that compliance with investment awards would be a non-issue … has not held true'.[36] In their examination of 46 awards not included in

[29] ICSID, Compliance and Enforcement of ICSID Awards (2024), para. 22.

[30] *Ibid.*, paras 25, 29.

[31] *Ibid.*, para. 21 (noting 'no distinction was made between full or partial satisfaction of the Award, if the award creditor considered itself satisfied').

[32] Strain *et al.*, *supra* note 3.

[33] *Ibid.*, at 586–587.

[34] Chernykh *et al.*, 'Compliance with ISDS Awards: Empirical Perspectives and Reform Implications', ISDS Academic Forum Working Paper no. 2022/3 (2022).

[35] Lavranos, Report on Compliance with Investment Treaty Arbitration Awards (2023), available at www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf.

[36] Gaillard and Penushliski, *supra* note 3, at 541.

Gaillard and Penushliski's sample, Chernykh and colleagues found evidence of payment in 10 cases, five post-award settlement agreements and clear non-compliance in seven cases.[37] In our study, which incorporated data from these earlier studies, we found public evidence that the investor received either partial or full compensation after 101 of the 232 awards, and 17 awards were set aside or annulled in full; while some claimants may still try to enforce an annulled award, the prevailing view is that the state no longer has an obligation to pay.[38] Lavranos' report emphasizes that non-payment is common and focuses on 60 unpaid awards against 14 states. In summary, existing studies find public evidence of payment after 40–50 per cent of awards, with no significant difference between ICSID and non-ICSID awards.[39]

The second trend is that several types of legal processes are common after awards. In our data, set-aside or annulment proceedings were initiated after 68 per cent of awards or 181 out of 260 cases.[40] These proceedings are often accompanied by enforcement proceedings in line with a consensus in the practitioner literature that enforcement struggles and proceedings in domestic courts are common after awards issued under both the ICSID and New York Conventions.[41] While enforcement proceedings generate public records, they are scattered around the world in local languages, and, therefore, there is no exhaustive list. Yet evidence gathered to date supports the consensus that they are common. Gaillard and Penushliski found that enforcement actions occur in 40 per cent of their surveyed cases.[42] Chernykh and colleagues found that claimants used enforcement proceedings in 39 per cent of their cases.[43] We found 172 enforcement or recognition proceedings across a range of jurisdictions.[44] ICSID compiled a

[37] Chernykh et al., *supra* note 35.

[38] Strain et al., *supra* note 3, 83. On the resurrection of annulled awards, see Norton Rose Fulbright, 'Awards Set Aside or Annulled at the Seat: Zombies, Ghosts and Buried Treasure' (2018), available at https://nortonrosefulbright.com/en-us/knowledge/publications/e202e90e/awards-set-aside-or-annulled-at-the-seat-zombies-ghosts-and-buried-treasure.

[39] There is a discrepancy between the ICSID report and other sources, but this is likely due to conceptual and methodological decisions. The ICSID report does not provide any information about payment. Instead, it uses one broad category, defined solely by claimant satisfaction, and excludes awards with missing information. These choices likely generate the discrepancy between that report (90 per cent voluntary compliance and post-award settlement) and other sources (Gaillard and Penushliski find evidence of payment after 50 per cent of awards, while Strain and colleagues find evidence of payment after 44 per cent of awards).

[40] Strain *et al.*, *supra* note 3.

[41] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159; Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, 330 UNTS 38. For instance, in 2006, Edward Baldwin, Mark Kantor and Michael Nolan cautioned that 'successful claimants and losing respondents should be aware of the potential for resistance to the enforcement of ICSID awards'. Baldwin, Kantor and Nolan, 'Limits to Enforcement of ICSID Awards', 23(1) *Journal of International Arbitration* (2006) 1, at 23; see also R.D. Bishop (ed.), *Enforcement of Arbitral Awards against Sovereigns* (2009); J. Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards* (2015); Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention', in C. Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 322.

[42] Gaillard and Penushliski, *supra* note 3, at 591.

[43] Chernykh *et al.*, *supra* note 35.

[44] Strain *et al.*, *supra* note 3, at 89.

list of 84 enforcement proceedings in 21 jurisdictions.[45] These numbers all suggest that subsequent proceedings occur frequently.

The third trend is that post-award settlement agreements are common. We found evidence of a settlement agreement after roughly one in five awards in our data, and, since these agreements are often confidential, the actual number may be even higher. Chernykh and Sattorova have analysed these agreements and found that they often diverge widely from what tribunals ordered in the award and that they are remarkably diverse.[46] Among other examples, Chernykh and Mavluda Sattorova found settlement agreements that include: an undertaking to withdraw a controversial legislative act (*British Caribbean Bank Limited v. Government of Belize*); signing new agreements with the investor or investor-controlled companies (*Flemingo Duty Free Pvt Ltd v. Poland*); a withdrawal of recovery orders and termination of criminal investigations (*France Telecom v. Lebanon; Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*); special tax concessions (*Cairn Energy PLC v. India*); payment by the host government for exclusive information and data (*Gold Reserve Inc. v. Venezuela*); and non-monetary reconciliation (*Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*).[47] The prevalence and variety of these agreements points to the centrality of bargaining.

