Predictability Versus Flexibility: Secrecy in International Investment Arbitration

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Predictability Versus Flexibility: Secrecy in International Investment Arbitration

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Abstract:

There is heated debate over the secrecy of many international negotiations. This debate is central to disputes over foreign investment arbitration because parties to dispute nearly always can choose to hide the results from public view. Working with a new database of disputes at the world's largest investor---statearbitral institution, this paper examines the incentives of firms and governments to keep the details of their disputes secret. We argue that secrecy in the context of investment arbitration works like a flexibility enhancing device, similar to the way escape clauses work in the context of international trade. To attract and preserve investment, governments make contractual promises to submit to binding arbitration in the event of a dispute. Yet governments also know that political situations may eventually create incentives to undermine investment promises and that

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the credibility of their investment agreements will decline if they are seen to violate their commitments too frequently. The option of secret arbitral outcomes provides them some measure of flexibility in precisely those situations where diluting the public signal would be most beneficial: in disputes over investments where costly compromises are essential to keeping a project viable over a long time horizon. Secrecy is also favored when host governments expect to lose. A central implication is that secret outcomes help facilitate hard bargains and prevent political posturing, but the public is least informed about precisely those cases where broad public interests are likely to be most affected. Moreover, while secrecy can incentivize arbitration over politically-sensitive disputes, it also diminishes one of the central purposes of arbitration—to allow governments to signal their commitment to investor-friendly policies—by hiding the relevant information about the government’s past and likely future behavior toward investors.

There is longstanding debate over the appeal of publicly transparent international institutions. The shared provision of information, it is thought, helps to set norms and stabilize expectations around which actors can organize complex and politically challenging domestic policies.\(^1\) It can encourage participation and accountability and lend legitimacy to governance institutions.\(^2\) Information that ties hands by raising the cost of reneging on an agreement is also a vital element in most theories that explain how international institutions facilitate the creation of credible commitments.\(^3\) These logics help explain why most international tribunals on boundary disputes are required to rule publicly when they settle zero sum matters such as shifting borders—decisions that would be nearly impossible for governments to implement without credible, visible external pressure.\(^4\) They also explain why all WTO dispute panel decisions are publicly released,

\(^1\) Keohane 1982; 1984.


\(^3\) Fearon 1997.

\(^4\) Allee and Huth 2006.
partly on the logic that countries will find it easier to make domestic policy adjustments after their hands are publicly tied. Yet ‘open door’ negotiations, as well, can create strong incentives for parties to posture in public. Publicity can raise transaction costs and impede negotiations needed to resolve entrenched disputes. It can also make it harder to hide and manage the fallout of inconvenient decisions.

Nowhere is this debate over the function of public information within international institutions more heated or economically consequential than over the regulation of foreign investment that now totals nearly 1.5 trillion (U.S.) dollars a year in capital flows. Firms that invest overseas fear that obsolescing bargains and time inconsistency problems will put their investments at risk of expropriation or other harmful treatment in the hands of host governments. To mitigate this fear—and attract FDI—governments have created an expansive legal regime designed to boost investor confidence and create a more predictable environment for investors. The keystone to that regime is binding

5 Davis 2012; WTO 2014.


7 Rabinovich—Einy 2002.

8 Kurizaki 2007; Levenotoglu and Tarar 2005.

9 For recent work on investment, see the World Politics special issue on the Global Economy, FDI and the Regime for Investment, ed., Milner 2014.

10 Tobin and Rose--Ackerman 2005; Tobin and Busch 2010; Butte and Milner 2014.

11 See Milner 2014. There is debate over whether investment treaties actually increase FDI. See Neumayer and Spess 2005; Tobin and Rose--Ackerman 2005; Buthe and Milner 2008.
independent arbitration that provides direct access to an international resolution that, in theory, depoliticizes the process and subjects decisions to objective legal criteria.\textsuperscript{12} Nearly all of the existing bilateral investment treaties (BITs), along with some trade agreements (such as the North American Free Trade Agreement), thus allow private investors to invoke arbitration by filing complaints when they feel wronged by a foreign host government. By most accounts, the promise of arbitration helps countries to credibly signal their commitment to investor-friendly policies.\textsuperscript{13}

As a device for sending credible information about a country’s commitment to protecting investors, most investment arbitration has the peculiar feature that the filing of disputes is public knowledge yet the outcomes of negotiations and the final rulings need not be. In most disputes, any party can choose to hide the results of arbitration (known as the “award”) from the public, including from other governments and investors. Indeed, in a considerable fraction of the hundreds of investment cases heard to date, there is no public record as to whether or why the government was found guilty of improperly harming the investor nor whether the investor was actually compensated. This concealment of information can be costly for the disputing parties and for the system of arbitration itself. It makes it difficult for other parties, including potential investors, to determine whether the government actually honors its commitments. It reduces the predictability of the

\textsuperscript{12} Norris and Metzidakis 2010.

