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*Against International Settlement? Secrecy, Adjudication and the Transformation of International Law.*

**EMILIE M. HAFNER-BURTON, SERGIO PUIG AND DAVID G. VICTOR**

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## ARTICLE

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### AGAINST INTERNATIONAL SETTLEMENT? THE SOCIAL COST OF SECRECY IN INTERNATIONAL ADJUDICATION

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EMILIE M. HAFNER-BURTON, SERGIO PUIG, & DAVID G. VICTOR\*

*“Sunlight is the best disinfectant.”*

— William O. Douglas

#### ABSTRACT

*Three decades ago Owen Fiss published a landmark article — Against Settlement — which argued that the rising popularity of pre-trial settlement and alternative dispute resolution was an unwelcome trend. It sacrificed the public benefits of complete and transparent adjudication for the private expedience of settling disputes. In this Article, we propose that international law is on the cusp of its very own settlement crisis.*

*As international governance is taking on increasingly more difficult and demanding topics, firms and governments have radically expanded the use of international courts to resolve complex legal disputes. In their*

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*effort to become more legitimate and effective, these bodies have adopted a wide array of reforms aimed at promoting transparency. Using a unique dataset on all investor-state arbitrations under the World Bank's International Centre for Settlement of Investment Disputes (ICSID), we show that those reforms are, in part, failing because parties have found ways to use pre-judgment or 'out-of-court' settlement to hide procedural and substantive outcomes. In fact, such settlements are the dominant means by which parties keep the outcomes of investment adjudication secret.*

*We illustrate, statistically, how different factors explain why private interests favor settlements and argue that international scholars have tended to view dispute resolution as an unalloyed good even when it is done in private – exactly the bias Fiss warned about long ago. Reforms, such as stronger disclosure rules and supervised settlements, will be needed to stem the settlement crisis in international law and yield a more consistent, coherent, and legitimate corpus of law.*

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## INTRODUCTION

For decades, the scope of international legal commitments has been expanding to cover policy areas that were previously considered exclusive sovereign domains of the State.<sup>1</sup> Across many domains—such as public finance, human rights, commerce, and pollution standards—there has been a decisive shift of authority to international courts and other kinds of supranational legal administrators.<sup>2</sup> This transformation is especially evident within the institutions that manage international economic disputes<sup>3</sup> that now routinely address topics such as food safety standards, environmental rules, taxation and other matters that intrude deeply in national political affairs.<sup>4</sup> The expansion has been so extensive that many legal scholars now see the authority of international courts as superseding the set of treaties among nations that grant them jurisdiction into more profound

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<sup>1</sup> James E. Anderson & Eric Van Wincoop, *Borders, Trade, and Welfare*, BROOKINGS TRADE FORUM, 207-243 (2001); GLOBAL PUBLIC GOODS (Inge Kaul et al. eds, 1999). This expansion has spawned legal and interdisciplinary scholarship on how networks of public officials, connected through a web of international treaties and law making institutions, have created new forms of sovereignty and order. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1998); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005); Benedict Kingsbury & Richard Stewart eds., *Symposium on Global Administrative Law*, 37 NYU J. INT'L L. & POL. (2005); Emilie Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47 (2012). Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

<sup>2</sup> Emilie M. Hafner-Burton, *International Human Rights Regimes*, ANN. REV. OF POL. SCI. (2012); CHRISTINA DAVIS, *WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO* (2012).

<sup>3</sup> Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012). Davis, *supra* note 2.

<sup>4</sup> See e.g., *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, Case No. 2009-23, Claimant's Notice of Arbitration (Perm. Ct. Arb. Sept. 23, 2009) (involving billions of dollars over an Ecuadorian court's decision for environmental damage compensation as a potential denial of fair and equitable treatment). For food safety, see *Appellate Body Reports, United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (*adopted* 23 July 2012) DSR 2012:V, 2449 (reporting a dispute before the WTO regarding the consistency of "Country-of-Origin Labeling for Foods" and international trade law).

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constitutional roles.<sup>5</sup>

The empowerment of legal institutions has raised deep puzzles for scholars in law, political science and other fields who are trying to understand how law actually works at the international level.<sup>6</sup> Particularly vexing is the role of transparency.<sup>7</sup> For some scholars, transparency is a vital ingredient in making and enforcing treaties between nations—because it helps to stabilize expectations, develop a notion of international ‘rule of law’ and lower transaction costs.<sup>8</sup> At the same time, transparency can impede the bargaining that is essential to crafting and interpreting treaties—because transparency makes tradeoffs visible to audiences such as domestic interest groups that might oppose politically inconvenient deals and commercial competitors who can obtain advantageous information.<sup>9</sup> On balance, international legal

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<sup>5</sup> Terence P. Stewart et al., *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, 8 GLOBAL TRADE & CUSTOMS J. 390 (2013). Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2014) (noting roles of ICs “include exercising constitutional, enforcement, and administrative review”). On the role of settlement in this process, see Marc L Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law*, 24 FORDHAM INT’L L.J. 158 (2001).

<sup>6</sup> Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus For International Lawyers*, 14 YALE J. INT’L L. 335 (1989). Hafner-Burton, Victor & Lupu, *supra* note 1. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012).

<sup>7</sup> See generally TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters eds., 2013); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005). For WTO, see Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO’s View of Public Goods*, 23 EUR. J. INT’L. L. 731 (2012); Ronald U. Mendoza, *The Multilateral Trade Regime: A Global Public Good for All?*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 455 (Inge Kaul et al. eds., 2003). For the effort in international investment law, see James Harrison, *Recent Developments to Promote Transparency and Public Participation*, in INVESTMENT TREATY ARBITRATION, 29 L’Observateur des Nations Unies 119, 120 (2010); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 684–85 (2007).

