

Transparency of Investor-State Arbitration¹

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Abstract: Over the past three decades there has been a surge in the number of arbitrations under international investment laws such as bilateral investment treaties (BITs). While secrecy had long been the practice in arbitration, over the last two decades investment law and arbitration have undergone a gradual set of reforms aimed at promoting transparency. Working with a new statistical database of disputes at the world's largest investor-state arbitral institution—the World Bank's International Centre for the Settlement of Investment Disputes (ICSID)—this paper examines the tension between the public good of transparency and the private incentives of individual parties in arbitrations to keep the details of their disputes secret. We explain the variation in secrecy and demonstrate that institutional reforms have not led to growing disclosure in cases where the incentives for privacy are strongest: over investments that have long time horizons and when any party has reason to expect *ex ante* that it will lose. This research has sobering implications for scholarship that has identified transparency as an essential condition for institutional legitimacy and effectiveness and suggests that firm-level preferences affect the actual operation of international legal institutions that govern foreign investment.

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International arbitration plays a central role in the large and growing body of nearly 3,000 bilateral investment treaties (BITs).² Nearly all these treaties, along with some regional trade agreements that include similar investment chapters (such as the North American Free Trade Agreement) allow private investors to file complaints accusing a foreign government of actions, including expropriation, that are discriminatory and cause harm to the investor. By protecting investor rights, independent arbitration is designed to lower the risks associated with foreign direct investment (FDI) and offers a way for countries to “lock in” investor-friendly policies.³ As BITs and FDI have expanded, so has arbitration—since the mid-1990s the number of investor-state arbitrations has grown quickly.⁴ Several institutions handle the burgeoning caseload of investment disputes but the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) has emerged as the dominant venue and accounts for more than 60% of all investor-state arbitrations.⁵ With few exceptions, the decisions of arbitration tribunals (known as “awards”) need not be officially disclosed. Over its history, fully two-fifths of the final awards in ICSID cases remain secret.

This article explains variation in the decisions by parties to hide investment arbitration from the public. For decades, scholars have argued that one of the central functions of international institutions is to stabilize expectations, promote credibility, and

² Jandhyala, Henisz, and Mansfield 2011; Haftel and Thompson 2013.

³ Neumayer and Spess 2005; Busse and Hefeker 2007; Buthe and Milner 2008; Sykes 2005; Haftel 2010; Blake 2013.

⁴ Allee and Peinhardt 2011; Allee and Peinhardt 2010; Schreuer 2009; Franck 2007; Franck 2009; and Puig 2013

⁵ There is no reliable universe of arbitrations and thus this fraction is based on the most reliable estimates from UNCTAD, which reports on treaty-based cases through 2011 (UNCTAD 2012).

lower transaction costs by providing information.⁶ Some believe that transparency may also be an essential condition for institutional legitimacy, effectiveness and compliance.⁷ At ICSID, however, transparency is a public good whose provision is often in tension with the private interests of parties that bring and defend disputes.

We develop two central arguments to explain the choice of secrecy. First, private incentives for secrecy are particularly strong for disputes over investments that have long time horizons and are highly sensitive to changes in local regulation and taxation, such as mining and hydrocarbon extraction. Because these industries are often marked by high levels of fixed capital there are strong incentives for host countries to adopt policies, such as requirements for new royalty payments once a mine comes into operation, that are tantamount to expropriation.⁸ Investors, fearful of expropriation, have incentives to extract as many rents from the project as quickly as possible. Yet both sides know that each will benefit most if they manage their conflicts well enough to continue interaction—a process that can require concessions that are costly to adopt if implemented in the public eye. The investor must find satisfaction in less lucrative rents from policies that it hopes will not spread to other countries where the firm also does business; host governments may need to back down from aggressive anti-foreign rhetoric and may need to pay compensation for past wrongs. Secrecy makes these actions easier to implement.⁹ The consequence is that the public is least informed about precisely those cases where the public often has the most at stake—disputes over long-lived, high capital investments. In those cases, one of the

⁶ Keohane 1984.

⁷ Finnemore and Toope 2001; Risse 2000; Hood and Heald 2006.

⁸ Vernon 1971.

⁹ Levenotoglu and Tarar 2005; Kurizaki 2007.

central functions of bilateral investment treaties—namely, to demonstrate credibility of national investment laws—may be partially undermined.

Second, there are heightened incentives for secrecy when either party has reason to expect *ex ante* that it will lose. Public defeat for an investor can harm reputation, and information revealed in awards can make it harder for investors to operate lucratively in other countries. Similarly, respondent governments usually want to avoid full public scrutiny of their losses so their citizens do not perceive the state as weak or as responsible for the drop in FDI that typically follows in countries that publicly lose arbitration.¹⁰ While some governments might gain in popular support from suffering defeat in the hands of foreign tribunals, the details of public arbitral awards can be inconvenient for even the most ardent populist. Some arbitrations, for example, involve claims of corruption that, if revealed, can lead to prosecution and loss of office for government officials as well as costly criminal and civil entanglements for investor firms. Thus, when investors or host states see telltale signs that defeat is probable, they tend to prefer secrecy.

On the other hand, there can exist strong incentives to make outcomes public. As investment law has come to implicate a wide array of important social goals, the policy of secrecy has come under severe scrutiny.¹¹ Some have argued that secret arbitration provides private justice that advantages affluent parties such as large corporations and erodes good governance.¹² Secrecy, according to some observers, undermines the legitimacy and credibility of arbitration mechanisms, and some legal experts worry about

¹⁰ Allee and Peinhardt 2011.

¹¹ Rogers 2005; Johnson and Bernasconi-Osterwalder 2013.

¹² Robel 1993; Anderson and Grusky 2007.

the future viability of ICSID as an institution unless it is exposed to more public scrutiny.¹³ In response to such criticisms, the World Bank has adopted a far ranging set of reforms aimed at making its operations more transparent, including an array of new procedures, independent inspection panels, and even a halt in lending in some of the Bank's most controversial programs.¹⁴ ICSID, as an arm of the Bank, began to adopt similar reforms aimed at exposing its work to fuller public scrutiny.¹⁵ These reforms were organized around the logic that more transparent and participatory legal systems are also more legitimate and effective.¹⁶ Thus the parties to an investment dispute face a tradeoff between the rising pressure to disclose outcomes for the public benefit and the private advantages of secrecy in certain types of cases.

The article proceeds in several parts. We begin by explaining the core features of the ICSID process that relate to the decision to conceal a case. Next, we provide an account of the efforts to reform the ICSID process to discourage secrecy. We develop our theoretical arguments to explain when arbitration is likely to be concealed, and then test their observable implications on a new dataset we collected from all registered cases at ICSID from 1972 to 2011 (and the first 12 of 2012). We offer a unique illustration of a case that was intended by the parties to remain secret but was leaked, thus allowing us to observe what officially should have been unobservable. Finally, we conclude by considering some of the most important implications of this research.

¹³ Waibel, Kaushal et al. 2010; Puig 2013; Grillo 1991; Rabinovich-Einy 2002; Buys 2003.

¹⁴ Pincus and Winters 2002; Clark et al 2003.

¹⁵ Shihata 2009; Schreuer 2001; Puig 2013.

¹⁶ Parra 2012; Yackee and Wong 2010.

ICSID in a nutshell

ICSID was created in 1966 as a forum within the World Bank where firms and individuals could resolve disputes with governments related to private investments. The architects of this institution allowed investors to bring cases directly to international arbitration, in some case avoiding national courts that could be biased, slow, or even more expensive to use. ICSID has gained the largest share of investor-state arbitrations because of its expertise, low transaction costs, and perceived efficiency.¹⁷

Arbitration can be used for many types of disputes, but the most important in recent decades arise under BITs or the investment chapters in free trade agreements such as NAFTA or the Central America Free Trade Agreement (CAFTA).¹⁸ Since the middle 1980s essentially all “modern” BITs have included resort to binding treaty-based dispute settlement such as at ICSID.¹⁹ Claimants are almost always investor firms trying to gain compensation when a host country expropriates, discriminates, treats unfairly or otherwise degrades an investment.

There are four kinds of actors who play central roles in investor-state arbitration—claimants, respondents, arbitrators and the ICSID secretariat. Claimants are investors (individuals or firms). They launch arbitrations with the goal of receiving compensation for a lost or degraded investment or of hastening a settlement with the accused government. Arbitration is one of the few places in public international law where private actors have full, independent standing and can bring almost any grievance. Since many claimants invest

¹⁷ Puig 2013; Parra 2012.

¹⁸ See the Supplementary Appendix for more detail on different legal bases for arbitration.

¹⁹ Poulsen 2013; Poulsen and Aisbett 2013.

in multiple countries they also care about reputation in the other places where they do business. Launching disputes can establish a reputation for litigiousness that can help signal resolve; winning those cases can be even more advantageous.

Respondents are the accused, governments that host foreign investors, and their interest is not just to limit monetary damages but also to create a reputation for winning in order to deter future arbitration. A good reputation can also encourage future FDI.²⁰

Third are the arbitrators, almost always three per panel. They decide the case by majority vote.²¹ Typically, the claimants and the respondent each appoint one arbitrator, and the third, the president of the arbitral panel, is chosen by agreement of the parties, by agreement of the party-appointed arbitrators or from a roster of arbitrators that ICSID's secretariat manages. The president of an arbitral panel plays a particularly important role in deciding outcomes since the other two arbitrators often reveal bias toward the party that had more control over their appointment.²²

Fourth is the ICSID secretariat itself. The secretariat manages the process and plays key roles, such as providing assistance in the constitution of the arbitral tribunals and supporting their operations. The secretariat also proposes and implements major reforms to the arbitration process and administers the proceedings and finances of each case.