\textsuperscript{13} See Büthe and Milner 2008; 2014; Haftel 2010; Neumayer and Spess 2005; Tobin and Busch 2010; Tobin and Rose—Ackerman 2011; Poulsen and Aisbett 2013; Simmons 2014. See Allee and Peinhardt 2014 for an alternative view.
arbitration process and outcomes. And it prevents determination of whether the law is being applied consistently and effectively.\textsuperscript{14} The risks associated with making investments thus rise, which can deter rather than motivate FDI.\textsuperscript{15} As one arbitrator put it, “transparency generates certainty; ignorance panic”.\textsuperscript{16}

Accompanying these costs is a wave of attempted reforms aimed at reducing the use of secret arbitration. Since the early 2000s, when arbitration over a series of publicly controversial investments began to tread into the domain of regulatory policy on issues such as environmental protection and access to water, there has been growing pressure from certain governments, organizations like the World Bank, and civil society for parties undergoing arbitration to make the full record public and thus further raise the costs of engaging in secret arbitration.\textsuperscript{17} Yet a fair number of parties to investment arbitration still opt for secrecy, diluting the broader public signal that arbitration provides a credible commitment to protect investor rights.

We argue that secrecy in the context of investment arbitration works like a flexibility enhancing device, similar to the way escape clauses work in the context of international trade.\textsuperscript{18} To attract and preserve investment, governments need to make

\begin{flushleft}
\textsuperscript{14} ICSID 2006c; Tahyar 1986.\\
\textsuperscript{15} Brown 2001.\\
\textsuperscript{16} Hernandez 2013, 27.\\
\textsuperscript{17} Parra 2012, ch 10.\\
\textsuperscript{18} Rosendorff and Milner 2001; Mansfield and Milner 2012; Milner, Rosendorff, and Mansfield 2011.
\end{flushleft}
commitments to provide investor-friendly policies, which they do by making contractual promises to submit to binding arbitration in the event of a dispute. Yet governments also know at the time they make this commitment that political situations may arise that create incentives to undermine their promises. They also know that the credibility of their investment agreements will decline if they are seen to violate their commitments too frequently—investors will stop spending and other governments will stop signing investment agreements. Secrecy provides some measure of flexibility in precisely those situations where hiding information about their wrongdoing would be most immediately beneficial to the government.

Our starting point to identifying those situations, consistent with Stasavage\textsuperscript{19}, is the assumption that bargainers in a dispute care both about the substantive outcome of a particular bargain as well as the impact of the process on their public reputations.\textsuperscript{20} Both affect how the parties assess their future investment strategies. As we will argue, secrecy can affect substantive outcomes by creating the flexibility to allow hard bargains that would otherwise be impossible—making it possible for investor and host country, alike, to prolong their relationship. Secrecy can also have an impact on how the process of arbitration affects reputations since secrecy allows governments to hide information about their wrongdoing that could undermine the credibility of their broader public commitment to investor rights more generally.

\textsuperscript{19} Stasavage 2004.

\textsuperscript{20} While we draw upon Stasavage's assumption, our focus in this paper is different than his.
We see at least two broader implications of this argument of relevance for world politics. First, the decision to engage in secrecy may at once facilitate hard bargains and prevent posturing over politically sensitive disputes while also blunting the ability of governments to signal their broader commitment to investor--friendly policies in precisely the most contentious cases. Second, the result is that the public is least informed about those cases where it often has the most at stake and neither the parties to arbitration nor the arbitrators can be held publicly accountable, which has put the legitimacy of arbitration into question. This fact, we speculate, may help explain the empirical finding that BITs do not always increase FDI.

The article proceeds to develop the argument in several steps. Several institutions handle the burgeoning caseload of investment disputes but the World Bank’s International Centre for Settlement of Investment Disputes (ICSID)—the empirical focus of this paper—has emerged as the dominant venue and accounts for more than 60% of all investor--state arbitrations.21 We begin by explaining the core features of the ICSID process that relate to the decision to conceal a case—that any party to arbitration can unilaterally demand secrecy, a decision that is made prior to the final ruling.22 Next, we develop our theoretical

\[\text{21 There is no reliable universe of arbitrations and thus this fraction is based on the most reliable estimates from UNCTAD, which reports on treaty--based cases through 2011 (UNCTAD 2012). Recent discussions with practitioners has confirmed this number.}\]

\[\text{22 We model the choice for secrecy (which any party can make) rather than transparency (which requires the joint decision of all parties). We do this because secrecy is the outcome that most concerns ICSID, which has made public claims to the effect that secrecy is in}\]
arguments to explain when arbitration is most likely to be concealed, and then provide an account of the efforts to reform the ICSID process with the explicit goal of reducing the instances of secrecy over time. We then evaluate 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 then 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.

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decline, and also because the total number of cases limits our ability to precisely model the strategic interaction between claimants and responding governments that would be essential to assessing transparency. However, we return to the question of transparency in the empirical analysis.