In summary, the available aggregate data suggests that post-award dynamics are varied and interesting. The missing data underline that there is much we have yet to learn about both outcomes and processes in the post-award phase. In addition, while some post-award dynamics, such as subsequent proceedings, are relatively easy to observe, there are others, especially diplomatic involvement or how parties use multiple ongoing legal processes when negotiating with one another, that are infrequently observed but important in resolving disputes.

3 Theorizing Bargaining in the Shadow of an ISDS Award

A *The Fixed Standard Approach to Studying Compliance*

A rich body of scholarship across multiple disciplines studies compliance with international law in general and compliance with the rulings of international courts and tribunals in particular.[48] Scholars have tended to conceptualize both first-order compliance (with treaty obligations) and second-order compliance (with the rulings of courts and tribunals) as the fulfilment of a set of fixed legal obligations. For instance, Diana Kapiszewski and Matthew Taylor define second-order compliance as the 'full execution of the action (or complete avoidance of the action) called for (or prohibited)' in an adjudicative decision.[49] Applied to the ISDS context, the fixed standard approach equates compliance with the payment of compensation as ordered in the award.

[45] ICSID, *supra* note 30.

[46] Chernykh and Sattorova, 'The Afterlife of ISDS Awards: Post-award Settlements and the Limits of Transparency Reforms', *Journal of International Dispute Settlement* (forthcoming).

[47] *Ibid.*

[48] As summarized in Huneeus, 'Compliance with International Court Judgments and Decisions', in C. Romano, K. Alter and Y. Shany (eds), *Oxford Handbook of International Adjudication* (2013) 437.

[49] Kapiszewski and Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings', 38 *Law & Social Inquiry* (2013) 803, at 806.

Observing and measuring compliance, however, is often not as straightforward as defining it. Since a binary classification of outcomes as compliance or non-compliance is likely to miss important variation in how states respond to judgments or awards, scholars have introduced measures of the extent to which, and the time in which, states comply. First, states may partially comply with a ruling.[50] The likeliest form of partial compliance in ISDS is that a state pays some, but not all, of the awarded compensation. A second possibility is delayed compliance. Tracking when compliance occurs helps scholars understand if factors that vary over time, such as the ideology of the government in power in the respondent state, changes in public opinion or various enforcement actions, influence the likelihood of compliance. Measures of partial and delayed compliance help scholars to understand variation in how states respond to judgments or awards, but these measures are anchored to a conceptualization of compliance as the execution of some fixed legal requirement.

B *Reasons to Go beyond the Fixed Standard Approach*

Moving beyond the fixed standard has several benefits for our understanding of what happens after awards are handed down. First, we may gain insights into what a claimant is seeking to achieve. The fixed standard approach assumes that compliance with a remedial obligation is a claimant's preference, overlooking their actual goals. A claimant's goal may not be payment. If an ISDS claimant instigated legal proceedings to trigger a regulatory or policy shift from a state, then the fixed standard misunderstands what the investor wants.

Second, we may see that different actors on the claimant side have different goals. An ISDS case may have a claimant investor and a third-party funder, or the law firm representing the claimant may be working under a contingency fee arrangement, or the original claimant may sell an award to a litigation fund.[51] Despite playing for the same side, their goals may diverge considerably. For instance, the original claimant may want to repair their relationship with the respondent state and therefore be open to a post-award settlement, while the litigation funder or award purchaser may refuse to settle.[52] Respondent states may behave differently towards different types of claimants – for instance, trying to settle with some claimants while knowing other claimants will continue to hold out.[53] Actor motivations shape the range of available resolutions, and figuring out what different claimants wanted is an important step in explaining why a dispute was or was not resolved.

[50] Hawkins and Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights', 6 *Journal of International Law and International Relations* (2010) 35. Partial compliance takes different forms, depending on what remedies were ordered in the decision. See further Hillebrecht, 'Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals', 1 *Journal of Human Rights Practice* (2009) 362.

[51] Dafe and Williams, 'Banking on Courts: Financialization and the Rise of Third-party Funding in Investment Arbitration', 28 *Review of International Political Economy* (2021) 1362.

[52] *Ibid.*, at 1379 (noting that the consequences of third-party funders on settlement dynamics is an important area for future research).