<sup>8</sup> Todd Sandler, *Intergenerational Public Goods: Strategies, Efficiency and Institutions*, in GLOBAL PUBLIC GOODS 20 (Inge Kaul et al. eds., 1999). ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2007); Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT’L L. 569 (2010). George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002).

<sup>9</sup> David Stasavage, *Open-door or Closed-door? Transparency in Domestic and International Bargaining*, 58 INT’L ORG. 667 (2004).



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scholars have viewed transparency as essential to building broader public debate, legitimacy and support for international rules,<sup>10</sup> and this need for transparency has increased along with the scope and ‘intrusiveness’ of international law.<sup>11</sup> Yet the richer content of public international law has created more interpretive disputes and stronger incentives for individual parties to keep inconvenient information secret. In other words, the public good of legitimacy and international order stands in sharp contrast with private incentives to avoid sunlight.

The problem of transparency is hardly a new topic in legal scholarship. It has played a central role in the study of how adjudicatory institutions function within domestic courts. This has been most famously argued by Owen Fiss in *Against Settlement*.<sup>12</sup> For three decades his argument—that settlements should be “neither encouraged nor praised” because they sacrifice the public benefits of transparent adjudication at the altar of private efficiency and conflict management—has been routinely debated, revisited, and contested.<sup>13</sup> Defenders of private settlement have pointed to

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<sup>10</sup> Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT’L ORG. 741 (2001); Martha Finnemore, *Are Legal Norms Distinctive?*, 32 NYU J. INT’L L. & POL. 699 (2000); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Law*, 54 DUKE L.J. 621 (2004).

<sup>11</sup> Jutta Brunée & Stephen J. Toope, *International Law and Constructivism: Elements of an International Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19 (2000); Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997). See Chayes & Chayes, *supra* note 1.

<sup>12</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. (1984). Fiss, of course, was not alone in claiming that alternative dispute resolution could disaggregate conflicts properly understood as collective social problems. See, e.g., Harry T. Edwards, *Commentary, Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-78 (1986); Laura Nader, *The ADR Explosion-The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269, 271 (1988). Cf. Edwards H, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668 (1985); Jerold Auerbach, *JUSTICE WITHOUT LAW?*, 138 (1983). Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HAST. L. REV. 239, 249 (1986).

<sup>13</sup> See Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005); Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 118 (2003). Timothy Terrell, *Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution*, 36 EM L. J. 541, 544 (1987); David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO L.J. 2619 (1994). James Rehnquist, *The Power That Shall be Vested in a Precedent: Stare Decisis, The*

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the large benefits of efficiency, especially for the parties who make the decision to settle, along with the fact that some welfare-improving bargains may be hard to reach in the public eye with large audience costs.<sup>14</sup> Critics warn that private settlement shields legal reasoning and substantive outcomes from public scrutiny and debate, undermines the legitimacy of legal processes, encourages corruption, and impedes the formation and correct application of precedent.<sup>15</sup>

In this Article, we suggest that the transformation in the breadth and depth of international law has created a similar tension between public benefits of a transparent legal order and the private incentives for efficiency. Yet the scholarship on transparency in the international domain has treated transparency as a free public good while largely ignoring the precise incentives and mechanisms that determine the actual flow of information.<sup>16</sup>

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*Constitution and the Supreme Court* 66 B.U. L. REV. 345 at 347 (1986). See also, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>14</sup> See, e.g., Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117 (2009).

<sup>15</sup> Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973 (2008); Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

<sup>16</sup> EUR. PARL. ASS., *Mass Communication Media and Human Rights*, 18th Sess., Rec. No. 582 (1970); EUR. PARL. ASS., *Declaration on Mass Communication Media and Human Rights*, 18th Sess., Res. No. 428 (1970); EUR. PARL. ASS., *Access by the Public to Government Records and Freedom of Information*, 24th Sess., Rec. No. 854 (1979); Council of Europe, Comm. of Ministers, *Declaration on the Freedom of Expression and Information*, Decl. 29.04.82E (Apr. 29, 1982); Council of Europe, Comm. of Ministers, *Recommendation on Access to Official Documents*, Rec(2002)2E (Feb. 21, 2002). Parliament & Council Directive 2003/4/EC, 2003 O.J. (L41) 26. *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Jun. 25, 1998), at [www.unece.org/env/pp/documents/cep43e.pdf](http://www.unece.org/env/pp/documents/cep43e.pdf). *United Nations Convention against Corruption*, art. 10, (Oct. 31, 2003), at [www.unodc.org/unodc/en/treaties/CAC/](http://www.unodc.org/unodc/en/treaties/CAC/). For investor state arbitration see, ANTONIO R. PARRA, *THE HISTORY OF ICSID* (2012). See also, *UNCITRAL Adopts Transparency Rules for Treaty-based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules*, UNIS/L/186 (2013), at [www.unis.unvienna.org/unis/pressrels/2013/unis186.html](http://www.unis.unvienna.org/unis/pressrels/2013/unis186.html). See CONG. REC. SA3430 (daily edition May 16, 2002) [hereinafter 2002 TPA] (stating as an objective that, under future trade and investment agreements, dispute settlement mechanisms shall ensure the fullest measure of transparency); Aurelia Antonietti,

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We focus on investor-state arbitration as an entry point to study this tension. This specialized form of international dispute settlement puts these pressures in particularly stark relief because it provides a formal mechanism for private firms to file claims against governments for alleged harmful expropriation, discrimination based on nationality or other unfair treatment.<sup>17</sup> Whereas most disputes that implicate public international law are initiated by nation states themselves—who often choose to avoid disputes in the first place—this formal role for firms encourages a large and rapidly growing array of disputes that require the balancing of private interests and public goods.<sup>18</sup>