23 For other efforts to collect data on arbitration see Caddel and Jensen 2014 and Franck 2007. Caddel and Jensen are interested in which parts of a government are involved in investment disputes and has coded 163 of the 264 cases completed through the end of 2012. Franck looks at all public awards before 2006, the vast majority of which are ICSID-based. We extend these by making the claimant the unit of analysis, incorporating more home and host country features, including non-public cases in our analysis, and, where feasible, relying on leaked documents for information. Other work that relates to investment treaties, such as Elkins, Guzman, and Simmons 2006; Simmons 2014; Allee and Peinhardt 2010; 2011; 2014, take BITs as their dependent variable or primary independent variable.
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 cases avoiding national courts that could be biased, slow, or even more expensive to use. It was created to address what was seen as a major challenge for economic development—the need to entice higher levels of private investment into developing countries by making arbitration more efficient and the awards more enforceable. At the time, ICSID’s architects were less worried about whether or how ICSID cases would create precedent—or shape public opinion—and more concerned with protecting the interests of investors and states while expeditiously boosting the level of investment. Secrecy was seen as a way to facilitate bargains. And while this foundation was laid in the late 1960s, as a practical matter, ICSID and other such institutions did little until the seeds of economic globalization sprouted in the 1980s and investment soared. ICSID has gained the largest share of investor-state arbitrations because of its expertise, low transaction costs, and perceived efficiency.

Arbitration can be used for many types of disputes, but the most important in recent decades arises under BITs or the investment chapters in free trade agreements such as NAFTA or the Central America Free Trade Agreement (CAFTA). Since the mid-1980s

24 Parra 2012, 17.

essentially all “modern” BITs have included a resort to binding treaty-based dispute settlement such as at ICSID.\textsuperscript{26}

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 primary goal of receiving compensation for a lost or degraded investment or of hastening a settlement with the accused government. Since many claimants invest in multiple countries they also care about reputation in the other places where they do business. Respondents are the accused governments that host foreign investors. Their interest is not just to limit monetary damages but—usually—also to create a reputation for winning in order to deter future arbitration. A good reputation can also encourage future FDI.\textsuperscript{27} Third are the arbitrators, almost always three per panel. They decide the case by majority vote.\textsuperscript{28} Fourth is the ICSID secretariat itself, which manages the process and provides assistance in the constitution of the arbitral tribunals and supports their operations. The secretariat also proposes and

\textsuperscript{26} See Poulsen and Aisbett 2013. See Büthe and Milner 2014 for a discussion of dispute settlement in preferential trade agreements.

\textsuperscript{27} Büthe and Milner 2008; 2014; Haftel 2010; Jensen 2003.

\textsuperscript{28} A very small number of cases have only one arbitration panelist. 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.
implements major reforms to the arbitration process and administers the proceedings and finances of each case.

**Figure 1: Overview of ICSID Case Process**

<table>
<thead>
<tr>
<th>Pre-Arbitration!</th>
<th>Arbitration!</th>
<th>Post-Arbitration!</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claimant files request!</td>
<td>Procedural arguments, including public decision?</td>
<td>Final challenges (e.g., interpretation, revision, annulment)! Case closed!</td>
</tr>
<tr>
<td>ICSID registers request!</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parties select Arbitrators!</td>
<td>Yes! Case ends!</td>
<td>Yes!</td>
</tr>
<tr>
<td></td>
<td>No!</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legal reasoning and award!</td>
<td></td>
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<td></td>
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</tbody>
</table>

*Decision on secrecy of award made here!"
Figure 1 illustrates the process, which begins when a claimant registers the dispute with ICSID. Hearings begin with an array of procedural matters, including decisions to keep the outcome secret. By “secret” we mean that the full final award of the arbitral panel is not formally released—either through ICSID or through other official sources with the consent of the parties. 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. During the early procedures, before the outcome is known, either party to the arbitration can unilaterally and privately demand secrecy (see figure 2).29 Once a case is designated secret, the parties to disputes are required to keep the outcome confidential. The initial choice for secrecy is binding by practice and enforced through the relatively small cadre of arbitration professionals. This norm appears robust: over the course of ICSID’s history, only a small handful of secret cases have ever been leaked.

29 See, e.g., Rule 20 of the ICSID Arbitration rules (ICSID 2006a, 111; 2010).
Figure 2. Secrecy at ICSID Over Time

In addition to ICSID's core arbitration, which is available when the claimant's host country and the respondent are both members of ICSID, ICSID also manages two other processes—conciliation (a rarely used form of mediation) and the “additional facility (AF)” that is used if one or more of the countries involved is not a member of the ICSID Convention (ICSID 2006b). 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.30

Explaining Secrecy at ICSID

A considerable number (about 40%) of cases are kept secret (figure 2). Here, we
suggest that secrecy in the context of investment arbitration works like a flexibility
enhancing device in precisely those situations where diluting the public signal that a
government has harmed investors would be most beneficial for the disputing parties.

One source of flexibility is the ability to work out bargains behind closed doors—
deals that would be hard for either party to accept in a public space. We argue, in
particular, that investments in industries marked by long-lived projects that are vulnerable
to government regulation are especially likely to benefit from this kind of closed-door
bargaining.