²⁰ Jensen 2003; Haftel 2010; Busse and Hefeker 2007; Buthe and Milner 2008.

²¹ A very small number of cases have only one arbitration panelist.

²² Van Harten 2012; Puig 2014.

Figure 1: Overview of ICSID Case Process

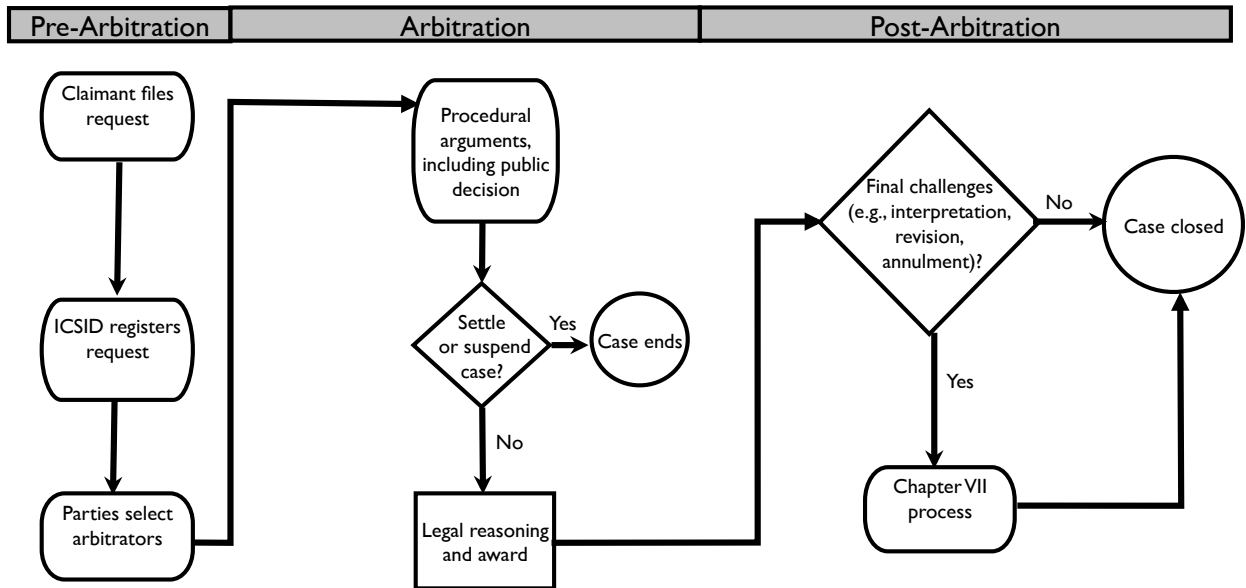


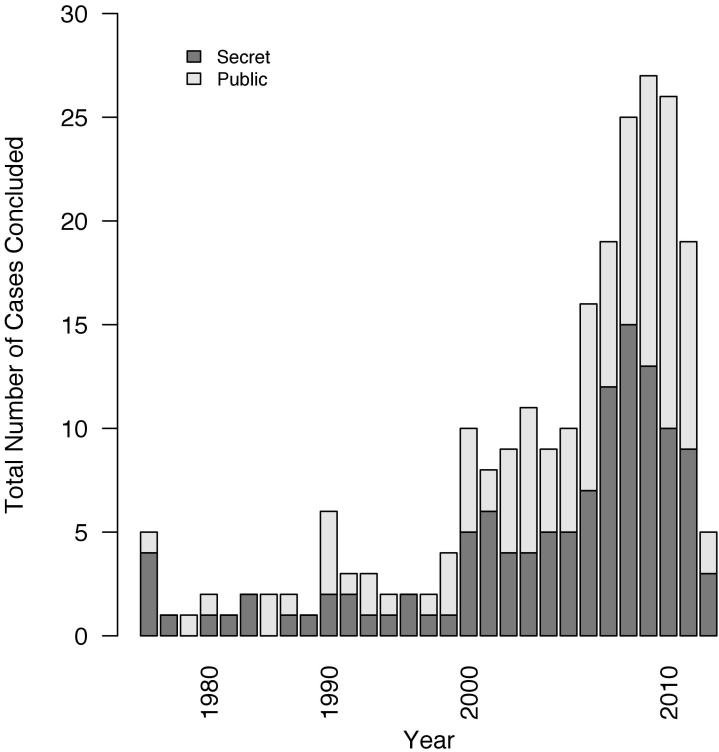
Figure 1 illustrates the process. A case formally begins when a claimant registers the dispute with ICSID. Claimants and respondents then pay fees to ICSID and also choose and begin paying arbitrators—a process that usually leads within a year to the constitution of a panel and the beginning of hearings. Hearings begin with an array of procedural matters, including decisions by the parties about whether they will disclose the ultimate outcome of this process—the final award—or keep the outcome secret.²³ If parties do not agree at the outset, the default rule states that “ICSID shall not publish the award without the consent of the parties”.

Figure 2 illustrates the occurrence of secret arbitration over the life of ICSID. By “secret” we mean that the final award of the arbitral panel is not formally released—either through ICSID or through other official sources with the consent of the parties to a dispute

²³ See, e.g., Rule 20 of the ICSID Arbitration rules (ICSID 2006a, page 111) and slide 137 of the “ICSID 101” presentation that ICSID gives to parties in cases when familiarizing them with the ICSID process (ICSID 2010). For more detail see the SI.

for public viewing. Crucially for our analysis, however, is that even in secret cases ICSID will at least release the names of the parties and the arbitrators as well as other procedural milestones such as decisions on jurisdiction and whether an arbitration is settled or terminated through some other means.

Figure 2. Secrecy at ICSID Over Time



This process concerns ICSID’s core arbitration, for which all members of the ICSID Convention agree to honor arbitral awards from that process automatically.²⁴ In addition, ICSID also manages two other processes—conciliation (a rarely used form of mediation) and the “additional facility (AF).”²⁵ If one or more of the countries involved in the dispute

²⁴ ICSID 2003; ICSID 2006a.

²⁵ ICSID 2006b.

is not a member of the ICSID Convention then the core procedure is not available and the AF must be used. Because AF cases are not directly enforceable they are often referred to domestic courts for ultimate enforcement—an extra step that often requires more public disclosure of information because most national legal systems require a definitive, public ruling before they can enforce an award.²⁶

The Push For Transparency

The past few decades have witnessed growing pressure to make international organizations and many other governing institutions more transparent.²⁷ From a normative perspective, many observers argue that the shroud of secrecy around IOs is improper for institutions that must be publicly accountable.²⁸ From the perspective of positive theory, transparency is key to IOs performing a wide array of functions that are crucial to international cooperation—such as creating focal points, lengthening the “shadow of the future,” lowering transaction costs by providing credible information on evolving norms and compliance, and creating reputations for member states.²⁹ Within more transparent organizations it can be easier for principals to control the agents to whom they often delegate extensive authority.³⁰ A prodigious supply of information can also encourage actors to focus their arguments on public interests rather than narrower

²⁶ Parra 2012, p. 145. See also ICSID Additional Facility Rules, Article 3. A small portion (16%) of all ICSID cases do not end with the panel’s award or settlement but lead to further action, in particular efforts to annul the panel’s findings. Annulment is rarely successful (only 2% of cases have an application for annulment that is upheld in the respondent’s favor).

²⁷ McGee and Gaventa 2010.

²⁸ Dahl 1999.

²⁹ Axelrod 1984; Axelrod and Keohane 1985; Milner 1997; Keohane 2002; Stasavage 2003. Hawkins et al. 2006.

self-advantage, which in turn could lead to greater cooperation on a wide array of public goods.³¹

No arbitral institution has experienced a greater shift in formal rules and procedures around transparency than ICSID, which has experienced pressures for transparency on four fronts. First is the World Bank, which hosts ICSID. The Bank, in tandem with other Bretton Woods institutions, was in the cross hairs of the anti-globalization movements of the 1990s, which were partly animated by the view that international institutions could not be held accountable by civil society unless they were more transparent in their operations and granted outsiders formal roles to participate in the process of setting bank priorities and evaluating its operations. The Bank, led by a few of its advanced industrial member states, responded with broad transparency reforms that included the creation of an independent Inspection Panel that NGOs could help trigger, with the aim of reinforcing the Bank's existing and increasingly independent system for evaluating its operations.³² Because key staff in the ICSID Secretariat were drawn from the Bank, these same pressures spread to ICSID.³³ For example, Ibrahim Shihata, ICSID's longest serving Secretary-General, simultaneously served as the Bank's general counsel and was centrally involved in the Bank's own reform movement, including the creation of the Inspection Panel, while he also sought to make ICSID more transparent.³⁴

Second, NGOs have become more attentive to investment law and its possible impacts on environmental protection, human rights, welfare of the poor and other important areas for government regulation. Large segments of the NGO community were

³¹ Risse 2000; Elster 1997.