[53] Peat notes that his interviewees suggested that 'Ecuador would be less likely to settle with Chevron because it was Chevron' and quotes one official who stated: '[I]t is not a thing that we would ever settle with

Third, if we use the fixed standard approach, we may overlook important outcomes that do not constitute payment. Disputing parties may renegotiate the contract or remove the regulation that gave rise to their dispute and then consider the dispute to be resolved, even though there has not been compliance under a fixed standard. To take money from the national budget, officials often need to negotiate with other ministries, and these internal negotiations may be very difficult. Officials may find it easier or less sensitive to give the claimant a permit or change a relevant rule than pay, especially if one ministry is able to grant the permit or change the rule without consulting other ministries or parliament.

Fourth, we see relevant interactions and relationships by stepping back from the fixed standard approach. A claimant and respondent may face each other in multiple legal and non-legal arenas simultaneously. It is common for a dispute to be heard in commercial arbitration, domestic courts and investor-state arbitration at the same time, as in *Tethyan Copper*. Several ISDS cases have also generated parallel proceedings in other international courts and tribunals, such as the European Court of Human Rights or the World Trade Organization.[54] Awards may also be raised during discussions in multilateral development banks or in diplomatic visits between the respondent state and the home state.

In order to see more of these dynamics and to better understand the ways in which a dispute is resolved, we suggest a new concept: resolution. A dispute can be resolved even if it does not meet the threshold for compliance, which is understood as payment of the amount specified in the award. The concept of resolution prioritises satisfaction – that is, the extent to which disputing parties see a case as resolved. What led them to see the dispute as resolved is left open: an award can be resolved through payment, non-monetary settlement, annulment or being set aside; through compliance with a different judgment; through regulatory change; or through other means. Measuring resolution is not as parsimonious as measuring compliance but more accurately reflects how actors see their post-award options in practice.

C *A Bargaining Framework to Understand Post-Award Dynamics*

We develop a bargaining framework to study the wide range of dynamics that can happen after ISDS awards are handed down. There are two steps in this framework. Step one of our framework places ISDS awards in the context of longer-term bargaining. This step builds on Christer Jönsson and Jonas Tallberg's work on the 'compliance bargaining' that follows an international agreement. In their framing, an agreement 'simply creates a new bargaining situation'.[55] Tallberg and James McCall

them, just because of the kind of fights and political issues around it. But with other investors we are more open to settle or to have a talk and maybe just see and try to negotiate.' Peat, *supra* note 23.

[54] Li, 'Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses,' 19(1) *Chicago Journal of International Law* (2018) 189; Puig, 'The Merging of International Trade and Investment Law', 33 *Berkeley Journal of International Law* (2015) 1.

[55] Jönsson and Tallberg, 'Compliance and Post-Agreement Bargaining', 4(4) *European Journal of International Relations* (*EJIR*) (1998) 371, at 372. They applied the term 'compliance bargaining' to first-order compliance (with the substantive obligations of an agreement), while we focus on second-order compliance (with an award).

Smith extend this argument to include the dispute settlement process, observing that states 'bargain for settlement at multiple stages of international dispute resolution: before recourse to formal non-compliance procedures; once proceedings have been initiated in an attempt to preclude adjudication; and in the aftermath of international legal rulings'.[56] After legal decisions like an ISDS award, the disputing parties move into a new phase of bargaining.

Placing post-award bargaining in the context of a longer-term relationship is helpful for understanding the disputing parties' motivations and behaviour. An investor and a state may have negotiated with one another before, be negotiating in another venue or expect to negotiate in the future. These encounters can shape the disputing parties' views and behaviour towards one another. Each party's expectations about their future relationship can also shape their behaviour. A bargaining framework also enables researchers to appreciate the sophistication of actors' post-award strategies. Disputing parties often have a wide range of 'moves and countermoves, concessions and counterproposals' available to them.[57] As the examples in the previous section show, strategic moves after an ISDS award can include making regulatory changes or providing a tax holiday (on the respondent state side) or exerting pressure through bilateral diplomacy or multilateral lending (on the claimant side).

Available strategic moves also usually include further legal proceedings, such as annulment or set aside (on the respondent state side) or recognition and enforcement (on the claimant side). In other contexts, scholars have seen bargaining and legal proceedings as alternatives, but we believe it is more appropriate to understand legal proceedings as one tactic within a larger bargaining strategy, at least in the ISDS context.[58] Similar to John Odell's description of small state trade negotiation strategies as 'astute combinations of negotiation moves at the table and away from the table',[59] disputing parties in ISDS have possible moves in court and moves outside of court, and we should expect these moves to reinforce each other. A claimant may instigate litigation for varied reasons, including placing pressure on another party, obtaining access to documents or forcing further negotiation.

Step two in our framework recognizes that bargaining is different when it occurs in the shadow of an award. How bargaining is different, however, depends on the way in which officials within the respondent government perceive an award. We articulate three mechanisms through which awards can operate.