When an investor starts a bank in another country and suffers expropriation, the
investment is generally done. By the time the machinery of arbitration can be mobilized
and reach 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 arbitrate. In such cases, arbitration is a means
of obtaining compensation, but beyond payment of damages there is no necessary ongoing

30 Parra 2012, 145. See also ICSID Additional Facility Rules, Article 3 (ICSID 2006b). A small
portion (16%) of cases undergo further annulment proceedings (rarely successful); see
Simmons 2014.
interaction between the claimant and respondent and the cost of arbitration may outweigh the lost investment.

By contrast, investments in projects that tend to be long-lived are much different. In these cases, firms cannot readily enter or exit. Often the investment involves the building of infrastructures—for example, roads, electricity grids, networks of mines, or airports—that have elements of natural monopoly and thus tariffs that are heavily regulated by government. This structure makes for markets that are not contestable through entry or exit. They are laden with incentives for government to intervene to impose politically popular tariffs and taxes that could be catastrophic for investors. And from the investor’s perspective there are incentives, as well, to find ways to accommodate and adjust to these government pressures because the useful commercial lifetime of these projects spans decades.31 Both parties in these cases benefit from the successful continued operation of these assets. Both parties—investor and government alike—are required to obtain the technical and managerial expertise to operate the asset efficiently along with the political

31 See Reisman 2009. 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). The argument we outline here is a standard one for networked infrastructures, and our coding will reflect that logic.
and regulatory environments needed for the investment to generate a useful financial return.32

Exactly these kinds of investments first gave rise to classical theories of the “obsolescing bargain” that underpin the logic of international investment regimes and arbitration and the need for host governments to send credible signals.33 For an investment to be made, the investor and host government must have reached an agreement that initially favored the venture. However, as the investor sinks more assets into the host country, the bargaining power shifts to the host government, in the extreme, turning fixed assets into liabilities. In industries marked by long---term investments that sink capital there are particular 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.34

In these cases, secrecy is a valuable device to create the flexibility to reach a bargain. Successfully managing the dispute will require that both sides make concessions, often with substantial audience costs for each if those concessions become publicly 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.35 The investor must find satisfaction in less lucrative rents from policies that it hopes will not spread to other

32 Fudenberg, Rand, Dreber 2012.

33 Vernon 1971.

34 Kobrin 1987; Brewer 1992.

countries where the firm also does business. Host governments may need to back down from aggressive anti-foreign rhetoric and pay compensation for past wrongs. Secrecy makes these high-stakes bargains easier to reach and implement by reducing incentives for posturing, or taking uncompromising positions, in front of shareholders or constituents.\textsuperscript{36} In short, secrecy can help to extend the shadow of the particular investment in dispute as well as the relationship between the investor and host government.

This argument has an analogue in game theoretic models of ‘quiet diplomacy’.\textsuperscript{37} 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 helps to shield governments from the negative domestic consequences of publicly capitulating to a foreign investor that has long-term sunk costs in the country.

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—as do the benefits

\textsuperscript{36} Stasavage 2004.

\textsuperscript{37} Kurizaki 2007; Stasavage 2004.
of secrecy.

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

Secrecy can also have an impact on how the process of arbitration affects reputations since secrecy allows governments the flexibility to hide information about their wrongdoing that could undermine the credibility of their broader public commitment to investor rights. Secrecy creates an avenue to lessen the blow of arbitration on governments, who do not have a say in whether they are the targets of dispute. Arbitration creates bad reputations for host governments that can negatively affect their shadow of future investment. These reputations are particularly harmful when the government is publicly judged to be in violation of the law and the investor is awarded compensation for the wrongdoing.

This concern over reputation creates heightened incentives for secrecy when governments expect ex ante to lose a case. Being charged with a violation in public is bad for a country’s ability to attract FDI; public defeat is even worse.38 While some governments might gain in popular support from suffering defeat at the hands of foreign tribunals, most states behave as if they want to conceal damaging information about the abuse they inflict on investors.39 Moreover, arbitral awards often include blunt language about egregious—even corrupt—behavior by the losers. For example, a series of cases in

38 Allee and Peinhardt 2011.

39 We later examine empirically whether countries such as Argentina and Venezuela, which are at various stages of withdrawing from the institution, behave differently.
2006 and 2007 concerned western firms that had invested in aluminum, oil and gas industries in Azerbaijan in sectors of the economy that had been controlled by a former Economic Development Minister: Farhad Aliyev. When Aliyev was jailed in 2005 for conspiracy to overthrow the government, the backlash against his allies undermined the investments and led the western firms to sue seeking millions of dollars in damages. Information revealed during the proceedings had an impact on one of the core functions of government (survival of leaders). Normally dry arbitral proceedings were brought to a standstill when one of the witnesses for the claimants testified about state bribery. The cases were settled, with special attention paid to how much information and claims of wrongdoing could be released—a matter of special sensitivity to the Azeri government, which was concerned about harm to potential future investment.\(^\text{40}\)

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 were harmful to the firm across the region and to the government of Argentina, which has been the recurring subject of dispute.\(^\text{41}\)

\[^{40}\text{Peterson 2009, 12-13.}\]

\[^{41}\text{e.g., Yackee 2012. See ICSID Case No. ARB/02/8.}\]
respondent states, corruption claims can also lead to unwanted international scrutiny, and particular government officials charged with corruption can face prosecution at home. Thus, when host states see telltale signs that defeat is probable, they have strong reasons to operate in secrecy in an effort to preserve future investment into the country.