Empirically, we examine the International Centre for Settlement of Investment Disputes (ICSID), the arm of the World Bank (WB) that facilitates investor-state arbitration. It accounts for the largest share of known proceedings—roughly 60%—and also has the longest history, nearing its half-centennial.<sup>19</sup> The unique dataset resulting from ICSID cases, combined with the long and active history of this international organization, offers an opportunity for systematic analysis.<sup>20</sup> ICSID's rules allow us to

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*The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV.—FOREIGN INV. L.J. 427 (2006) [hereinafter *The 2006 Amendments*]. [Pending ALBASHAR and ANIRUZZAMAN (on third party access reforms)]; Robert Z. Lawrence, *The United States and the WTO Dispute Settlement System*, CSR No. 25 (March 2007).

<sup>17</sup> Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 FORDHAM INT'L L.J. 465 (2013) (Proposing an empirical research agenda to address, among others, the value of ICSID adjudication).

<sup>18</sup> See, e.g., William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 317 (2010) (thanks to Marc L. Busch for this point.)

<sup>19</sup> 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, *Latest Development in Investor-State Dispute Settlement*, IIA ISSUES NOTE 1 (April 2012). The next largest share is for investor disputes processed under the rules of the United National Commission on International Trade Law (UNCITRAL), with about 28% market share. But UNCITRAL does not administer arbitration, it only provides rules; about half of UNCITRAL cases are actually managed under the Permanent Court of Arbitration. All other venues account for marginal shares—for example, the Stockholm Chamber of Commerce (5%) and the International Chamber of Commerce (2%). ICSID, *New Issue of the ICSID Caseload – Statistics published (Issue 2015-1)* (January 31, 2015).

<sup>20</sup> Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011). Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEORGETOWN J. INT'L L. 531 (2013); Emilie M. Hafner-Burton,

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examine not just patterns of secrecy, but also the procedural mechanism by which parties obtain secrecy—including pre-award settlement, which accounts for three-quarters of all the cases whose substantive outcomes are not transparent. The ICSID history also includes several policy reforms aimed at fostering transparency; statistically it is now possible to observe whether those reforms are actually associated with the policy goal of brighter sunlight.

We make three claims in this Article. First, by looking to the rich history of debating settlement within national legal systems we can identify four factors that explain patterns of settlement. We translate those factors into phenomena that are relevant at the international level and use them as hypotheses to see whether the same kinds of patterns long debated within national legal systems apply internationally. Using statistical models, we demonstrate that it is possible to identify historical patterns to explain why information is concealed in certain types of disputes.<sup>21</sup> This suggests that the theoretical literature about the incentives for secrecy and settlement within national legal systems is a reasonable starting point for a wave of new scholarship on the same questions' international application.

Second, based on our evidence, we argue that the reforms adopted at ICSID with the goal of fostering transparency have not been followed by a general decline in secrecy. In fact, the largest effort to produce greater transparency in the field—a set of procedural reforms adopted by ICSID in 2006—preceded a noticeable rise in the probability of secret arbitration. We suggest that the general lack of an observable impact on transparency may be rooted in the fact that reforms have never been designed to have much impact on settlement. Reformers have focused on procedural issues rather than the underlying incentives motivating the preference for secrecy, and parties have preserved many ways to keep inconvenient information away from the public eye—settlement foremost among them.<sup>22</sup>

Third, we suggest that high levels of secrecy may create a legitimacy spiral in which parties face ever-stronger incentives to keep outcomes secret.<sup>23</sup> This spiral is bad news for the legitimacy of

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Zachary Steinert-Threlkeld, & David G. Victor, *Predictability versus Flexibility: Secrecy in International Investment Arbitration*, SSRN paper (2015).

<sup>21</sup> See discussion *infra* sections IV(B) and IV(C).

<sup>22</sup> See discussion *infra* section III(B).

<sup>23</sup> See discussion *infra* sections VI(A) and VI(B).

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international investment law whose expanding scope and depth is creating stronger public needs for transparency.<sup>24</sup> Settlement occupies a pivotal role in this crisis because it is the mechanism of choice for litigants who want secret outcomes—exactly what Fiss and the rich literature that resulted warned against.<sup>25</sup> Re-wiring the incentives and procedures ‘against’ settlement could help fix the problem, but halting settlements is neither feasible nor wise since full transparency can impede some efficient outcomes.<sup>26</sup> Hence, we argue for policy reforms that lead to more discipline and disclosure in settlements.<sup>27</sup> While we have focused on the domain of investor-state arbitration, we suggest that our conclusions will become relevant in other areas as the authority of international courts keep expanding.<sup>28</sup>

Part I of the Article looks at why secrecy matters—why it is often branded as a harmful outcome of settlements in national legal systems and why similar concerns are now rising in international law. Part II looks into the literature on secrecy and settlements within national legal systems to identify the main factors that scholars think explain the penchant for secret settlements. It then suggests how those factors might apply within international legal systems, where the same tensions arise between public goods linked to transparency and private incentives for

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<sup>24</sup> See generally, Bianchi & Peters, *supra* note 7. See also, Megan Donaldson & Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 ANN. REV. L. & SOC. SCI. 119 (2013).

<sup>25</sup> George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?* 50 INT’L. ORG. 379 (1996); Lisa Martin, *Against Compliance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: SYNTHESIZING INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP 591-610 (Jeffrey L. Dunoff & Mark Pollack, eds., 2013).

<sup>26</sup> Paul H. Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977).