³² Grasso et al 2003.

³³ Parra 2012, p. 138-141 and 323.

³⁴ Shihata 2000.

galvanized around the dangers of private investment law by the *Metalclad* case, decided by an ICSID panel in 2000 in favor of a U.S. corporation which claimed that Mexico's state environmental laws undermined the value of its Metalclad's foreign investment.³⁵ While the Metalclad case was public, like many arbitrations it entrained issues such as the national sovereign prerogative to set social policy that resonated with anti-globalization fears.³⁶ In response, NAFTA's member governments adopted several reforms—including a July 31st, 2001, decision by NAFTA's Free Trade Commission—which reinterpreted the treaty in ways that allowed any party to a dispute to disclose the outcome without universal consent of all the parties.³⁷ That ruling made disclosure much more likely for the small subset of ICSID cases based on NAFTA.

Third, some governments in advanced industrialized countries have altered their own foreign investment laws in ways that facilitate more public participation. A growing number of investment treaties now require disclosure of arbitral awards. For example, since 2004, the U.S. Model BIT—the template that the U.S. government uses when negotiating new BITs—has included provisions that strongly favor disclosure. That model BIT was based on the 2002 Trade Promotion Authority Act, and the disclosure provisions in CAFTA (which were finalized in 2004 and adopted into law the next year under the same trade promotion authority) are very similar to the 2004 Model BIT.³⁸ A few other BITs,

³⁵ ICSID 2000.

³⁶ Choudury 2008.

³⁷ NAFTA 2001.

³⁸ See CAFTA Ch. 10, Article 10.21.1 as well as Gantz 2007.

notably the 2006 BIT between Spain and Mexico (which has generated only one fully concluded ICSID case), have strong disclosure rules as well.³⁹

Fourth, ICSID's secretariat has pursued a wide array of reforms aimed at making itself more transparent. ICSID staff have played a central role in articulating how transparency is essential to the institution's legitimacy—putting, in the words of current Secretary General Meg Kinnear, ICSID “at the forefront of the trend toward increased transparency in the conduct of investment arbitration.”⁴⁰ From the 1980s, the secretariat began publishing excerpts of the legal reasoning in nearly all cases even when the parties refused to release the full details of a case.⁴¹ In tandem with these reforms, ICSID Secretary-General Shihata opened the archives to select scholars, leading notably to a 2001 book by Christoph Schreuer that was the first independent account of how ICSID operates.⁴² That book is a milestone because it offered for the first time a public account to which arbitrators could refer as they developed and justified their legal reasoning. While arbitration does not utilize *stare decisis* (the policy of courts to abide by or adhere to principles established by decisions in earlier cases) and thus there is no evidence of parties bringing cases purely for the purpose of setting precedent, the Schreuer book has helped to create a more consistent body of reasoning. No other work on ICSID has a higher citation rate in actual cases or in the academic literature.

The Secretariat also masterminded the organization's most extensive formal transparency reforms, adopted in 2006. It even took the unprecedented step of publishing

³⁹ ICSID also handles investment-related arbitrations under the Energy Charter Treaty (ECT), which does not officially require disclosure it defers to ICSID's rules for cases handled at ICSID and requires that the award be “generally available” for non-ICSID cases (ECT 1994, Article 27(3)).

⁴⁰ E.g., Kinnear et al 2013, p.109.

⁴¹ Puig 2013.

⁴² Schreuer 2001.

the proposals that led to the 2006 reforms and soliciting external comments, notably from NGOs.⁴³ Those reforms gave arbitral panels more flexibility in making information public and soliciting additional views from non-parties and would not have been adopted without the support of a large number of ICSID member governments that were under similar domestic pressure.⁴⁴ Our reading suggests that while transparency reforms began in the early 1980s, new and much stronger norms and requirements for transparency emerged around 2001—with the publication of Schreuer’s tome—and have become stronger since that time.

Explaining Variation in Secrecy at ICSID: A Theory

Parties are thus under more pressure today than ever to allow awards and other details to be revealed. Nevertheless, a considerable number of cases are kept secret. Here, we aim to explain why certain types of ICSID awards are rarely disclosed to the public despite growing pressures for transparency. We argue that at least two factors create incentives to conceal the results of arbitration from the public.

First, the parties’ incentives for disclosure depend on the kinds of investments at stake—specifically, on the expected lifetime of the project. When an investor starts a bank in another country and suffers expropriation the investment is done. By the time the machinery of arbitration can be mobilized and reaches a final decision—most cases run one to five years—the present discounted value of the remaining investment has already evaporated, especially for complex and hotly contested cases that tend to take longer to

⁴³ See the responses from IISD, the NGO most systematically engaged on arbitration issues. See Parra 2012, p.253.

⁴⁴ Parra 2012. Puig 2014. See generally Grigorescu 2007.

arbitrate. In such cases, arbitration is a means of obtaining compensation, but beyond payment of damages there is no necessary ongoing interaction between the claimant and respondent and the cost of arbitration may outweigh the lost investment.

By contrast, investments in long-lived infrastructures such as power plants, roads or bridges remain valuable because the useful commercial lifetime of these projects spans decades.⁴⁵ Crucially, the successful continued operation of these assets requires the ongoing involvement of the investor since it can be extremely difficult (if not impossible) for the host country to obtain the technical and managerial expertise to operate the asset efficiently on their own. Successfully managing the dispute will require that both sides make concessions, often with substantial audience costs for each if those concessions become publically known—for example, the financial viability of power plants hinges on the cost of electricity sold, and electricity tariffs are highly visible to the public and often politicized. These costs can deter the parties from making arbitration transparent. This argument has an analogue in game theoretic models of ‘quiet diplomacy.’⁴⁶ In the same way that secrecy insulates leaders in a diplomatic crisis from the domestic political consequences if they capitulate to a challenge to avoid an unwanted war, secrecy in investment arbitration shields governments from the negative domestic consequences of publicly capitulating to a foreign investor that has long term sunk costs in the country.

⁴⁵ While commercial lifetime is a difficult concept to pin down, the standard model for foreign investment in infrastructure projects—roads, tunnels, airports, power plants, ports, railroads and such—is “build operate transfer (BOT)” in which the investor builds the facility, operates it for a period, and then the asset reverts to the host state. A typical infrastructure BOT project runs 15-25 years—much longer than the duration of a typical ICSID dispute. See, Tam 1999. We are mindful that there are many other time horizons that affect investment law, including government preferences for the content of BITs themselves—a topic we do not examine but which others probe in detail (eg., Blake 2013).

Thus we expect to see quite different patterns of disclosure depending on the kind of investment at stake. For long-lived investments we expect that investors and respondents will be more likely to favor secrecy because their goals in arbitration are to help conclude negotiations that keep a costly investment intact. Making those deals feasible requires secrecy because at least one party (often both) must be able to abandon publicly declared positions. By contrast, the audience costs for a foreign investor who starts a bank are much lower because once an investment is financially dead the odds of an ongoing relationship between the investor and host country plummet. This view of bargaining under the shadow of the law contrasts with the standard view of arbitration, which is that arbitration is to be invoked only as a last resort—when other avenues have failed.⁴⁷

Hypothesis 1: Arbitration of disputes over long-lived investments is more likely to remain secret.

A second factor that pulls toward secrecy is the expectation of defeat. Because decisions about whether to disclose arbitral outcomes are typically made early in the arbitral process, long before the likely winner or loser might be evident, the parties' incentives for disclosure may also depend on their expectations of a favorable outcome. We assume that, when given a choice, parties that expect to lose will generally prefer to conceal their defeats, including the details, from public view. Beyond the transaction costs of arbitration, public defeat can be costly for many reasons. First, for investors, who trigger

⁴⁷ E.g., see OECD's international investment toolkit for a summary of the standard view on the role of arbitration (see OECD User's Toolkit—International Arbitration Instruments, www.oecd.org/investment/toolkit/policyareas/investmentpolicy/internationalarbitrationinstruments.htm).

arbitration, defeat in one case can signal to other governments that it would be viable to adopt similar policies to degrade the firm's investments.

Second, respondent governments have strong incentives to keep potential losses secret because costly decreases in FDI follow from visibly losing arbitration.⁴⁸ They may also suffer domestic political costs from being admonished by a foreign investor and court. To be sure, a few respondents may achieve domestic political gains by publicizing losses at the hands of international organizations—a pattern evident today in the small number of governments that have cultivated a contested relationship with ICSID, such as Argentina and Venezuela that are at various stages of withdrawing from the institution. However, these situations are probably rare, and we later examine empirically whether these countries behave differently.

Third, arbitral awards often include blunt language about egregious—even corrupt—behavior by the losers. For example, in a 1999 case launched by a U.S. national concerning a failed banking investment in Estonia, the final award documented a wide array of wrong-doing, including illegal shell games, by the claimant designed to boost profits. The final award dismissed the claimant's central argument that Estonia's banking authorities had unfairly harassed him, concluded that “[we] cannot but decry [the claimant's] failure to cooperate with the Estonian banking authorities...” and documented how the claimant had concealed key facts and documents—perhaps as a way to ensure a favorable outcome from arbitration.⁴⁹ A Google search of the claimant's name (Alex

⁴⁸ Allee and Peinhardt 2011.

⁴⁹ ICSID 2001 at para 380.