Yet it can take time and experience before states see these telltale signs. Governments facing arbitration operate with a great deal of uncertainty about the eventual outcome of the negotiation. International investment laws are imprecise, often highly contested and subject to multiple interpretations.42 There is no formal precedent, and the kinds of informal precedents that have emerged in other areas of international law such as dispute settlement at the WTO have been slower to emerge in investment arbitration because so many awards are left in secrecy.43 And there is evidence to suggest that governments act like “narcissistic learners”, making commitments to investment agreements without seriously considering the future risks associated until they have been brought into arbitration and learn from the process.44 It is not until governments are both indicted and found in the wrong that they begin to more accurately evaluate the risks associated with submitting to or losing arbitration, electing for secrecy in order to avoid the costs associated with another public loss.

Over time, most governments 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—for

42 Levinson and Goldsmith 2009.

43 Pelc 2013.

44 Poulsen and Aisbett 2013.
claimants, looking to history is harder because most only file one case in their entire lifetimes. We expect that 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 publicly 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._

**The Movement Against Secrecy**

There are potential costs to secrecy, which helps explain why not all cases are kept secret. When results are kept confidential it is difficult for actors to establish public reputations, making it harder to deter future accusations and attract FDI.\(^4\) For investors and host governments, alike, opting for secrecy can spur pressures for information that create focal points for public dissent. Some of the costs of secrecy are borne not by individual parties to arbitration but by the collective good, such as well-functioning international institutions. Secrecy prevents, for example, public scrutiny of arbitrator conduct or conclusions\(^4\) and makes it harder to develop a shared body of interpretations of international investment law.\(^4\) Secrecy may also impede the formation of legitimacy that


\(^4\) Rabinovich—Einy 2002; Waibel and Wu 2011.

\(^4\) Roberts 2010.
arises when legal institutions operate effectively in the public eye.\textsuperscript{48} Indeed, some scholars argue that secrecy undermines the long--term viability of arbitral institutions such as ICSID.\textsuperscript{49}

For all these reasons, the past few decades have witnessed growing pressure to make international organizations more transparent.\textsuperscript{50} No arbitral institution has experienced a greater shift in formal rules and procedures around secrecy than ICSID, which has experienced pressures on four fronts, intended to make secrecy both more difficult to achieve and more costly for parties to arbitration. First is the World Bank, which hosts ICSID. The Bank, in tandem with other Bretton Woods institutions, was in the crosshairs of the anti--globalization movements of the 1990s, which were partly animated by concern that closed--door negotiations shut out civil society and prevent public accountability. Because key staff in the ICSID secretariat were drawn from the Bank, these same pressures spread to ICSID.\textsuperscript{51} 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 while he also sought to make ICSID more transparent.

Second, a growing group of NGOs have become more attentive to investment law and its possible social impacts. These organizations routinely shame both the investors

\begin{footnotesize}
\begin{itemize}
\item[48] Finnemore and Toope 2001; Risse 2000; Yackee and Wong 2010.
\item[49] Puig 2013; Waibel, Kaushal, Chung, and Balchin 2010.
\item[50] Keohane 1998; McGee and Gaventa 2010.
\item[51] Parra 2012, 138--141, 323.
\end{itemize}
\end{footnotesize}
and the governments involved in arbitration. In particular, large segments of the NGO community were 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 Metalclad's foreign investment.\(^{52}\) While the Metalclad case was not kept secret, it entrained many of the same issues—such as fear that international institutions would encroach on national sovereignty—that also resonated with the NGO--based transparency movement.\(^{53}\) In response, NAFTA's member governments adopted several reforms—including a July 31, 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 and thus made disclosure more likely for the subset of ICSID cases based on NAFTA.\(^{54}\)

Third, some governments 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 favor disclosure. That model BIT was based on the 2002 Trade Promotion Authority Act, and the disclosure provisions in CAFTA (finalized in 2004 and adopted into law the next year under the same trade promotion authority) are very similar to the 2004

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52 ICSID 2000.

53 Choudury 2008.

Model BIT.\textsuperscript{55} A few other BITs, notably the 2006 BIT between Spain and Mexico (which has generated only one fully concluded ICSID case), have disclosure rules as well.

Fourth, ICSID’s secretariat has pursued a wide array of institutional reforms aimed at making itself more transparent and encouraging the parties to the dispute to inform the public. ICSID staff have played a central role in articulating how secrecy is harmful to the institution’s legitimacy.\textsuperscript{56} 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.\textsuperscript{57} In tandem with these reforms, ICSID Secretary--General Shihata opened ICSID’s archives to select scholars.\textsuperscript{58}

The secretariat also masterminded the institution’s most extensive formal transparency reforms, adopted in 2006. It even took the unprecedented step of publishing the proposals that led to the 2006 reforms and soliciting external comments, notably from NGOs. 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.\textsuperscript{59} Indeed, according to ICSID’s Secretary--General Meg Kinnear, ICSID is “at the forefront of the trend toward increased transparency in the conduct of investment

\textsuperscript{55} e.g., Gantz 2007; and see CAFTA Ch. 10, Article 10.21.1.