<sup>27</sup> Wolfgang Alschner, *Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, WORLD TRADE REVIEW, 2014.

<sup>28</sup> See e.g., Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD’s Package on Base Erosion and Profit Shifting (BEPS)*, 19 ASIL Insights 24 (2015). (suggesting that “Twenty countries (including the United States, Canada, Japan, Australia, and several European countries) declared their commitment to provide for mandatory binding arbitration in their bilateral tax treaties.”). For similar public law approaches see, Stephan Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT’L. L. 58 (2011-2012); Daniel Barstow Magraw Jr & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration* 15 ILSA J. INT’L. & COMP. L. 337 at 339 (2008-2009).

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secrecy. Part III shifts to ICSID, detailing the background and institutional procedures crucial to understanding how the incentives for secrecy and settlement are manifest within that investor-state arbitration system. Part IV introduces our dataset and offers statistical models to explore the conditions associated with secrecy and settlement. Part V complements the analysis with three case studies to further explore the incentives for secrecy and settlement and their effects within the international legal system. Before concluding, Part VI explores the relevance of this work for the workings of legal domains and proposes several reform alternatives.

## I. THE PERNICIOUS EFFECTS OF SECRECY AND SETTLEMENT

Why is secrecy a problem? An answer to that question has emerged over several decades of legal scholarship focused on the harmful impacts of settlements within the U.S. and other national legal systems.<sup>29</sup> Here we first review answers to that question from the literature and then, second, suggest the same problem is now arising within international law.

*A. Effects of Settlement: Private Gains and Public Externalities*

For the parties in a proceeding, the benefits of pre-trial settlement may be clear enough: to save themselves the costs and risks of trial and a potentially unfavorable ruling. In some contexts, settlement may also prevent permanent rupture of a relationship or help to maintain privacy.<sup>30</sup>

The private benefits from settlement can come, however, at large social costs.<sup>31</sup> In employment discrimination cases, for example, one commentator has argued that “[b]ecause of invisible settlements, no one knows—or has the capacity to determine—what really is going on with employment discrimination litigation.”<sup>32</sup> The private interests for settlement may clash with the

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<sup>29</sup> For a review of the literature, see, J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1718-25 (2012) (discussing various factors that have contributed to the decline of civil trials in the U.S., among them settlement).

<sup>30</sup> Steven Shavell, *The Fundamental Divergence Between The Private And The Social Motive To Use The Legal System*, 24 J. LEGAL STUD. 575 (1997).

<sup>31</sup> Fiss, *supra* note 12.

<sup>32</sup> See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 930 (2006) (“[I]nvisible settlements hamper lawyers’ efforts to evaluate cases, counsel clients, and negotiate effectively on clients’ behalf.”).

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public good and welfare of a fully functioning judiciary.<sup>33</sup>

Most arguments against settlement are rooted in a dichotomy familiar to legal scholars: is law simply a mechanism to help litigants efficiently manage conflicts and interpret and apply rules, or does law serve a broader objective that gives society a stake in observing and debating the outcomes of disputes.<sup>34</sup> When framed that way, legal scholarship has overwhelmingly favored a public role, especially in disputes and legal actions that implicate the authority and behavior of the state.<sup>35</sup> To be sure, settlement may also result in societal benefits, such as lower costs and efficient allocation of resources;<sup>36</sup> however, most of the probing around social impacts has been cautionary in nature.<sup>37</sup>

Three broader effects of settlement on public welfare are commonly claimed – each of which suggests that settlement should be curtailed or, at least, subjected to rigorous oversight. First, settlement could affect the ability of legal systems to develop accurate, persuasive, and coherent precedent.<sup>38</sup> Settlements, some argue, can lead both parties to accept outcomes that are not aligned with the normative foundation or the true interpretation of the law.<sup>39</sup> The lack of consistency between cases that end in settlement and those that are fully litigated harm public welfare.<sup>40</sup> Settlement, in effect, may distort precedent and weaken the utility of

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<sup>33</sup> LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002). W. KIP VISCUSI ED., REGULATION THROUGH LITIGATION (2002). For the origins of this argument, see also, Chayes, *supra* note 13. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

<sup>34</sup> Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1 (1987). But see, Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20 (1987). See also Resnik, *supra* note 13.

<sup>35</sup> Among the classical work on the private versus the social incentive to use the legal system, see even Shavell, *supra* note 30.

<sup>36</sup> For a classic study, see Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973). See also Kathryn E. Spier, *'Tied to the Mast': Most-Favored-Nation Clauses in Settlement Contracts*, 32 J. LEGAL STUD. 91 (2003) ("avoiding delayed settlement is privately and socially desirable").

<sup>37</sup> Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

<sup>38</sup> On the social value of accuracy in adjudication, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994). Fiss, *supra* note 12.

<sup>39</sup> See, e.g., Henrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327 (2006).

<sup>40</sup> Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961 (2001). See also, Shavell, *supra* note 30.

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adjudication as a regulatory tool.<sup>41</sup> And by allowing parties to shield inconvenient information from the public eye, settlement might even allow parties to manipulate precedent and the reasoning available to courts.<sup>42</sup>

Second, settlements might undermine the ability of courts to deter undesirable action such as abuse of power by public officials.<sup>43</sup> Where secret settlements are available, the application of some sanctions might go unnoticed by the broader public<sup>44</sup>—in effect, insulating public officials (or other powerful actors) against charges of corruption, collusion, misconduct, and arbitrariness.