[56] Tallberg and McCall Smith, 'Dispute Settlement in World Politics: States, Supranational Prosecutors, and Compliance', 20(1) *EJIR* (2014) 118, at 119. Tallberg and McCall Smith applied their argument to the World Trade Organization (WTO) and European Union (EU).

[57] Putnam and Jones, 'The Role of Communication in Bargaining', 8(3) *Human Communication Research* (1982) 263.

[58] Studies drawing the distinction focused on the EU or the WTO, including Jönsson and Tallberg, *supra* note 56; Tallberg and Jönsson, 'Compliance Bargaining in the European Union', in Elgström and Jönsson (eds), *European Union Negotiations: Processes, Networks, and Institutions* (2005) 79; McCall Smith, 'Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute', in J. Odell (ed.), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (2006) 257.

[59] Odell, 'Negotiating from Weakness in International Trade Relations', 44(3) *Journal of World Trade* (2010) 545.

Mechanism 1: The Award Is Seen as a Legitimate Outcome

In the first mechanism, officials in the respondent state see the award as a legitimate outcome and believe that they ought to pay the award amount, and that doing so is appropriate and accords with the state's identity. These officials feel a 'compliance pull', in Thomas Franck's words.[60] They feel a sense of legal obligation towards the tribunal and broader ISDS system.[61] Paying the award affirms their identity and is a way to publicly demonstrate their commitment to the ISDS system and what it represents. This mechanism is familiar from theories of compliance that emphasize norms, obligation and legitimacy, which are well-developed elsewhere.[62]

While evidence supports these theories in other contexts, this mechanism can only operate if restrictive conditions regarding legitimacy and public information are met, and these conditions are rarely met in ISDS. The first condition is that officials must believe the ISDS system possesses enough legitimacy to sustain their sense of legal obligation. After years of legitimacy critique,[63] it is easy to imagine that, even if officials are committed to principles like property protection or non-discrimination and even if other national and international courts' judgments exert compliance pull, an ISDS award does not. The second condition is that officials must believe paying an ISDS award is an important means through which to demonstrate the state's identity or values. If this were true, at a minimum, we would expect states to make payment evidence public. While there are examples of this, such as with Mexico,[64] the lack of public information about payment in most cases suggests that officials in most states do not see payment of an ISDS award as a meaningful way to demonstrate their state's values or identity.

Mechanism 2: The Award Is Seen as a Coordinating Focal Point

In the second mechanism, officials in the respondent state see the award as a focal point.[65] By issuing an award, a tribunal selects and publicizes a path forward on which all actors are able to coordinate – that is, the tribunal constructs a focal point.[66] This is how Tom Ginsburg and Richard McAdams see judgments from the International

60 T. Franck, *The Power of Legitimacy among Nations* (1990), at 26.

61 Legal obligation (towards general international law) emphasized by J. Brunnée and S. Toope, *Legitimacy and Legality in International Law* (2013), at 92.

62 Such as Franck, *supra* note 61; Brunnée and Toope, *supra* note 62; R. Goodman and D. Jinks, *Socializing States* (2013).

63 For an early summary of such critiques, see M. Waibel *et al.* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010).

64 The Mexican government often publishes a summary of the case and post-award actions. For example, *Abengoa, S.A. y COFIDES, S.A. c. Estados Unidos Mexicanos* (2013), available at www.gob.mx/cms/uploads/attachment/file/157698/abengoa_ficha.pdf.

65 Thomas Schelling developed the concept of focal points, which can facilitate coordination when multiple equilibria are possible and parties either cannot communicate or fail to agree. T.H. Schelling, *The Strategy of Conflict* (1960).

66 Geoffrey Garrett and Barry Weingast developed the concept of a constructed focal point. Garrett and Weingast, 'Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', in J. Goldstein and R.O. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (1993) 176.

Court of Justice (ICJ) working – by constructing a focal point and clarifying the underlying convention as well as the state of the world to which it applies.[67] If dispute resolution is understood as a coordination game, then judgments and awards can work expressively. Treaties can have a similar expressive function; Lauge Poulsen demonstrates that European states intended investment treaties to serve as focal points amid the negotiation and informal bargaining they assumed would be used to resolve investment disputes.[68] When awards work expressively, adjudicators can resolve disputes without possessing legitimacy or the ability to sanction.[69] The core mechanism is that, by expressively influencing the parties, adjudicators make coordination easier.