\textsuperscript{56} Kinnear, Obadia, and Gagain 2013.

\textsuperscript{57} Puig 2013.

\textsuperscript{58} Schreuer 2001.

\textsuperscript{59} Parra 2012; Puig 2013.
arbitration”.

_Hypothesis 3: Arbitration of disputes is less likely to remain secret in the post-reform period (after 2000)._ 

**Empirical Analysis**

We evaluate the argument on a newly collected dataset of all cases filed before ICSID from January 1, 1972 to April 20, 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. We thus 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 first (in Column 1) estimate a logit model:

\[
Pr(Secret=1) = f(\beta_0 + \beta_1 LongLived + \beta_2 Losses_R + \beta_3 PublicCases_R + \beta_4 Reform + 
\]

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60 Kinnear, Obadia, and Gagain 2013, 109.

61 We have also consulted the highly selective printed record, _ICSID Reports_, to cross check information and thank Leslie Johns and Andrea Vilan for their assistance.
\[
\beta_{4} \text{AdditionalFacility} + \phi X + \epsilon)
\]

(Equation 1)

and then (in Column 2) include \(X\), 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.\(^{62}\) We also code separate binary variables for each category of industry in dispute (full details are included in the appendix). Approximately 50\% of disputes in our study involve long-lived investments.

To evaluate our second hypothesis—that governments with a public history of losing are more likely to shroud arbitration in secrecy in order to reduce the reputational and material harm of another loss—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.

\(^{62}\) 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. See the Supplementary Materials for our mapping from ICSID’s information to our categories.
(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 \((\text{PublicCases}_R)\), which varies from 0 to 13. This allows us to distinguish between respondents that have never lost a previous case because they have always won from those that have never lost because they have never previously been the target of a public arbitration.

To evaluate the third hypothesis—that secret arbitration should have steadily declined after 2000 when reforms began to take effect—we code \(\text{Reform} \) as the number of years from the year 2001. This measure is at best a proxy because we have no way to directly code reform other than to differentiate pre-- and post--reform periods. Although ICSID’s own efforts began in the 1980s, the most substantive reforms pivot around the year 2001 and gain prominence over time with outcomes such as the 2006 formal reforms to ICSID procedures. They include efforts to disseminate information more widely through newsletters, the ICSID website, and specialized publications, as well as greater access to third parties.

We also account for two additional measures of the institutional factors designed to reduce secrecy. First, a few BITs and multilateral investment agreements require disclosure of awards. We therefore code \(\text{Public Provisions} \) 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 \(\text{Public Provisions} \) 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 pull towards transparency because, as noted earlier, these cases must rely more heavily on domestic courts for enforcement.

In Column 2 we account for certain characteristics of the claimant and respondent states that could also influence the decision to conceal arbitration. To account for power imbalances between host and claimant states, we control for the claimant’s (log GDPc) and respondent’s (log GDPR) GDP per capita and the respondent’s inward FDI (log FDIr) as a proportion of GDP—both from the World Bank’s World Development Indicators. (All wealth figures are reported in 2011 constant dollars.) Low income could correspond with immature public institutions and a large role for the state in the economy—all of which could make it easier for actors to keep information secret. 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. 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 it 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. We thus control for Polityc and Polityr.

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63 Only 9 cases in our sample were filed under a BIT which requires public disclosure.

64 Allee and Peinhardt 2014.
which range from \(-10\) to \(10\).\(^{65}\)

Finally, we include information on whether either the respondent or the claimant’s home governments had ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Bribery) at the time the dispute was registered at ICSID. We use this measure as a proxy for the presence of domestic institutions specifically designed to curtail and expose corruption related to international business transactions. The Convention is a procedural one—it does not set detailed standards for anti—corruption policies but requires that governments adopt and implement laws that make bribery of foreign public officials a criminal offense, including official enforcement procedures that are “effective, proportionate and dissuasive criminal penalties” (article 3). We expect arbitration is less likely to be kept secret among parties where governments have ratified this Convention because fraud—a key incentive to hide losing—is less likely. Column 2 of Table 1 reports estimates from this extended model. Descriptive statistics as well as correlations are reported in the appendix.

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\(^{65}\) See [www.systemicpeace.org/polity/polity4.htm](http://www.systemicpeace.org/polity/polity4.htm).
The estimates reported in Columns 1 and 2 indicate that secrecy is a function of the kinds of investment under dispute—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 nearly twice as likely to conceal the outcome of arbitration than are the parties to disputes over investments that are short—lived. In these types of cases, it is in the interest of both parties to conceal the results in order to reduce incentives for public posturing that can lead to breakdowns in negotiations.
In Column 3 we include fixed effects for the type of industry in order to ensure, in particular, that countries with high numbers of public losses are not differentially attracting long--lived investment. 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. The predictions are statistically significant for Roads and Rail, Mining and Hydrocarbon.
**Hypothesis 2: Hiding Respondent Losses**

Table 1 suggests, indirectly, that concerns for reputation—avoiding public losses—also matter. 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 publicly 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 2, 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. The effects are quite substantial. For a state with no previous experience of $Losses_R$, the model predicts less than
a 14% likelihood of secret arbitration. A state with 2 previous public losses is likely to be a party to secrecy more than 50% of the time, whereas a state that has lost 4 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 loss, most seek to hide their defeat, potentially in order to reduce the reputational and material harm from losing again.