Third, because settlements are designed to offer quiet halts to adjudication, they might impede public debate about the legitimacy and precise content of rules. At its core, this concern recognizes that a distinct function of legal proceedings is to help structure public debate about legal ideas, public norms, and societal values.<sup>45</sup> Visible legal outcomes, perhaps especially when they conflict with established social norms, can inspire public debate about needed reforms in policy—leading politicians to adopt new legislation, courts to alter their interpretation of existing statutes, or to changes in agency behavior. Settlement can have a disrupting effect on such recursive process.

All three of these concerns—on the impact of precedent, on

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<sup>41</sup> Viscusi, *supra* note 33. Extensions of this line of argument include a focus on how *repeat players*, such as powerful corporations whose sheer size assures they will have regular legal entanglements, can play for precedent by privately settling cases that might create inconvenient precedents. Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994). See also Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

<sup>42</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Fiss, *supra* note 12. For a different perspective, see A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INT'L REV. L. & ECON. 109 (1988). Kathryn E. Spier, *Settlements Bargaining and the Design of Damage Awards*, 10 J. L. ECON. & ORG. 84 (1994). Shavell, *supra* note 30. Robert Friedman, *Confusing the Means for the Ends: How a Pro-Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. PENN. L. REV. 1361 (2013).

<sup>43</sup> Luban, *supra* note 13 at 2658-59 (contending that prohibiting secrecy enables settlements "to fulfill at least some of the public values of adjudication").

<sup>44</sup> Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631f. See also, Varda Bondy & Maurice Sunkin, *Settlement in Judicial Review Proceedings* PUBLIC L. 237 (2009).

<sup>45</sup> See, e.g., Luban, *supra* note 13.



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deterrence, and on public debate—have led to many proposals for reforms, at least in the U.S. These proposals include notice and comment procedures on settlement proposals,<sup>46</sup> requirements for approval by a judge prior to settlement,<sup>47</sup> authorization by a judge prior to vacating judgments after settlement,<sup>48</sup> or even the adoption of ethical guidelines for lawyers involved in mass claim settlements.<sup>49</sup>

*B. Secrecy and Settlement in International Law*

The same dichotomy—whether legal institutions are merely a means to settle disputes or offer a larger public constitutional order—is now playing out at the international level for two reasons. One is the expanding scope and impact of international law, a trend that is evident in many areas from human rights<sup>50</sup> to foreign direct investment,<sup>51</sup> the social and economic domains of law.

Consider, for instance, the controversial proceedings recently brought by Phillip Morris (“PM”) against Uruguay and Australia challenging domestic legislation on marketing of tobacco products and imposing plain packaging requirements as an alleged expropriation of PM’s brand.<sup>52</sup> Freedom to regulate marketing, and to set health and safety standards, has long been an area of sovereign prerogative—one that these cases, and related disputes, could now constrain. Other similar proceedings rely on expansive

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<sup>46</sup> Advisory Comm. on Rules of Civil Procedure, Judicial Conference of the United States, Minutes: Civil Rules Advisory Committee 2 (2001).

<sup>47</sup> See Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 233 (2008). Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies*, FEDERAL JUDICIAL CENTER (1998).

<sup>48</sup> Resnik, *supra* note 41.

<sup>49</sup> ABA, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, (2002). The Guidelines are based on the ABA’s Model Rules of Professional Conduct.

<sup>50</sup> EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2009). EMILIE M. HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY (2013). Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593 (2005).

<sup>51</sup> Sanford E. Gaines, *Environmental Policy Implications of Investor-state Arbitration Under NAFTA Chapter 11*, 7 INT’L ENVTL AGREEMENTS 171 (2007).

<sup>52</sup> See *Philip Morris Asia v. the Commonwealth of Australia*, Philip Morris Asia Notice of Arbitration, ¶7.15–7.17 (Nov. 21, 2012). (There is pending litigation against Australian tobacco-packaging legislation mandating graphic images of the long-term effects of smoking.) For the Uruguayan case see, *Philip Morris Brand Sàrl et al vs. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2010).

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bases for adjudication—for example, the concept of “fair and equitable treatment”—in ways that impose greater discipline on previously national affairs, perhaps outside the normal realms of political accountability.<sup>53</sup>

Second is the growing importance of judges in international law performing a wide array of functions related to administrative review, and judicial lawmaking to clarify or expand substantive obligations.<sup>54</sup> This judicialization of international law resonates with what some scholars call global administrative law—a shift in the role of international legal institutions that empowers certain legal actors.<sup>55</sup> International treaties and the resulting institutions empower bureaucrats and networks of national technocracies to make decisions with reference to treaty rules and interpretations, or standard-setting bodies.<sup>56</sup> As scholars have looked at these institutions they have found a wide array of implementation review mechanisms<sup>57</sup> and compliance procedures<sup>58</sup> that encourage

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<sup>53</sup> Letter of Senator Warren to Ambassador Michael Froman, United States Trade Representative dated December 17, 2014 available <http://www.warren.senate.gov/files/documents/TPP.pdf> (criticizing ISDS as a mechanism to “challenge U.S. government policies before a panel of private attorneys that sits outside of any domestic legal system”).

<sup>54</sup> As explained by Helfer, other tasks include improving state compliance with primary legal norms; and enhancing the legitimacy of international norms and institutions. Larry Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT’L ORG. 77 (2014).

<sup>55</sup> Kingsbury & Stewart, *supra* note 1.

<sup>56</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections Upon Global Administrative Law as Small-C Global Constitutionalism*, 44 N.Y.U. J. INT’L L. & POL. 55 (2011).

<sup>57</sup> THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998). Owen Green, *The System for Implementation Review in the Ozone Regime*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 89 (David G. Victor et al. eds., 1998). David G. Victor, *‘Learning by Doing’ in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 221 (David G. Victor et al. eds., 1998).