Genin) delivers the full text of the ICSID award as the first response—a public shaming that surely makes it harder to engage in similar investments in the future.⁵⁰

For parties that are subject to legal strictures against corruption—such as the US Foreign Corrupt Practices Act, similar EU anti-corruption legislation, and a growing array of broader multilateral anti-corruption agreements such as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*—evidence of corruption can cause serious legal jeopardy. For example, in a case launched by Siemens against Argentina, public scrutiny led to new revelations about how Siemens obtained its contracts in Argentina through corruption—facts that later forced Siemens to abandon its ICSID award against Argentina and which was harmful to the firm across the region.⁵¹ For respondent states, corruption claims can lead to unwanted international scrutiny, and particular government officials and firms charged with corruption can face prosecution at home.⁵²

At the outset of any arbitration, when most procedural decisions relate to whether the outcome of the case will be disclosed, predictions of victory are shrouded in uncertainty—in part because arbitral outcomes do not formally adhere to *stare decisis* and thus it is hard for any party to know the legal reasoning that will be applied in any particular case. Each party has different tools for reducing this uncertainty. For respondents, the uncertainty can be lifted, at least partly, by looking to history. Over time, most respondents have come to defend themselves more than once and they can look at their own rate of losing in the past as a rough guide for the future. We expect that

⁵⁰ ICISD 2001 para 381-383.

⁵¹ See generally Yackee 2012 and ICSID Case No. ARB/02/8.

⁵² Sayed 2004.

respondents with a history of past public losses will be more inclined to keep future arbitration secret—having already lost a case, the government is prone to fear it may lose again and might even believe, as Venezuela and Argentina have publically argued, that the system is stacked against them.

Hypothesis 2: Arbitration of disputes against respondents with a history of past public losses is more likely to remain secret.

For most claimants, however, looking to history is harder because most only file one case in their entire lifetimes. For them, looking to history or to the merits of their individual case may reveal little because they have no practical experience to guide their decisions. A few claimants, however, know that they are probably bringing weak cases. The logic we utilize here, familiar to poker players who bluff, has been examined in game theory analyses of asymmetrical contests where there are strong incentives to commit resources as a signal of willingness to commit still more and force adversaries to back down.⁵³ Applying this logic to international arbitration, the strategy of a litigious firm—that is, a firm that as a matter of corporate strategy uses adversarial institutions like arbitration to signal resolve—is the filing of a large number of cases but also a special effort to keep the outcomes of losing cases from becoming public, lest its global strategy be undermined by a string of conspicuous losses. For such firms, (for example, Exxon⁵⁴) the greatest value to strategy lies in filing cases. Yet firms that file large numbers of cases are likely to have a higher fraction of cases that would be losers if they ran to completion and can use contractual provisions in settlement agreements to prevent the disclosure of outcomes. By contrast, firms that bring just one case in their lifetime will be more likely to choose the

⁵³ Dixit 1987.

⁵⁴ Coll 2012.

best case from their portfolio of grievances and to use that case as a mechanism for publically obtaining compensation for actions that undermine their investment.

Hypothesis 3: Arbitration of disputes brought by litigious claimants is more likely to remain secret.

Empirical Analysis

We evaluate the argument on a newly collected dataset of all cases filed before ICSID from 1972 to April 20th, 2012. Because we are interested in characteristics of both the claimants, of which there can be multiple per case, and respondents, as well as the nature of the dispute, our unit of analysis is the claimant-case. Our dependent variable, *Secret*, describes whether the final outcome of a concluded case was disclosed (0) or concealed (1). Unfortunately, no existing single source of information on disclosure and content of awards is complete or adequate and thus we have compiled data from various sources—mainly the ICSID website and the Investment Treaty Arbitration website (www.italaw.com), the most widely utilized public sources of information on arbitration—using consistent rules that reflect what the parties could reasonably expect would be disclosed at the time they made key decisions during the arbitration process.

In order to evaluate when arbitration is likely to be kept *Secret*, we estimate a logit model:

$$\Pr(\text{Secret}=1) = f(\beta_0 + \beta_1 \text{LongLived} + \beta_2 \text{Losses}_R + \beta_3 \text{PublicCases}_R + \beta_4 \text{Litigious}_C + \beta_5 \text{Transparency} + \phi X + \varepsilon)$$

(Equation 1)

where X is a vector of control variables.

Our first hypothesis is that disputes over long-lived investments in industries such as infrastructure (e.g., roads and tunnels), electric power and mining are more likely to conclude in secrecy than are disputes over investments in industries that are intrinsically shorter in duration and involve less interplay between investor and regulator over the lifetime of the project. To evaluate this claim, we code *LongLived* (1) for disputes pertaining to electricity and electric infrastructure, hydrocarbon supply and infrastructure, mining, ports and airports and roads, railroads and transport infrastructure and (0) for all other investments since those are typically shorter in duration.⁵⁵ (More detail on this coding is reported in SI.) We also code separate binary variables for each category of industry in dispute. Approximately 50% of disputes in our study involve long-lived investments.

To evaluate our second hypothesis that respondents with a public history of losing are more likely to shroud arbitration in secrecy we code *Losses_R* for all of a respondent's previous public cases. The measure varies from 0 to 9, indicating that some countries— notably Argentina and Egypt—have gone into arbitration with a past history of many public losses (defined as being in breach of a treaty or contractual provision as determined by an arbitral panel). More than one third of all states targeted by investors had previously (and publicly) lost one or more cases. To isolate the effect of past losses from the effect of public ICSID experience more generally, we control for the respondent's total previous number of public cases (*PublicCases_R*), which varies from 0 to 13. This allows us to distinguish between respondents that have never lost a previous case because they have

⁵⁵ For each case, ICSID provides summary information such as claimant, respondent, date of registration, etc. One piece of information provided is "Subject Matter". We coded *LongLived* from ICSID's identified subject matter. Consult the SI for more coding detail.

always won from those that have never lost because they have never previously been the target of a public arbitration.⁵⁶

To evaluate the third hypothesis—that highly litigious claimants are more likely to be involved in secret arbitration than are less litigious investors—we code *Litigious_c*, which ranges from 1 to 6. The value of (1) indicates that the investor brought just one case over the course of our data, while (6) indicates six separate complaints. This measure is admittedly imperfect but is a best first effort to capture the legal concept of litigiousness as a form of corporate strategy that is stable over time rather than changing with each new potential case. Our assumption is that because litigation is an element of corporate strategy a company knows whether it is prone to litigation even before it brings multiple cases to ICSID and that it factors that information into its calculation of winning a case. In our study, approximately 25% of claimants have filed more than once at ICSID and are to some degree litigious and thus—if we are correct—are prone to prefer secrecy. The most litigious investors are based in Western democracies such as Italy, the Netherlands and the United States, although investors that hail from countries such as China, Columbia and Mexico have also brought multiple cases to ICSID.

These factors—long-lived investments, a history of losing and litigious claimants—all point to secrecy. But the World Bank has taken a variety of efforts to make secrecy costly for parties. Plausibly, those costs would rise as ICSID adopts extensive transparency-oriented reforms. As a first step to represent ICSID’s internal reform efforts to make

⁵⁶ Throughout this work we are mindful of the difficulties in coding “win” and “lose.” Our approach is based on which party prevails on the merits of a case when the award is made public. But some (perhaps many) cases are split—where a respondent, for example, is forced to pay some compensation under an award but wins the argument on larger legal issues. We thank Lauge Paulsen for this point.

transparency a more established norm we code *Transparency* as the number of years from the year 2001. Although ICSID's own efforts began in the 1980s, additional reforms pivot around the year 2001 and gain prominence over time and include efforts to disseminate information more widely through newsletters, the ICSID website, specialized publications and newsletters; those efforts included, as well, formal reforms to ICSID's procedures in 2006.⁵⁷ We later relax this assumption that the year 2001 is the central pivot for transparency efforts.

We also account for two additional measures of the institutional factors designed to increase transparency. First, a few BITs and multilateral investment agreements require disclosure of awards. We therefore code *Public Provisions* as 1 if the agreement used as the basis for arbitration requires disclosure and 0 otherwise. If disputes brought under those agreements are concluded with an ICSID ruling they must be made public. Because all *Public Provisions* cases are public, we constrain the models to exclude those handful of cases where *Public Provisions* is equal to 1. Second, we include a binary variable for the ICSID's *Additional Facility*, which exerts a strong pull towards transparency because, as noted earlier, these cases must rely more heavily on domestic courts for enforcement.

Finally, we account for certain characteristics of the respondent state that could also influence the decision to conceal arbitration. We measure the respondent's log GDP_R (per capita), log inward FDI_R (as a proportion of GDP)—both from the World Bank's World Development Indicators—and $Polity_R$, which ranges from -10 to 10.⁵⁸ (All wealth figures are reported in 2011 constant dollars.) For respondents, low income could correspond

⁵⁷ e.g., Parra 2012 for a review of the three amendments to ICSID's rules (1984 and 2003, which had no real impact on transparency) and 2006 which was heavily focused on disclosure.