The condition for this mechanism to operate is that disputing parties prioritize coordination, specifically that officials perceive the coordination aspect of dispute resolution as more important than the distributive aspect. Many disputes in international law meet this condition; after categorizing ICJ disputes, Ginsburg and McAdams show that the ICJ is more effective at resolving disputes that involve coordination, such as boundary disputes, than other types of disputes.[70] In coordination disputes, constructing a focal point and generating information is 'sufficient in many cases to generate compliance, because the parties have an interest in coordinating around the pronouncement of the court'.[71] Coordination is also central to some investment disputes – for instance, if all parties want to get a project back up and running. Yet there is also a distributive aspect to almost all investment disputes, and this aspect often dominates post-award bargaining. Post-award bargaining often resembles a zero-sum game: more money for the investor means less money for the state's taxpayers. Therefore, even if investment disputes have a coordination aspect (in that all parties are better off if there is a settlement), this aspect is outweighed by distributive concerns for most disputes that reach the post-award phase.[72]

Mechanism 3: The Award Is Seen as a Bargaining Endowment

In the third mechanism, officials in the respondent state see the award as a bargaining endowment. An award does not necessarily prescribe what must occur, but it constrains and influences what outcomes can be reached through bargaining. A claimant holding an ISDS award can threaten to enforce the award in a court with

67 Ginsberg and McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45(4) *William and Mary Law Review* (2004) 1229, at 1329; see also R. McAdams, *The Expressive Powers of Law: Theories and Limits* (2015).

68 Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points', 64(1) *International Studies Quarterly* (2020) 26, at 29 (observing 'third-party dispute settlement is much less important for treaties intended as focal points as the substantive obligations are expected to be self-enforcing even without the shadow of international litigation').

69 McAdams, *supra* note 68, at 199. McAdams does note that focal points constructed by third-party adjudicators are made more salient by 'rituals of adjudication' (at 209).

70 Ginsburg and McAdams, *supra* note 68, at 1308–1329.

71 *Ibid.*, at 1328.

72 McAdams, *supra* note 68 (who notes that coordination can still be important even in games with distributive aspects. This is why the condition is relative that disputing parties prioritize coordination over distributive aspects).

some unknown probability of success. For officials in the respondent state, therefore, the bargaining space is defined by their beliefs about the probability of enforcement succeeding multiplied by the amount awarded. Within this bargaining space, however, many outcomes are still possible, and several factors affect which outcome is ultimately reached.[73]

The first factor is disputing party preferences. What do the disputing parties actually want? A claimant may prefer a mining licence to payment of the award, as in *Tethyan Copper*. Other claimants may prefer payment. Claimants also vary in their willingness to settle; a litigation funder with no expected future dealings with the government may be less willing than an oil company that anticipates future negotiations with the government, for instance. These preferences shape what bargaining outcomes are available.

The second factor is bargaining endowments. An ISDS award is a valuable endowment, but it can be strengthened or weakened by subsequent legal proceedings. If an award is annulled or set aside, the endowment evaporates, and bargaining likely ends. If an annulment or set-aside decision changes the compensation ordered in an award, or if a court provides an order for seizure of assets as an interim measure during enforcement proceedings, bargaining evolves.[74] If courts in one jurisdiction refuse enforcement, bargaining is likely to change, but how much it changes depends on how important the assets in this jurisdiction are and how many jurisdictions in which the claimant has brought enforcement proceedings. Legal standards and arguments can be decisive for bargaining outcomes – for instance, how a domestic court interprets sovereign immunity from execution can end or energize post-award bargaining.[75]

But how likely is any given outcome in subsequent legal proceedings? The degree of uncertainty is the third factor. Throughout subsequent legal proceedings, disputing parties assess the probabilities of various outcomes and make decisions based on their

[73] These factors, and this mechanism in general, are adapted from Mnookin and Kornhauser, *supra* note 5. Mnookin and Kornhauser's insights have been applied to diverse contexts, including corporate disputes. See Mnookin and Wilson, 'Rational Bargaining and Market Efficiency: Understanding *Pennzoil v. Texaco*', 75(2) *Virginia Law Review* (1989) 295. Their insights have also provided the basis for formal models. See Cooter *et al.*, 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior', 11(2) *Journal of Legal Studies* (1982) 225. Their insights have also been the subject of critique, and there is an acknowledgement that, in some cases, social norms may be determinative: Mnookin, 'Bargaining in the Shadow of the Law Reassessed', in A. Hinshaw, A. Schneider and S. Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (2019) 22. For more on this critique, see Jacob, 'The Elusive Shadow of the Law', 26(3) *Law & Society Review* (1992) 565.

[74] For instance, an annulment committee in *Perenco v. Ecuador* partially annulled the award and lowered the amount owed by US$25 million. ICSID, *Perenco Ecuador Limited v. Republic of Ecuador – Decision on Annulment*, 28 May 2021, ICSID Case no. ARB/08/6. While rare, non-ICSID decisions can also be partially set aside. See, e.g., 'Tax Fraud Leads to Partial Set-Aside of Treaty Award', *Global Arbitration Review* (2023), available at https://globalarbitrationreview.com/article/tax-fraud-leads-partial-set-aside-of-treaty-award.