<sup>58</sup> David G. Victor, *The Operation and Effectiveness of the Montreal Protocol’s Non-Compliance Procedure*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 137 (David G. Victor et al. eds.,

experimentation and then create governing systems through groups of experts who evaluate what works (and not).<sup>59</sup> Some argue this reflects that international law is shifting from *ex-ante* law codified in detail in treaties to *ex-post* law that relies on elaboration and interpretation by delegated bodies, including international courts and tribunals.<sup>60</sup>

With expanded legal scope and more powerful legal procedures, the transparency of how these legal institutions actually function has become more important. Scholars have long noted that transparency is essential to creating reputations that, in turn, can allow states to build credibility and accountability.<sup>61</sup> It also exerts a civilizing force on public discourse—encouraging actors to focus their arguments on public interests rather than narrower self-advantage, which in turn could lead to greater cooperation on a wide array of areas.<sup>62</sup> It facilitates deliberation that can lead to greater legitimacy and impact of legal norms.<sup>63</sup> Many scholars working at the intersection of international law and international relations see the power of international law coming from similar legitimizing, deliberative processes.<sup>64</sup>

With some notable exceptions, scholars have ignored the causes and consequences of settlements in international

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1998). UN Framework Convention on Climate Change, Art. 13; Cesare Romano, THE ILO SYSTEM OF SUPERVISION AND COMPLIANCE CONTROL: A REVIEW AND LESSONS FOR MULTILATERAL ENVIRONMENTAL AGREEMENTS (IIASA 1996).

<sup>59</sup> Gráinne De Búrca, Robert O. Keohane, & Charles F. Sabel, *Global Experimentalist Governance*, 44 BRIT. J. OF POL. SCI. 477 (2014); Charles F. Sabel & David G. Victor, *Governing Global Problems Under Uncertainty: Making Bottom-up Climate Policy Work*, CLIMATIC CHANGE 1 (2015).

<sup>60</sup> Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., *INFORMAL INTERNATIONAL LAWMAKING* (2012). See also Joost Pauwelyn, Ramses A. Wessel, & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014).

<sup>61</sup> Finnemore & Toope, *supra* note 10; For an alternative view, see Michael Gilligan, Leslie Johns, & B. Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 J. OF CONFLICT RESOLUTION 5 (2010).

<sup>62</sup> JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW*. CAMBRIDGE 411 (2010).

<sup>63</sup> Harold Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997). Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

<sup>64</sup> As Thomas Franck has argued, precision and transparency increase the legitimacy of rules and normative pull. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). Jutta Brunnée, Meinhard Doelle, & Lavanya Rajamani, *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME* (2012); Finnemore & Toope, *supra* note 10. See also Guzman, *supra* note 8.

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adjudication.<sup>65</sup> This dearth of reflection is partly the result of a vision of international law as a tool of intergovernmental diplomacy—a vision that views dispute settlement as a consensual process biased toward negotiated outcomes.<sup>66</sup> In fact, many international law scholars take the default normative position that settlements are superior forms of outputs.<sup>67</sup> By that logic, it is the amicable resolution rather than the transparency of the content that matters. Other scholars have looked to the root causes for legal outcomes, such as the role of state power, and worried less about the visibility of those outcomes.<sup>68</sup> The questions they have debated include whether powerful countries could reject outright inconvenient rulings from international courts rather than try to hide them through settlement.<sup>69</sup>

The lack of academic work on settlement reflects, as well, the longstanding practice that parties in most international disputes do not have to disclose outcomes. While international courts are often obliged to make their judgments public, the parties to an international dispute rarely have the duty to disclose settlements. Generally, international law leaves ample leeway to states not to make decisions public.<sup>70</sup> To be sure, secret treaty and diplomatic

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<sup>65</sup> Cf. Wolfgang Alschner, *Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, 13 *WORLD TRADE REVIEW* 65 (2014). Bianchi & Peters, *supra* note 7. One of the few areas where scholars have probed the incentives for secrecy and settlement is the GATT/WTO system. Busch & Reinhardt, *supra* note 5.

<sup>66</sup> In fact, when this logic was applied to fields such as investor state arbitration the incentives to allow secrecy only grew—because private parties, it was assumed, would often want to keep commercial dealings from the public eye.

<sup>67</sup> W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 *RECUEIL DES COURS* 358, 358 (1996) (questioning the social value of international adjudication).

<sup>68</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 *YALE L. J.* 273 (1997).

<sup>69</sup> See generally ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH H. H. WEILER, *THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* (1998). See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401 (2000); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557, 1558 (2003).

<sup>70</sup> In cases involving violations of international human rights court decisions have mandated the dissemination of the judgment with the hope of deterring repetition. Such disclosure obligations, as when the rights of third parties may be affected, are the exception, however. The international obligation of transparency is typically imposed on the institution (court) and not the disputants (states). *Case of Vera Vera v. Ecuador*, Judgment, Inter-American Court of HR Series C No. 226, 2011 (May 19).

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negotiations have been an area of academic preoccupation and research for years.<sup>71</sup> And, with the proliferation of international courts and tribunals, more attention has been given to access written submissions, oral proceedings, or rulings in general.<sup>72</sup>

## II. EVER SINCE FISS: EXPLAINING SECRET SETTLEMENTS

The scholarly literature since Fiss suggests that secrecy in judicial outcomes—through settlement in particular—could be deeply problematic for the legitimacy and functioning of a legal order. And the international implications of that insight are just now becoming apparent with the expanding scope of international legal standards and procedures.

Here we turn to explanations and follow the same approach—looking first at the national debate and then extensions to the international setting.