⁵⁸ <http://www.systemicpeace.org/polity/polity4.htm>

with immature public institutions and a large role for the state in the economy—all of which could make it easier for governments to keep information secret. Similarly, the lack of well-developed democratic institutions may correspond with the lack of domestic legal requirements and expectations of public transparency as well as a dearth of independent pressure groups; such factors would allow governments to pursue secrecy when that is convenient. Indeed, a move toward democratic rule is widely associated with greater disclosure of information related to the conduct of public institutions and public policy. Respondents with low dependence on inward FDI might also be less inclined to reveal arbitral results publicly because they are less vulnerable to the consequences of gaining a bad reputation for their behavior in international arbitration. Column 1 of Table 1 reports estimates from this core model.

TABLE 1. Predicting Secret Arbitration at ICSID, 1972-2012

	(1) Core	(2) Industry	(3) Experience	(4) No Experience
<i>LongLived</i>	0.877*** (0.254)	1.952*** (0.678)	0.954*** (0.25)	0.822*** (0.265)
<i>Losses_R</i>	1.026*** (0.281)	1.179*** (0.311)	0.976*** (0.274)	0.806*** (0.29)
<i>PublicCases_R</i>	-0.753*** (0.224)	-0.821*** (0.245)	-0.697*** (0.218)	-0.583** (0.231)
<i>Litigious_C</i>	0.331** (0.134)	0.399*** (0.154)		0.753*** (0.244)
<i>GDP_R (log)</i>	0.00152 (0.12)	-0.0286 (0.137)	0.0536 (0.117)	-0.0362 (0.126)
<i>Polity_R</i>	0.0264 (0.0242)	0.0576** (0.0278)	0.0281 (0.0241)	0.0125 (0.0251)
<i>FDI_R (log)</i>	-0.15 (0.114)	-0.132 (0.124)	-0.138 (0.114)	-0.0915 (0.121)
<i>Transparency</i>	0.128*** (0.0475)	0.147*** (0.0532)	0.120** (0.0468)	0.141*** (0.0507)
<i>Additional Facility</i>	-2.239*** (0.675)	-2.664*** (0.784)	-2.410*** (0.671)	-2.123*** (0.673)
<i>Experience_C</i>			-0.0922 (0.286)	
<i>Intercept</i>	-1.596* (0.898)	-1.811* (-1.028)	-1.571* (0.893)	-1.823* (0.958)
Industry Fixed Effects		Yes		
Log Likelihood	-197.74615	-184.66993	-200.9257	-177.82008
Pseudo R ²	.1399	.1902	.1261	.1466
Observations	343	341	343	313

Standard errors in parentheses (***) p<0.01, ** p<0.05, * p<0.1)

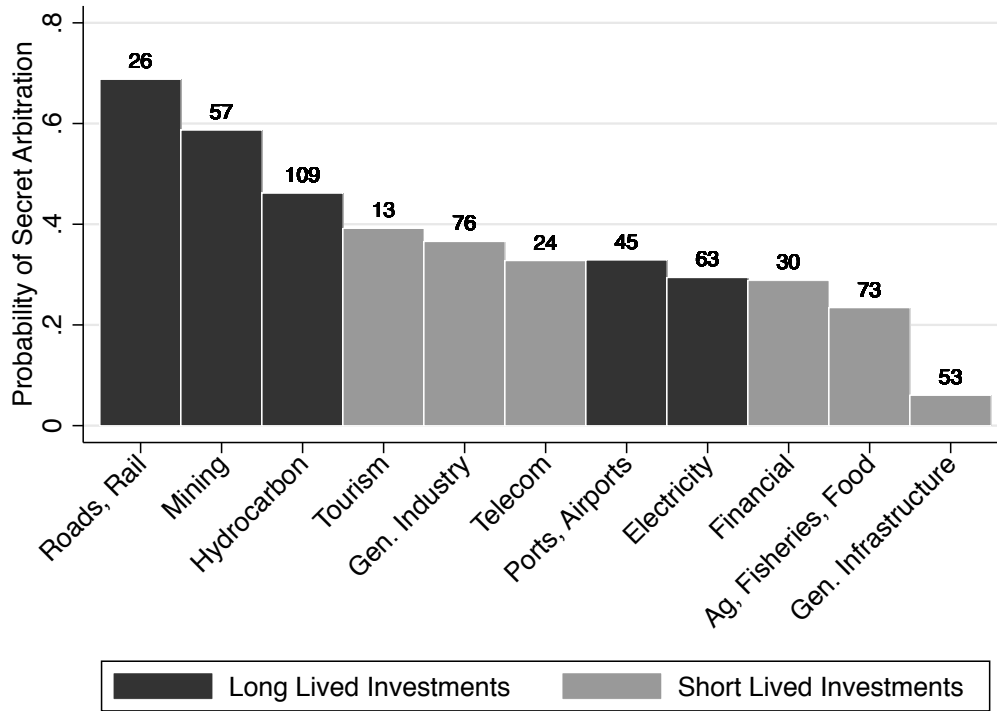
Hypothesis 1: Long-Lived Investments

The estimates reported in Column 1 indicate that the kinds of investment under dispute matter—the coefficient on *LongLived* is a positive and statistically significant predictor of secrecy. When all other characteristics of a dispute are held at their means, the model predicts that the parties to long-lived disputes are approximately twice as likely to conceal the outcome of arbitration than are the parties to disputes over investments that are short-lived.

In Column 2 we include fixed effects for the type of industry in order to ensure, in particular, that litigious firms or countries with high numbers of public losses do not differentially select into long-lived or shorter-lived industries.⁵⁹ This gives us variation within industries that allows us to show that our specification of “long-lived” is not what is driving the significance of the other variables (which we discuss next). We graph the predicted probabilities of secrecy by each industry in Figure 3, holding the other variables in the model constant at their means. The numbers above each bar represent the total number of claimants in each industry. The black bars represent industries where investments tend to be long lived and show that the probability of secret arbitration is higher for disputes over these industries. In all but two industries—electricity and ports and airports—long-lived disputes are more likely to conclude in secrecy than are disputes over short term, capital light investments.

⁵⁹ In our data set, for example, the three most litigious firms come from quite varied industries: oil and gas production (Mobil, now owned by Exxon), electric power generation (AES) and construction (Impregilo, S.p.A).

Figure 5. Probability of Secret Arbitration by Industry

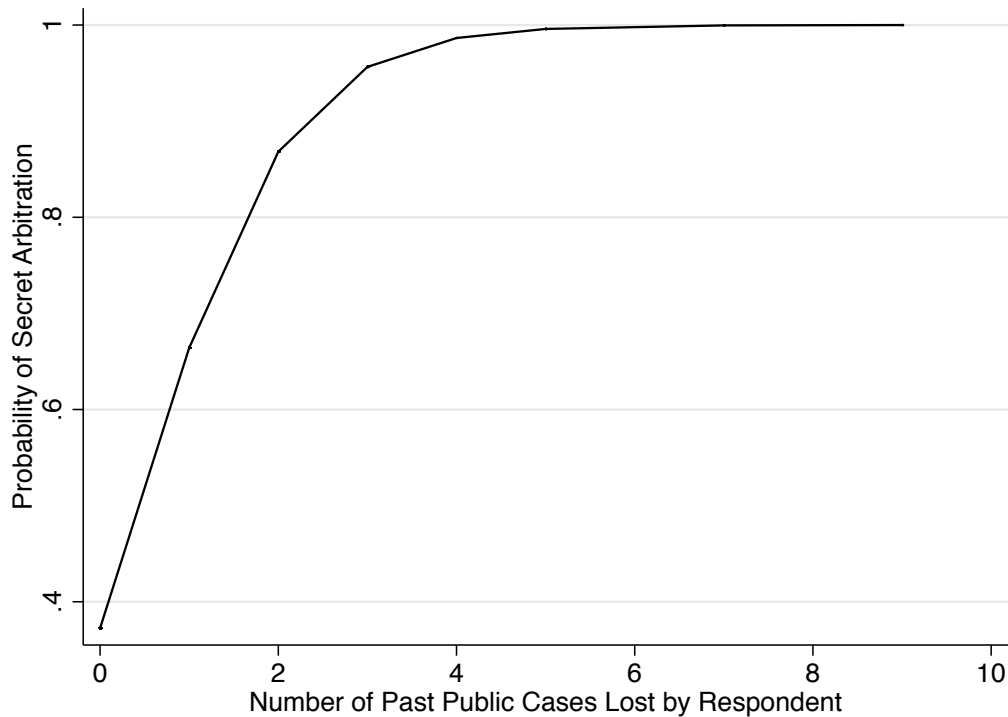


Hypothesis 2: Hiding State Loses

Table 1 suggests that a history of losing also affects the transparency decision. More than one third of respondent states in our dataset have been the subject of one or more previous ICSID disputes. Respondent states are more likely to be parties to secret cases when they have past experience publically losing cases, even when controlling for the number of public cases they have experienced. The coefficient for $Losses_R$ is positive and statistically significant. Figure 4 illustrates the result for an average state by plotting the predicted probabilities of secrecy (generated from column 1, Table 1) as they vary by the number of previous $Losses_R$ holding all other variables constant at their means. This simulates the marginal effect of losses at the means of the data. For a state with no previous

experience of $Losses_R$, the model predicts less than a 20% likelihood of secret arbitration. A state with 2 previous public losses is likely to be a party to secrecy about 50% of the time, whereas a state that has lost 5 or more past (public) cases is predicted to engage in secret arbitration nearly 100% of the time. This suggests that, while a few governments may prefer to publicize a likely public loss, most seek to hide their defeat.