[75] As discussed in the next section, national approaches to sovereign immunities against execution vary, which can shape the strategies of disputing parties. See Thouvenin and Grandaubert, 'The Material Scope of State Immunity from Execution', in T. Ruys, N. Angelet and L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (2019) 245, at 265 (observing that 'the exact content of customary international law on the material scope of immunity from execution is not clear … and domestic practice is sometimes pointing in different directions').

assessments. This also holds for the pre-award phase of bargaining. If officials in a respondent state expect to lose, then they may seek to settle earlier, while if they believe a claim is weak, they may let it play all the way out to the award stage.

Disputing parties' behaviour is also shaped by transaction costs, which is the fourth factor. Pursuing subsequent litigation is costly. How much litigation will pay off or even pay for itself? It can be a risky gamble and difficult for disputing parties to assess, given the uncertainties in enforcement. How much risk a disputing party takes may also be shaped by its funding arrangement; if a claimant has a contingency fee arrangement with its counsel, they may make different decisions than if they are paying all legal fees out of pocket. Similarly, if a state hires outside counsel, it may make different decisions than if it represents itself.

Finally, the actual bargain that is struck is shaped by strategic behaviour, which is the fifth factor. As noted above, bargaining strategies can include moves in several different courts and moves outside of court. These strategies can play out simultaneously in several jurisdictions and be shaped by various actors – from regional appeals courts to multilateral development banks and from hedge funds to foreign ministries. This decentralization can make it hard to see connections and overall strategies. Therefore, it is helpful to imagine disputing parties facing each other in negotiations as a dispute's central arena, with various legal decisions and other bargaining endowments feeding into this arena. A disputing party's moves in and out of court are expected to reinforce each other as part of an overall strategy – for instance, if a claimant fails at attaching assets, then we expect that claimant to ask its government to help it secure payment. We also expect disputing parties to make the most out of the strategic options available to them, which will vary: exerting pressure through multilateral lending or trade preferences is possible in some but not all contexts; bilateral diplomatic pressure is likely to be effective in some but not all contexts; and so on. The essence of this third mechanism is that each disputing party is expected to leverage their endowments as part of a broader strategy.

The condition for this mechanism to operate is that disputing parties prioritize distribution – that is, even if all parties have an interest in settlement, they have an even stronger interest in how much is paid or what concessions are given. Distributional concerns likely outweigh coordination after most ISDS awards. One reason for this is because ISDS awards, unlike judgments in many areas of international law, are 'translated into dollar values'.[76] They put a price on policy actions and create a situation where more money for the investor means less money for the state's taxpayers. A second reason is that there may be little impetus for coordination in some cases. As a stylized example, consider recent post-award struggles between US private equity groups or litigation funders as claimants and wealthy, democratic states like South Korea or Spain as respondents. It is questionable if paying these awards would have any effect on these respondents' reputations or ability to attract foreign investment, and it is easy to imagine that these respondents have concerns about moral hazard

[76] In this sense, they resemble the divorce bargaining studied by Mnookin and Kornhauser, *supra* note 5, at 959.

– that is, if they pay these award holders easily, it may incentivize more litigation against them. Their interest in coordination (finding an agreement to make the dispute go away), may be balanced by an interest in discouraging speculative litigation. By contrast, governments always have distributive concerns – awards are paid by taxpayers, and there are always other priorities that could be addressed with this money.

In conclusion, post-award bargaining is usually the continuation of bargaining in earlier phases of the dispute, and the award is seen by disputing parties as a bargaining endowment to be leveraged as part of a broader strategy that can include moves in court and moves out of court.

4 The Role of Enforcement Architecture in a Bargaining Framework

ISDS is at first glance an unlikely place to observe bargaining because of its enforcement architecture, which has long fostered a belief in automatic or full compliance with ISDS awards.[77] High-profile enforcement actions have strengthened beliefs that states either pay or have their assets seized.[78] However, as the evidence discussed in section 2 shows, the role of this enforcement architecture is more complicated in reality – operating in essence as a new legal shadow for bargaining. Therefore, in this section, we move beyond idealized images of this architecture towards a more realistic depiction of it as a strong set of legal tools that enable disputing parties to develop sophisticated bargaining strategies.

The enforcement architecture has two multilateral conventions at its centre – the ICSID Convention[79] and the New York Convention[80] – which enable claimants to compel enforcement in the respondent state's courts or in third countries where state assets may be available. There is no currently available data demonstrating if enforcement is easier under one convention or another. While there has been a perception among practitioners that enforcing ICSID awards is easier (since the convention contains an express undertaking that states should enforce obligations as though they were final judgments of a domestic court), some have said that this advantage 'is [now] hard to gauge'.[81] The main pro-enforcement advantage of the New York Convention is its wider applicability, while the main disadvantage for claimants is more potential

[77] Alexandroff and Laird, 'Compliance and Enforcement', in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 1173, at 1173 (observing that 'expectation by investors of compliance … is certainly justified' after describing the enforcement architecture).