**Figure 4. Probability of Secret Arbitration: past public losses**
Number of Past Public Cases Lost by Respondent
Hypothesis 3: Reform Against Secrecy

Here, we investigate whether ICSID’s own efforts to create a norm against secrecy correspond to a reduction in secrecy over time—as the many different reforms aimed at putting ICSID at the forefront of transparency have intended, and as ICSID has claimed. We find, in fact, no clear evidence that ICSID’s efforts have reduced the overall probability of secrecy over time. The coefficient on Reform predicts that, all else equal, 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 Reform 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. Figure 5 plots the predicted probabilities of secrecy at or after each potential reform treatment year. For example, the figure shows that cases filed on or after 1995 had about a 35% probability of being secret; after 2005 that probability rose to 50%. It illustrates that the probability of 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 the probability of public disclosure, those reforms have not been followed by a consistent reduction in secrecy over time—instead, the opposite.

Figure 5. ICSID Transparency Efforts: Rolling Reform Treatment

66 For more on the rule changes see Parra 2012.
We cannot distinguish whether this finding is causal—whether reform efforts have somehow backfired, increasing the benefits of secrecy to parties in dispute over time. It is plausible that ICSID’s efforts to stomp out secrecy are simply a response to a steadily growing interest by the parties to arbitration for secrecy. Claimants over time have brought
more of the types of cases where the incentives to veil arbitration in secrecy are strongest.

Figure 6 illustrates. Beginning in the year 2000, claimants began lodging complaints
predominantly over long-lived investments. 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 reduce secrecy over time is another trend: the nature of the
disputes brought for arbitration increasingly pull towards secrecy, although there is a great
deal of variance year by year. Yet our statistical models of institutional reforms—plotted in Figure 5—control for these factors. Holding $LongLived$ and $Losses_R$ constant, no matter in what year we measure the start of a reform treatment, ICSID’s Reform efforts have not been followed by a consistent reduction in secrecy as ICSID’s leaders hope. Although we cannot conclude that ICSID reforms, in practice, have little real (or even negative) impact, we can conclude that the overall probability of secrecy has not declined over time despite reform efforts.

**Figure 6. Probability of Secret Arbitration: trends over time**

![Figure 6](image-url)
The variance before 1995 reflects the scarcity of cases.
In contrast to Reforms, the ICSID Additional Facility is a highly significant predictor against secrecy as expected. These cases are public because the Additional Facility, unlike ICSID's core arbitration, does not lead to automatically enforceable awards. The OECD Convention on Bribery also predicts against secrecy. Cases where the host or investor governments of disputing parties have ratified this Convention—and thus require the adoption and implementation of domestic laws that make bribery of foreign public officials a criminal offense prosecuted publicly by state institutions—are less likely to be kept secret.

**Robustness Checks**

We take several additional steps in an effort to determine the robustness of the
findings. In Column 1, Table 2 we include fixed effects for each case; the findings are consistent. Column 2 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. The estimates remain consistent.
### TABLE 2. Robustness Checks

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<td>.226</td>
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<tr>
<td>Observations</td>
<td>339</td>
<td>289</td>
<td>339</td>
<td>339</td>
<td>339</td>
<td>261</td>
</tr>
</tbody>
</table>
Standard errors in parentheses (*** p<0.01, ** p<0.05, * p<0.1)

Column 3 includes a control for investment disputes with Argentina, which accounts for more arbitration at ICSID than any other host government (and is likely one of the few governments that might actually benefit from publicly losing arbitration). This is notably important since the ICSID caseload has swelled over the last decade by economic and political crises in Argentina. Controlling for disputes against Argentina—a clear outlier—does not improve the model fit or change the model’s substantive results, though cases against Argentina are likely to be kept secret.

Column 4 controls for cases coded from Investment Treaty Arbitration (ITA) rather than ICSID to reveal whether our results might reflect a bias from the organizations that collect investment awards. ICSID’s ability to publish awards on its website reflects not only whether the parties consent to publication but also perhaps various bureaucratic inefficiencies or inconsistencies. ITA, by contrast, can draw from a wider array of sources that might include cases that the parties did not intend to reveal to the public, such as through leaks—inclusion of that data might lead to a source of bias, although we see no evidence of that problem in Column 4.

We are not able to evaluate whether a claimant’s history of prior public losses affects the secrecy decision because few claimants in our dataset have prior public losses. We can, however, evaluate whether a claimant’s past history of bringing cases, their overall Experience, affects their secrecy decisions. Experience—is measured here as a count of the claimant’s previous disputes in Column 5 is negative and statistically insignificant, while all

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68 Available at italaw.com.
other variables in the model remain consistent in sign and significance.