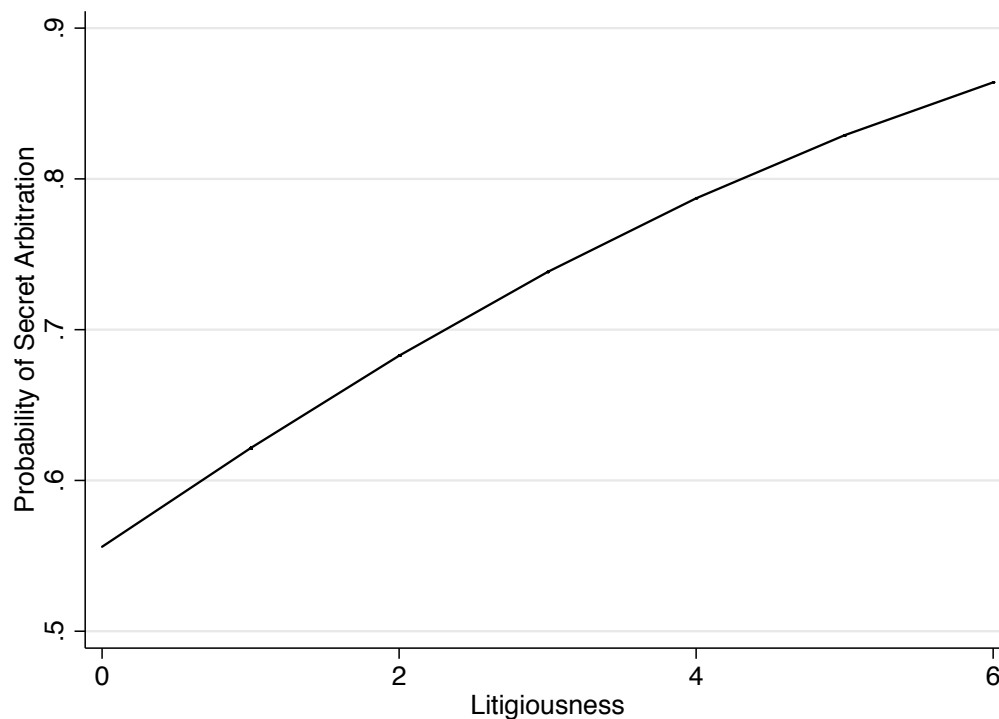
Figure 4. Probability of Secret Arbitration: the effect of past public losses



Hypothesis 3: Litigious Investors

The estimates in Table 1 suggest that more litigious claimants are also more likely to be a party to a secret arbitration. Figure 5 illustrates for an average state how the predicted probability of secret arbitration varies across levels of *Litigious_c* holding other variables (in column 3) at their means. It shows, for example, that a litigious investor filing 6 claims is predicted to be a party to secret arbitration almost all of the time compared with the type of investor that brings only a single case in the lifetime of ICSID and, on average, is predicted to be a party to a secret case only half of the time.

Figure 5. Probability of Secret Arbitration: the effect of litigiousness



We are not able to evaluate whether a claimant's history of prior public losses affects the transparency decision because only four claimants in our dataset have prior

public losses, and each had previously lost only a single public case. We can, however, evaluate whether a claimant's past history of bringing cases, their overall *Experience_c*, affects their transparency decisions. *Experience_c*—measured as a count of the claimant's previous disputes—also allows us to roughly compare the effect of being a highly litigious firm as a matter of stable business strategy from the effect of learning that accrues from previous ICSID experience. When we replace *Litigious_c* with *Experience_c*—they are correlated at 0.75—the coefficient on *Experience_c* is negative and statistically insignificant, while all other variables in the model remain consistent in sign and significance. We report the model estimates in Column 3. We also re-estimate the model in Column 4 restricting the sample to investors with no previous ICSID experience in order to illustrate that—when taking claimant experience out of the equation—*Litigious_c* is still predictive of secrecy. This lends indirect support to the idea that litigiousness as an investor strategy may lead to the filing of weak cases.

The ICSID *Additional Facility* is a highly significant predictor of public disclosure as expected—these cases are public because the Additional Facility, unlike ICSID's core arbitration, does not lead to automatically enforceable awards. None of the coefficients for the respondent's *GDP_R*, *FDI_R* or *Polity_R* are statistically significant predictors of secrecy.

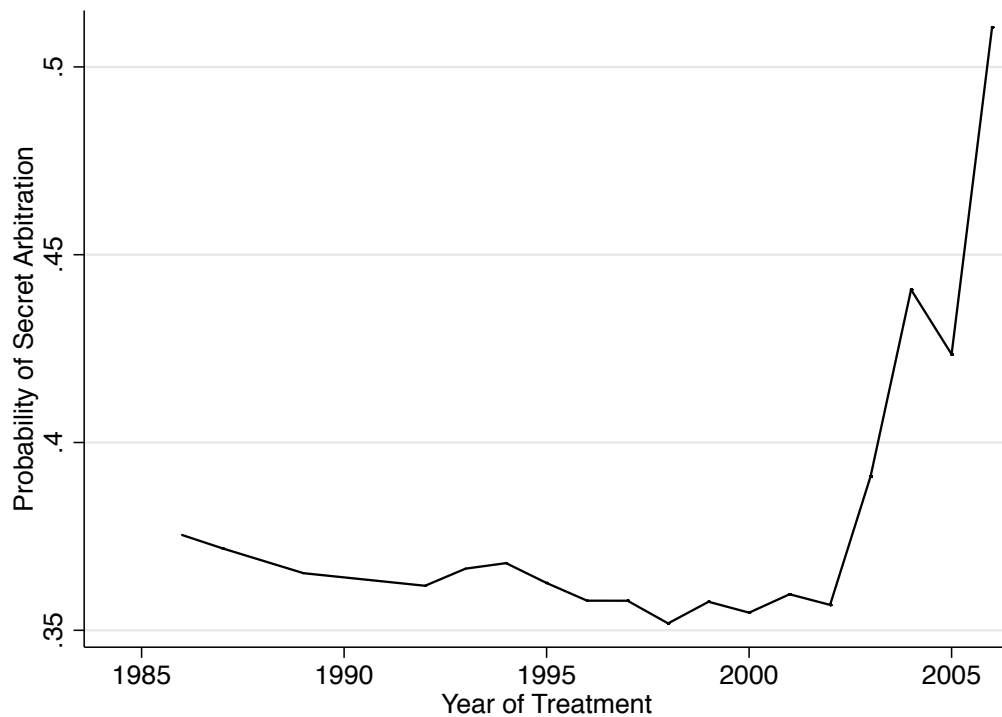
Transparency Reforms

Here, we evaluate whether ICSID's own efforts to create a norm of transparency correspond to a reduction in secrecy over time—as the many different reforms aimed at putting ICSID at the forefront of transparency have intended. We find, in fact, no evidence that ICSID's efforts at transparency have reduced secrecy. The coefficient on *Transparency* predicts that the parties to recent disputes (after 2001) are more likely to conceal the

outcome of arbitration than are the parties to disputes that took place prior to ICSID's intensive efforts to increase transparency. In order to determine whether that finding is an artifact of our decision to code a *Transparency* treatment as taking effect in 2001, we also evaluate alternative pivot years for the initiation of reform—we estimate a model for every possible pivot year beginning in 1985 when ICSID launched its first transparency efforts, through 2006 when it changed its formal rules of procedure.⁶⁰ Figure 6 plots the predicted probabilities of secrecy at or after each year. It figure illustrates that secrecy became more likely beginning in the early 2000s—precisely when ICSID launched its most intensive efforts for transparency. While ICSID has tried to increase public disclosure those reforms have not been followed by a consistent reduction in secrecy over time—instead, other forces have led to more secrecy.

⁶⁰ For more on the rule changes see Parra 2012.

Figure 6. ICSID Transparency Efforts: Rolling Reform Treatment



It is the case that claimants over time have brought more of the types of cases where the incentives to veil arbitration in secrecy are strongest. Figure 7 illustrates. Beginning in the year 2000, claimants began lodging complaints predominantly over long-lived investments. While litigious investors are the minority, a growing number of them began to file claims around that same time, and claimants also began to lodge more complaints against respondents with a previous history of losing at ICSID. In other words, alongside ICSID's growing efforts to generate transparency over time is another trend: the nature of the disputes brought for arbitration increasingly pull towards secrecy. Our statistical models of institutional reforms—plotted in Figure 6—control for these factors. Holding *LongLived*, *Losses_R* and *Litigious_C* constant, no matter in what year we measure the start of

reform, ICSID's *Transparency* efforts have not been followed by an overall increase in transparency over time.

One possible explanation for this trend is competition that leads ICSID reforms, in practice, to have little real impact. While ICSID has the largest share of the market for investment arbitration, it has many competitors such as the International Chamber of Commerce that have their own recognized arbitration mechanisms with stricter protections for secrecy.⁶¹ If ICSID pushed its own rules too aggressively it could lose paying clients who favor more secret outcomes. Indeed, when the ICSID secretariat proposed a bold program of extensive transparency reforms in 2004, ICSID's members pushed back and narrowed the scope of reforms to the ones actually adopted in 2006.⁶² In other words, ICSID has responded to public pressures for transparency by creating a set of growing guidelines that the institution cannot—and may also care not to—enforce in the face of pushback from the parties to dispute.