[78] For instance, a German insolvency administrator had the Thai Crown Prince's plane seized to force the Thai government to pay an award. 'Thai Prince's Plane Is Impounded in Germany', *New York Times* (13 July 2011), available at www.nytimes.com/2011/07/14/business/global/thai-princes-plane-impounded-in-germany.html.

[79] ICSID Convention, *supra* note 42.

[80] New York Convention, *supra* note 42.

[81] See generally Bernardini, 'ICSID Versus Non-ICSID Investment Treaty Arbitration', *International Council for Commercial Arbitration* (2009), available at www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (noting that the limited review and full compliance with the awards are no longer so evident).

review in domestic courts.[82] However, there may be a trend emerging in which domestic courts are increasingly willing to scrutinize ICSID awards,[83] and, even if they do not, local law still matters, especially to 'determine whether particular assets may be seized to satisfy an ICSID award'.[84] Another assumption has been that a need to enforce ICSID awards was 'unlikely to arise' due to states' reputational concerns.[85] Some officials expected that ICSID's location within the World Bank and, in turn, the bank's role as a lender would facilitate payment.[86] But little is known empirically about if, or how, ICSID's location in the Bank shapes behaviour, and it may be less important than often assumed.[87] Therefore, while awards under the ICSID or New York Conventions provide disputing parties with different strategic options, it is reasonable to expect bargaining after awards under both conventions.[88]

Fundamentally, the enforcement architecture rests on domestic courts. In many cases, it rests on how domestic courts view legal issues on which there is no settled consensus, and their decisions have consequences for the disputing parties' bargaining positions and available strategies. Sovereign immunity against execution is one such issue – neither convention neutralizes sovereign immunity, so it often becomes important in enforcement struggles, and the courts in different jurisdictions can take strikingly different approaches to it.[89] Post-award legal proceedings initiated by Yukos

[82] While this review is formally limited (to a list of legitimate grounds for refusing recognition and enforcement), it provides significant opportunities for states seeking to frustrate enforcement. Importantly, two grounds – lack of arbitrability and public policy concerns – are not defined, which means that domestic courts often rely on localized understandings of these terms.

[83] Hirsch, *supra* note 3, at 696–697.

[84] Baldwin, Kantor and Nolan, *supra* note 42.

[85] Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', 1 *ICSID Review* (1986) 1, at 9.

[86] In a 1962 memo, British officials discussed why states would cooperate with ICSID: 'The "real reason" namely reliance on the "authority and lending power" of the Bank, means reliance on the power of the Bank to withhold loans. This is an argument we could not use in open debate. It is precisely what the under-developed countries are frightened of.' Cited in St. John, *supra* note 21, at 152.

[87] The World Bank has no direct lever to compel payment when faced with states unwilling or unable to pay an award. On the one hand, there is an operational policy which may force the Bank to stop new loans to a member country when a dispute over default, expropriation or governmental breach of contract comes to the attention of the Bank. On the other hand, the Bank has an incentive to lend and measures its own effectiveness by using lending as its main indicator. See discussion in Puig, 'Emergence and Dynamism in International Organization: ICSID, Investor-State Arbitration and International Investment Law', 44 *Georgetown Journal of International Law* (2013) 531.

[88] For instance, Article 64 of the ICSID Convention creates a possibility to bring a case before the International Court of Justice on the application of the ICSID Convention if there is non-compliance, which is not anticipated under the New York Convention.

[89] Sovereign immunity against execution means that most state assets, such as assets of central banks, military property, cultural property and property under diplomatic or consular protection, cannot be seized. Stoll, 'State Immunity', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* Vol. IX (2011) 498, paras 60–73. While claimants seeking to enforce an award could argue that a waiver of execution immunity is implicit in an investment treaty, this argument 'would be an uphill battle' and would 'depend on the municipal state immunity law in the jurisdiction where the victor seeks to enforce the award'. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-politicization of International Investment Disputes', 21 *American Review of International Arbitration* (2010) 211, at 218.

shareholders seeking to execute their awards (totalling over US$50 billion) against the Russian Federation provide a high-profile example. Sovereign immunity from execution is central to several of the post-award proceedings (which have included a protracted set-aside process in The Netherlands and enforcement cases in seven national jurisdictions), and decisions from courts in The Netherlands and the UK show different approaches to the topic.[90] These decisions shape bargaining endowments.