In Column 6 we include additional information on *Corruption* measured by the Worldwide Governance Indicators. This measure captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests. 69 Unfortunately, these data are available only beginning in 1996, substantially reducing our sample size. The core findings nonetheless remain.

Finally, while our focus is the decision for secrecy, which can be made by any party unilaterally, we briefly explore joint decisions about the transparency of arbitral outcomes. Transparency is most likely to occur—according to the logic of our theory—when disputes are over short--lived investments and governments do not have a visible history of losing. This is precisely what we see when we estimate the predicted probabilities of our model (Table 1, Column 2) at different values of *LongLived* and *Losses*\textsubscript{R}. Specifically, when the dispute is over a short--lived investment and the accused government has never previously (publicly) lost, the probability of secrecy is only 10%. By contrast, when the dispute is over a long--lived investment and the government had previously lost a case, that probability rises to 43%. It rises to nearly 90% if the government had previously lost three cases and to 100% with any further losses. These predictions fit squarely with our argument.

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. 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

70 After an exhaustive online search, we were able to locate only one other ICSID case whose award was intended to remain secret but details of which were leaked to the public. In that case, ICSID ARB/10/16, leaked diplomatic cables via Wikileaks revealed outcomes related to a relatively minor real estate dispute between the AES Corporation and Kazakhstan. Having searched widely in non-official sources as well as all three more official sources (ICSID’s website, ICSID Reports, and ITA) we are confident that leaks are not common.

71 Tongia and Arunachalam 1999.
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. 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 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 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 and highly regulated venture to produce, pipe and sell gas.

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72 Olcott 2006.
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.73 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, and secrecy would reduce incentives to posture that would threaten negotiations.

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.74 Bangladesh’s concerns about international arbitration were understandable—in 2002, a similar dispute between Cairn Energy, an oil

73 Woodhouse 2006.

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 stationary 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 U.S. Embassy in Dhaka back to Washington.75

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 help explain why news of the outcome leaked immediately in the local press76 and was soon picked up by the international oil and gas press.77 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.78

75 Embassy Dhaka 2007.
76 Financial Express 2009.
77 Upstream 2010.
78 ICSID 2011.
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. 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.

Conclusion

Scholarship on BITs and investor-state arbitration is now beginning to flourish in political science. That trend is welcome because these agreements have sparked important debates with large implications for theory and policy. Some scholars see BITs and arbitration as a fair, efficient and balanced mechanism that helps to facilitate higher levels of FDI—especially in the developing economies that need it most. Others are more skeptical—seeing international investment laws (and globalization more generally) as a


80 Chevron 2012.

source of exploitation of the developing world by wealthy corporations, and a threat to transparent, democratic governance.\textsuperscript{82} From either perspective, understanding how arbitration actually works is of vital importance.

In this paper, we have shown how the parties to arbitration use secrecy as a means of obtaining flexibility in arbitration. Secrecy makes it easier to work out deals—under the shadow of the law—that leave investor and host better off. It is a way to hide inconvenient information that, if a party knew might be exposed, could lead parties to avoid investment arbitration or investments altogether. As such, we suggest that the use of secrecy be viewed within the larger framework of legalization and flexibility that has animated so much productive work at the intersection of international law and international relations in recent years.\textsuperscript{83}

We are also mindful that the use of secrecy raises larger questions and tradeoffs in the operation of public legal institutions. On the one hand, widespread use of secrecy affects public deliberation and perhaps the broader legitimacy of international institutions. Many scholars who study international institutions have argued that public deliberation is an essential mechanism through which international institutions gain legitimacy and thus have a practical effect on behavior.\textsuperscript{84} This line of scholarship has not focused squarely on dispute resolution and arbitration, but the logic applies equally—where arbitration plays a

\textsuperscript{82} e.g., Price 2005.

\textsuperscript{83} Hafner--Burton, Victor, Lupu 2012.

\textsuperscript{84} e.g., Finnemore and Toope 2001; for an alternative view, see Gilligan, Johns, and Rosendorff 2010.
central role in how international legal obligations are interpreted in practice, secrecy prevents public deliberation about law. Our research shows that certain types of investment disputes tend to be hidden from 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. The enduring pressures for secrecy that result from firms as well as government interests has, not surprisingly, been central to the public backlash against investment law and arbitration.85

Yet on the other hand, secrecy may be essential to the efficiency of international institutions. We have suggested that it can reduce incentives for political posturing that could ultimately harm the public interest if investors and governments adopt uncompromising positions so as not to appear to cave in.86 In short, secrecy offers flexibility in some of the most sensitive disputes but in doing so weakening the public signal of commitment to uphold investor rights in precisely those types of cases. This tension between these two effects of secrecy—the undermining of debate and legitimacy but the promotion of efficient transactions—is an enduring element in the design of legal systems. And as international investment law becomes more demanding and spreads to cover many areas previously considered the sole prerogative of national law we expect that this tension will become more apparent and more important for policy makers and academics to understand.

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