*A. Explaining Settlement: The National Legal Systems Literature*

The literature on settlement is huge. Broadly, it has focused on four factors affecting the decision to settle: (i) the rules and procedures; (ii) the asymmetries in information and bargaining power; (iii) the desire for secrecy; and (iv) the opportunity to manipulate precedent.

*i. Rules and Procedures*

Legal scholars, especially law and economics proponents, have sought to unpack the incentives that explain why parties settle cases rather than pursue litigation and a final ruling.<sup>73</sup> In recent years, the fields of economics and political science have broadened to appreciate institutional, psychological, and sociological factors that affect decision-making generally and also as it relates to

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<sup>71</sup> George Washington: Message to the House Regarding Documents to the Jay Treaty March 30, 1796 (“The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions, which may have been proposed or contemplated, would be extremely impolitic.”).

<sup>72</sup> See discussion *infra* section III(A).

<sup>73</sup> For a review of the literature, see Bruce L. Hay & Kathryn E. Spier, *Litigation and Settlement*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., Vol. 3) (1998).

litigation.<sup>74</sup>

Scholarship, mostly theoretical in nature, has focused on how different legal rules influence litigants' decisions to settle.<sup>75</sup> Empirical research has followed and tested the important insights developed by theory.<sup>76</sup> Three rules, in particular, deserve more attention: attorney's fees;<sup>77</sup> procedural rules;<sup>78</sup> and 'informal'

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<sup>74</sup> See John J. Donohue III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 202-03 (1991); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). William L. F. Felstiner, Richard Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . . .*, 15 LAW & SOC'Y REV. 631 (1980-1981). Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994). ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 158-66 (1991). Emilie M. Hafner-Burton, Brad LeVeck, David Victor & James Fowler, *A Behavioral Approach to International Cooperation*, 53 INT'L ORG. (2015).

<sup>75</sup> Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 158, 176-78 (1989).

<sup>76</sup> For a classical approach on settlement and litigation, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973). Bruce Hay, *Procedural Justice: Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997). Andrew F. Daughety & Jennifer F. Reinganum, *Economic Theories of Settlement Bargaining*, 1 ANNU. REV. LAW & SOC. SCI. 35 (2005). Kathryn E. Spier, *Litigation*, in HANDBOOK OF LAW AND ECONOMICS 259 (A. Mitchell Polinsky & Steven Shavell eds., Vol. 1) (2007)

<sup>77</sup> The most obvious impact on settlement is on transaction costs, which mount as a dispute proceeds. Attorney fees are one of those costs, and rules assigning fees can affect the incentives of parties to anticipate final judicial outcomes and work backwards to settlement. Variants on this basic theme include literatures that have looked at different fee-assignment schemes, such as those that link liability for fees to whether parties that reject settlement offers do better at trial. For classical works, see Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982). Donohue, *supra* note 74. A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519 (1998). For an excellent literature review, see Bruce Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259 (1997). Lucian Bebchuk & Howard Chang, *An Analysis of Fee-shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996).

<sup>78</sup> Within the rules governing the actual litigation, rich literatures have examined elements such as prosecutorial costs (e.g., burden of proof), information costs (e.g., time of discovery), and sequencing of proceedings (e.g., splitting liability

mechanisms prior to invoking formal court proceedings.<sup>79</sup> The strength of the legal literature in this area is that it illuminates general factors that may affect the behavior of litigants, yet as John J. Donohue points out “the factors uncovered frequently have conflicting effects . . . and are very sensitive to [context and] institutional details.”<sup>80</sup> Moreover, many of the findings of this literature tend not to be relevant when the state or government agency is a party to the process.

*ii. Asymmetric Information and Power*

Settlement may also reflect structural asymmetries among litigants. Indeed, scholars often assume that a major motivation for settlement is to extract benefits and take advantage of asymmetrical information or bargaining power.<sup>81</sup> A central finding

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and damages stages of trial). That broader literature on the economics of adjudication has included some studies that focus, in particular, on how those economics affect settlement. Many studies have also examined rules surrounding access to the legal system—such as rules on standing, forum shopping, selection of judges—as well as provisions that allow parties to exit adjudication more promptly, such as rules concerning summary judgment. *See generally* ERIC RASMUSEN, *GAMES AND INFORMATION* (1994). For discovery *see* Robert Cooter & Daniel Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 425 (1994). William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). *See especially*, Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002). (explaining the effects of the False Claims Amendments Act of 1986 changes such as jurisdictional bar, burden of proof, and other protection for witnesses changes the incentives to settle.) *See also* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073 (2002).

<sup>79</sup> Other incentives (or lack thereof) such as compulsory court-connected arbitration or mediation have been debated in legal scholarship. The design of procedures that desirably and effectively calibrate the parties’ incentives to settle will remain a topic of interest among scholars analyzing the pre-litigation steps. One insight from that literature is that prior failed efforts to resolve disputes can affect whether the parties are willing to settle once the legal machinery formally begins operation. Deborah Hensler, *Court-Ordered Arbitration: An Alternative View*, U. CHICAGO LEGAL FORUM 399, 404 (1990). JAMES KAKALIK, ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (RAND)* (1996).

<sup>80</sup> Donohue, *supra* note 74.