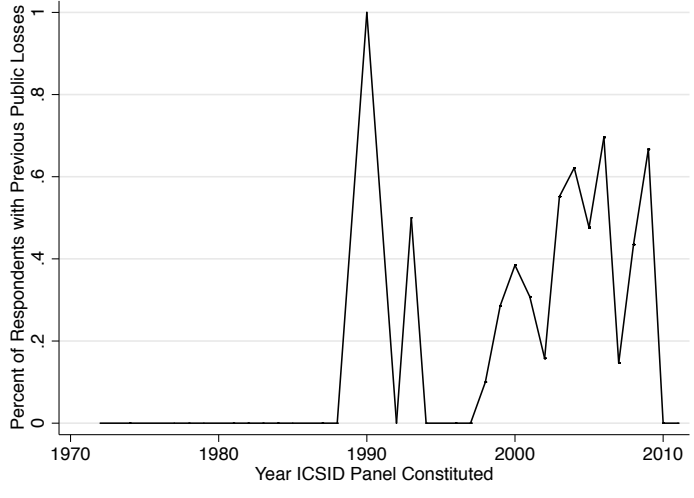
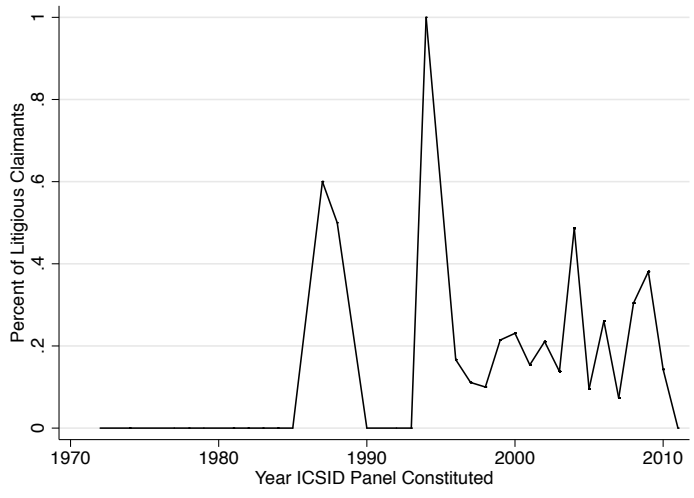
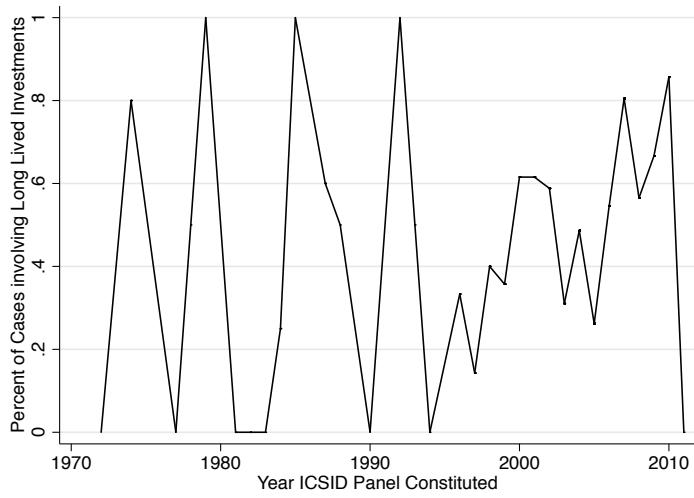
This explanation is plausible, but it is hard to sustain in the face of such massive efforts invested in ICISD reforms and ICSID's own belief that it is at the frontier of transparency in international arbitration. Moreover, while other institutions are an option, transparency-oriented reforms are becoming more widespread in investor arbitration.⁶³ And while ICSID imposes the cost of transparency on its participants, it still offers tremendous benefits of efficiency and, for members of the ICSID Convention, automatic enforceability of awards.

⁶¹For example, the UNCITRAL rules have no requirement for disclosure. See UNCITRAL Arbitration Rules (as revised in 2010).

⁶² For example, see the dispute over a draft revision to rule 32 (which concerns whether arbitrators on their own could decide to make proceedings public) reviewed in Parra 2012 at p. 255-256.

⁶³ UNCITRAL 2013.

Figure 7. Probability of Secret Arbitration: trends over time



Another possible explanation could be learning. Despite pressures for disclosure that have mounted since the late 1980s and which observers widely think have become stronger over time, other factors may also change over time. For example, parties and their legal counsel may have learned that disclosure is not in their interest. Indeed, we see that respondents with a past history of losses keep their arbitrations a secret. We are not able to fully estimate this learning effect for claimants because only four claimants in our dataset had previously (and publically) lost a case prior to initiating another claim. Perhaps learning, if that explanation holds, has occurred among the community of lawyers that serves as counsel to claimants and respondents. As this community has learned more about the process serving multiple roles—not just as counsel but also panelists and presidents of arbitral panels—perhaps they have devised a richer array of ways to keep cases secret even in the face of growing norms for publicity. A definitive answer is beyond the scope of this paper.

Robustness Checks

We take several additional steps in an effort to determine the robustness of the findings. Our unit of analysis is the claimant-case because a central hypothesis (Hypothesis 3) concerns the characteristics of the claimants, of which there can be multiple per case. In Column 1 of Table 2, we collapse the unit of analysis to the case level to ensure that our findings are not an artifact of this data structure—we thus cannot test the hypothesis on *Litigious_C* in this model because claimants in a case may have different levels of litigiousness. The findings on *LongLived* and *Losses_{SR}* are consistent in sign and significance.

In Column 2 we include fixed effects for each case; the findings are also consistent, however *LongLived* is only marginally significant at $p=0.106$.

TABLE 2. Robustness Checks

	(1) Case Unit	(2) Case FEs	(3) Claimant	(4) Respondent	(5) Year
<i>LongLived</i>	0.5415* (0.289)	0.475 (0.294)	1.003*** (0.303)	0.800* (0.433)	1.083*** (0.323)
<i>Litigious_C</i>		0.271* (0.157)	0.357** (0.157)	0.106 (0.207)	0.75 (0.188)
<i>Losses_R</i>	1.124*** (0.333)	1.203*** (0.346)	1.098*** (0.330)	1.274*** (0.484)	1.495*** (0.374)
<i>PublicCases_R</i>	-0.835*** (0.257)	-0.905*** (0.269)	-0.833*** (0.268)	-0.755* (0.416)	-0.997*** (0.291)
<i>GDP_R (log)</i>	-0.0110 (0.131)	-0.0421 (0.133)	0.0946 (0.138)	0.728 (0.832)	-0.210 (0.159)
<i>Polity_R</i>	-0.00723 (0.0274)	-0.0063 (0.0276)	0.0237 (0.0300)	-0.0208 (0.117)	0.0570 (0.0332)
<i>FDI_R Inward (log)</i>	0.000218 (0.128)	-1.66E-06 (0.128)	-0.122 (0.131)	0.654** (0.275)	0.0349 (0.173)
<i>Transparency</i>	0.0925* (0.0546)	0.0971* (0.055)	0.0963 (0.0601)	0.0336 (0.114)	0.3125 (0.351)
<i>Additional Facility</i>	-1.727** (0.813)	-1.663** (0.813)	-2.927*** (1.125)	1.696 (1.702)	-1.971** (0.779)
<i>Intercept</i>	-0.547 (0.995)	-0.652 (1.001)	-1.808 (1.852)	-5.899 (6.207)	-0.681 (3.237)
Case Fixed Effects		Yes			
Claimant- State Fixed Effects			Yes		
Respondent- State Fixed Effects				Yes	
Time Fixed Effects					Yes
Log Likelihood	-140.245	-138.69073	-164.650	-119.794	-143.006
Pseudo R2	0.0898	0.0999	0.2018	0.2445	0.2325
Observations	226	226	307	235	292

Columns 3 and 4 include fixed effects for the claimant's home state and the place of investment, respectively, in order to ensure that the decision to engage in secret arbitration is not simply a correlation between our variables of interest and the geographic location of the parties to a dispute. All estimates on the variables of substantive interest for our theory are consistent in sign and significance with one exception: *Litigious_c* remains positive in sign but is statistically insignificant in Column 4. This reflects the fact that most respondents in our data do not experience much variation in terms of *Litigious_c*—most are the targets of dispute by less litigious investors. Among claimants and respondents alike there are no particular country locations that predict that arbitration will likely remain secret. This result is notably important since the ICSID caseload has swelled over the last decade by economic and political crises in Argentina and Venezuela. While there is no doubt that many of the most salient issues today at ICSID relate to these countries, statistically they do not alter our findings. Controlling for disputes against Argentina—a clear outlier—does not change the model's substantive results.

Column 5 includes fixed effects for time—specifically, the year in which the ICSID panel was constituted. This allows us to examine the effect of the variables between countries in a given year. All of the variables in the model are consistent with the estimates in column 3 except for *Litigious_c*, which remains positive in sign but has become statistically insignificant. In no model are the coefficients for *Transparency* ever correlated with a decline in secrecy.