There are a number of issues, including corruption and public policy concerns, which courts may scrutinize more in the future, which would in turn shape bargaining endowments and strategies. Some courts may become less willing to enforce awards that have not considered issues that their own courts have accepted as defences for not enforcing awards, such as bribery or corruption. Corruption allegations are increasingly common and likely to impact subsequent proceedings, in particular. One example of this is *Process & Industrial Development v. Nigeria*, in which an award of US$6.6 billion grew to over US$11 billion before Nigeria's challenge to it was granted by an English court. The English court judgment was unsparing, even noting that this case provides 'an opportunity to consider whether the arbitration process … needs further attention where the value involved is so large and where a state is involved'.[91] Public policy concerns have also become more prominent and how courts address them usually affects enforcement, as seen in the preliminary ruling from the European Court of Justice in *Achmea v. Slovakia*.[92] The evolution of jurisprudence in domestic or European courts, as well as different interpretations across judiciaries, is likely to influence how disputing parties bargain.

In our bargaining framework, disputing parties' degree of uncertainty, or how they assess the probabilities of certain legal outcomes, shapes the decisions they make. If a claimant believes that enforcement proceedings are unlikely to succeed due to the way in which courts in a particular jurisdiction decide sovereign immunity from execution, then they may be more likely to settle earlier or for less money. Conversely, a respondent state may be less likely to settle early if they believe that courts in a relevant jurisdiction are likely to scrutinize corruption allegations during subsequent proceedings. Disputing parties' decisions are shaped by assessments like these and their strategies built around them. In addition, parties will try out new strategies – for instance, it may become more common for respondent states to use their own courts to contest or to block the enforcement of awards.[93] Parties will also try new legal arguments;

[90] 'UK High Court Finds That Russia Is Precluded from Relitigating Arbitration Tribunal's Jurisdiction in Support of Immunity Defence against Enforcement', *Investment Arbitration Reporter* (2023), available at www.iareporter.com/articles/uk-high-court-finds-that-russia-is-precluded-from-relitigating-arbitration-tribunals-jurisdiction-in-support-of-immunity-defence-against-enforcement/; 'Dutch Advocate General Supports Attachment of Russian Assets by Yukos Shareholders', *Investment Arbitration Reporter* (2023), available at www.iareporter.com/articles/dutch-advocate-general-supports-attachment-of-russian-assets-by-yukos-shareholders/.

[91] High Court of Justice of England and Wales, *Federal Republic of Nigeria v. Process & Industrial Developments Limited*, [2023] EWHC 2638 (Comm), para. 582.

[92] Scheu and Nikolov, 'The Setting Aside and Enforcement of Intra-EU Investment Arbitration Awards after Achmea', 36 *Arbitration International* (2020) 253.

[93] Bottini, 'Recognition and Enforcement of ICSID Awards', 6 *Transnational Dispute Management* (2009) (noting that 'at least absent any violation of the minimum standard of treatment under general international law foreign investors should expect to be treated like nationals for enforcement purposes'); see

given the growing number of 'mega-awards' like *Yukos* or *Tethyan*, which put pressure on the enforcement architecture, more states will argue against the principle of full reparation for cases where compensation is crippling.[94] The success of these arguments or strategies matters beyond a particular case – legal outcomes at one point in time create precedents and affect how future parties bargain.

To conclude, there are many reasons to move beyond idealized images of the enforcement architecture as a provider of automatic universal enforcement and, instead, towards more realistic pictures of it as a web of legal proceedings around which disputing parties develop sophisticated bargaining strategies.

5 Conclusion

In this article, we have introduced a new framework in which ISDS awards are seen as endowments in the context of longer-term bargaining. Even after an award is handed down, there are often many possible outcomes that can resolve a dispute. Several factors affect how a dispute is ultimately resolved, including disputing party preferences, bargaining endowments, the degree of uncertainty about enforcement, transaction costs and strategic behaviour. We expect disputing parties to use moves both inside and outside of court as part of an overall bargaining strategy.

This framework may be useful for understanding the dynamics that follow the rulings of other international courts and tribunals too. While the enforcement architecture in ISDS is unique, similar dynamics may occur in other areas of international law. For instance, existing work on compliance with judgments of the European Court of Human Rights tends to see judgments as creating a set of final obligations, while ignoring post-judgment bargaining over the nature and scope of the remedies.[95] It is possible that post-decision bargaining dynamics occur in various international courts and tribunals but that their frequency, form and consequences vary widely. The dynamics of bargaining across different phases of disputes, and the extent to which decisions operate as endowments, as focal points for coordination or as obligations to be fulfilled exactly, are rich terrain for future research in ISDS and beyond.

also Government of Argentina, *The 2001/2002 Crisis: Impact on Public Utilities Operators*, available at http://embassyofargentina.us/embassyofargentina.us/files/sitiowebciadiv8en.pdf.

94 Paparinskis, 'A Case against Crippling Compensation in International Law of State Responsibility', 83(6) *Modern Law Review* (2020) 1246.

95 Hawkins and Jacoby, *supra* note 51, at 35; Hillebrecht, *supra* note 51; Stiansen, 'Delayed but Not Derailed: Legislative Compliance with European Court of Human Rights Judgments', 23 *International Journal of Human Rights* (2019) 1221.