An Illustration: Leaked Secrets

So far we have discussed these matters with reference to the full universe of cases that ICSID has handled. Here we look at the single case in our data where the parties following the formal ICSID procedures intended outcomes to remain secret but those outcomes were later leaked in ways that made it possible to reveal the details of the case. The case concerns Chevron's natural gas production in Bangladesh and, though it was intended to remain a secret, the case has now generated a substantial public record that help to illustrate the ideas advanced in this paper.

After massive economic reforms in the early 1990s the Indian economy began to grow quickly and so did its demand for energy.⁶⁴ Seeing this, a wide array of foreign firms sought ways to supply fuel and electricity to the growing Indian economy. Those firms included Unocal, a US-based company that specialized in the development of natural gas resources in Asia. It looked at a range of options including piping gas from Turkmenistan across Afghanistan then Pakistan to India (a project infused with risk) as well as the seemingly easier task of producing gas in neighboring Bangladesh and piping it west into India.⁶⁵ Working with other partners it acquired three major exploration blocks in Bangladesh and discovered vast amounts of gas in 1998 at what became known as the Bibiyana gas field. It found gas elsewhere as well and over time has linked its various gas fields to become the largest single producer of gas in the country. Because it had its eyes on Indian prizes, Unocal carefully designed its contracts to give it flexibility in where it sold the gas so long as it paid Petrobangla, Bangladesh's state-owned hydrocarbon monopoly, a transit fee. And because it feared mistreatment in the local Bangladeshi courts, Unocal

⁶⁴ Tongia and Arunachalam 1999.

⁶⁵ Olcott 2006.

incorporated its investment into a series of Bermuda-based companies—allowing it access to mandatory offshore arbitration under the U.K.-Bangladesh Bilateral Investment Treaty.

In tandem with Unocal finding gas, political relations between India and Bangladesh soured and the option of piping gas to the lucrative Indian market vanished. That left Unocal—which in 2005 was bought by Chevron—no serious option but to sell the gas to Petrobangla at prices low enough that the gas could be used within Bangladesh. Thus Petrobangla became Chevron’s only customer and as Chevron kept finding and producing more gas it became Petrobangla’s largest supplier. Both sides were mutually dependent on each other in a long-lived, capital-intensive venture to produce, pipe and sell gas.

The dispute arose because in addition to buying the gas, Petrobangla also charged a large (4%) transit fee. Chevron contended that costly transit fees were originally designed only if Petrobangla merely moved the gas to other customers—not if Petrobangla, itself, purchased the gas for its own reselling. These kinds of disputes are commonplace surrounding fixed infrastructures in the oil and gas industry because once an infrastructure is in place both sides have an incentive to reap as large a fraction of the rents for themselves as possible.⁶⁶ We would expect both sides in this dispute to want to keep the dispute secret since both would need to engage with each other repeatedly even after the dispute was over. Moreover, Chevron displayed some of the characteristics of a litigious firm—only 16 firms in our data set had launched more cases than Chevron. Even if the firm lost this arbitration it would want to look resolute in enforcing contractual terms in other countries where it faced similar disputes.

⁶⁶ Woodhouse 2006.

Although both sides favored secrecy, news of the case leaked and revealed that both sides behaved in ways consistent with the theoretical propositions argued in this paper. Chevron sought to use offshore arbitration to force Petrobangla to agree on a reduced (ideally zero) transit fee. The government of Bangladesh, uninterested in negotiation on those terms, obtained a favorable ruling in the country's domestic courts to block international arbitration and thus refused to participate in the proceedings. It also hired as its chief lawyer a member of the country's anti-corruption commission, thus raising the specter of a high profile conflict between a leading authority on corruption and one of the country's largest foreign investors.⁶⁷ Bangladesh's concerns about international arbitration were understandable—in 2002, a similar dispute between Cairn Energy, an oil and gas exploration firm based in Britain, and Bangladesh on similar contractual matters had been decided in favor of the foreign investor.

In the face of all these difficulties, Chevron went so far as to seek help via the U.S. Embassy in Dhaka and send a letter on State Department stationery to senior Bangladeshi officials that included a warning that failure to engage with ICSID presented risks “to Bangladesh's commercial reputation, as other companies watch this case closely for signals about the sanctity of contract in Bangladesh and treatment of foreign investors.” While the public record does not reveal if that letter was ever sent, disclosures on Wikileaks reveal the cable from the US Embassy in Dhaka back to Washington.⁶⁸

Ironically, after Bangladesh engaged with ICSID it won the case and was not forced to repay past transit fees nor to stop charging them in the future. This unexpected win may

⁶⁷ Embassy Dhaka 2007.

⁶⁸ Embassy Dhaka 2007.

help explain why news of the outcome leaked immediately in the local press⁶⁹ and was soon picked up by the international oil and gas press.⁷⁰ For Bangladesh, unexpected good news would have played well locally. For Chevron, whose audience costs were now greater following this loss, silence remained the rule. The company never issued a press release nor a public filing for its investors on the outcome that would have been worth hundreds of millions of dollars. The parties never agreed to release the results publicly and thus ICSID, to this day, lists the case as private and has issued only rudimentary procedural details.⁷¹ The inability of ICSID to release the case even though the outcomes have now become widely known underscores the strict institutional constraints under which it operates.

While this dispute did affect the allocation of the rents from gas production in Bangladesh it appears to have had little impact on the ongoing business relationships between Chevron and Bangladesh. In the midst of the arbitration, for example, in 2009 Petrobangla gave Chevron approval to invest in a \$53m gas compressor station that would allow a radically increased output from Bibiyana and nearby fields.⁷² That same year, Chevron invested massively in new exploration for gas in the country, finding new gas deposits that were the largest on record for a decade.⁷³

⁶⁹ "Petrobangla set to allow Chevron install gas compression station." 24 August 2009, www.thefinancialexpress-bd.com/2009/08/24/77056.html

⁷⁰ "Chevron loses fight over costs." 28 May 2010, www.upstreamonline.com/hardcopy/news/article1190211.ece

⁷¹ ICSID 2011.

⁷² "Bangladesh: Chevron makes major new gas find." 23 September 2009, www.energy-pedia.com/news/bangladesh/chevron-makes-major-new-gas-find

⁷³ "Chevron to Expand Bangladesh Natural Gas Project." 30 July 2012, www.chevron.com/chevron/pressreleases/article/07302012_chevrontoexpandbangladeshnaturalgasproject.news

Conclusion

Scholarship on BITs and investor-state arbitration is now beginning to flourish in political science.⁷⁴ That trend is welcome because these agreements have sparked important debates with implications for theory and policy. On one side are scholars and practitioners who see BITs and arbitration as a fair, efficient and balanced mechanism to generate FDI, and thus as a way to support growth in developing economies. On the other are those who view international investment laws (and globalization more generally) as a source of exploitation of the developing world by wealthy corporations, and a threat to transparent, democratic governance.⁷⁵ For both sides, the transparency of the arbitration process plays a central role—in the former view it is an attribute to be balanced against efficiency, and in the latter it is a vital and threatened property of public international law.

Our research shows that certain types of investment rulings tend to be silenced in public debate and thus could undermine an important function of adversarial legal processes—public deliberation—in precisely those cases where the most is at stake for the public. While most scholarship on deliberation has looked at phenomena within states—for example, the deliberation and accountability for public officials that are hallmarks of democratic rule⁷⁶—scholars who study international law have argued that public deliberation may be the essential mechanism through which international law gains legitimacy and thus has a practical effect on behavior.⁷⁷ This line of scholarship has not focused squarely on dispute resolution and arbitration, but the logic applies equally—

⁷⁴ Jandhyala, Henisz, and Mansfield 2011; Elkins, Guzman, and Simmons 2006; Haftel and Thompson 2013; Neumayer and Spess 2005; Allee and Peinhardt 2011; Allee and Peinhardt 2010; Lupu and Poast 2013.

⁷⁵ See Price 2005.

⁷⁶ Bentham 2007; Habermas 1991; Elster 1998.

⁷⁷ Finnemore and Toope 2001; Risse 2000; Hood and Heald 2006.

where arbitration plays a central role in how international legal obligations are interpreted in practice, transparency is essential to public deliberation about investment law.

Transparency in investment law remains low when compared with inter-state dispute resolution such as at the WTO. That low transparency, the result of forces we reveal here, not surprisingly has been central to the backlash against investment law and arbitration.⁷⁸

Another implication of our research is that the benefits of secrecy may arise not only when a party fears a bad reputation from an inconvenient spotlight but also when there is a need to manage audience costs and market effects. Put differently, transparency is an outcome that reflects the private interests of the litigants. And, quite apart from the conventional wisdom, arbitration is not always a last resort.

Many scholars and practitioners have advocated transparency reforms at ICSID and other prominent international institutions.⁷⁹ Transparency has figured prominently in the scholarship, mainly written by lawyers, exploring how international investment arbitration is facing a “legitimacy crisis” or a “backlash.”⁸⁰ The solution to these woes—now widely adopted across international institutions—has been formal changes to rules as well as norms that favor transparency. Our results suggest that such reforms must be assessed within a larger context of commercial and national interest and that these very popular reforms may be powerless against the commercial and political interests of the actors they are supposed to affect when the most is at stake.

⁷⁸ Waibel et al 2010.

⁷⁹ Parra 2012; Delaney and Magraw 2008; Coe 2006; Banisar 2011.

⁸⁰ Atik 2004; Waibel and Wu 2011. And on consistency see Cate 2013.

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