<sup>81</sup> John Kennan & Robert Wilson, *Bargaining With Private Information*, 31 J. ECON. LIT. 45 (1991) (“[a]ctions by the court to encourage pretrial settlements by imposing incentives, penalties, and the like are themselves (if contested) often subject to trials, hearings, and appeal to higher courts. Such actions may therefore be self-defeating, if the relevant private information is complicated.”). Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlement*

of legal scholarship is that asymmetric information in fact reduces the possibility of agreeable solutions. The intuition behind this (which has been confirmed by experimental research) is that settlement is more likely if the parties can estimate the expected outcome, making it easier to find mutually acceptable terms.<sup>82</sup>

Although thinner, there is scholarship that looks at how bargaining power affects incentives to settle.<sup>83</sup> For example, scholars have found some support for the notion that power and reputation interact. If a more powerful defendant expects to be involved in a series of similar lawsuits, s/he is more likely to settle with less powerful adversaries to prevent a long-term reputational cost.<sup>84</sup>

*iii. Avoiding the Public Eye*

For some litigants, settlement is favorable because it affords a means of keeping inconvenient outcomes private. Within national legal systems scholars have been particularly concerned about allowing that logic to play out when the matters being adjudicated are not simply contractual interpretations but are rights created by general, public law.<sup>85</sup>

Because these incentives intrinsically lead to secret outcomes, empirical research is extremely difficult to conduct. In fact, despite the preeminent role for privacy in the settlement process,

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*Bargaining: Confidentiality and Correlated Culpability*, 33 RAND J. ECON. 587 (2002). HAZEL GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (1988).

<sup>82</sup> For surveys of the literature building on this result, see Robert Cooter & Daniel Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, J. ECON. LIT. 27, 1067 (1989); Kennan & Wilson, *supra* note 81.

<sup>83</sup> For an example and discussion, see George Loewenstein, et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993). See also Galanter, *supra* note 76.

<sup>84</sup> Erichson, *supra* note 13 (discussing aggregate settlement in terms of individual consent).

<sup>85</sup> Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PENN. J. BUS. L. 685, 703 (2004) ("Judicial proceedings are open to the public and judges explain, in published opinions, the reasons for their decisions.... Arbitration proceedings, on the other hand, are confidential and arbitration rules and practices, except in grievance arbitration, do not require a publicly available opinion explaining the reason for the decision."). Nixon v. Warner Communications Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.")



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systematic scholarship on the topic is only emerging.<sup>86</sup> In the few instances where scholars have had insider, systematic access to data on settlements—and thus are able to look at the universe of privately settled cases—the results confirm many of the fears, such as special dealing, that scholars opposed to settlement have raised.<sup>87</sup>

One area that has received more systematic treatment by scholars is the practice of sealed settlement agreements,<sup>88</sup> which allows litigants, under specific conditions, to maintain secrecy on some aspects of the proceedings. Typically, the central argument for a sealed settlement rests on the value of retaining privacy for personal or confidential business information, but in well functioning national legal systems the threshold to allowing a public seal of private information is often high. Indeed, despite the salience of public seals a report on this matter argues that this practice in the U.S. is rare, and that typically the only part of the court record that is sealed is the amount of settlement.<sup>89</sup> As we will explain, however, confidential settlements are more common in international adjudication.<sup>90</sup>

*iv. Litigiousness*

Given the long history of worrying about settlement within the United States it seems logical that there would be studies that explore how settlement varies across legal systems. Oddly, very little of that literature exists and most is theoretical in nature, building on the arguments made by Fiss.<sup>91</sup>

Some of the explanation for lack of attention to settlement in

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<sup>86</sup> See Shavell, *supra* note 30. Varda Bondy & Maurice Sunkin, THE DYNAMICS OF JUDICIAL REVIEW LITIGATION: THE RESOLUTION OF PUBLIC LAW CHALLENGES BEFORE FINAL HEARING (2009). For a similar, yet more limited assessment of the question, see Bondy & Sunkin, *supra* note 44.

<sup>87</sup> Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007).

<sup>88</sup> Robert Reagan, et al., *Sealed Settlement Agreements in Federal District Court*, FEDERAL JUDICIAL CENTER (2004).

<sup>89</sup> In particular, an analysis of anonymously coded 1,170 employment discrimination cases settled before federal judges in Chicago over a six-year period shows that settled cases lead to substantial compensation and that there is no evidence that plaintiffs are filing rampant, frivolous cases. That result sharply contradicts the image of employment discrimination where many cases are frivolous and plaintiffs have little chance of success. See Kotkin, *supra* note 87.

<sup>90</sup> See *infra*, section III(B).

<sup>91</sup> See Glover *supra* note 29, at 123-8.

other legal systems may reflect a property of the U.S. legal system that comparativists have long struggled to measure: litigiousness. In a thoughtful study, Ramseyer and Rasmusen have noted that in most areas of party-initiated litigation, the U.S. is not particularly special.<sup>92</sup> Instead, American notoriety arises mainly in how judges rule in cases related to class action lawsuits and in how they apply rules about punitive damages.<sup>93</sup> Action in these areas creates an incentive for individual parties to use the legal system. More precisely, parties have those incentives whether they know it or not—their litigious lawyers have an incentive to find (or manufacture) cases in the domain of class action and where punitive damages may be obtainable. And because the stakes are particularly high in these cases—for claimants and respondents—so may be the incentives to settle on terms that the individual parties find agreeable while hiding as much of that information from the broader public as possible.

#### *B. Toward Explaining Settlements in International Adjudication*

These four factors give us a place to start when contemplating theories of international settlement in adjudication. In Table 1 we suggest that these factors reflect two dimensions. One dimension is whether the factor is a function of the environment in which parties operate or the preferences of individual parties. Environmental factors include the rules that govern settlements generally or fundamental asymmetries in information and power. By contrast, individual preferences can include the desire to avoid the public eye in a particular case—because sunlight might reveal information that helps competitors or hurts reputations. We see these as ideal types that, in real world cases, could be reflected in multiple ways. Litigiousness, for example, could be an attribute of a whole society or a particular class of cases or individual litigants.

The other dimension is the extent to which these factors can be manipulated with policy. Some factors are very hard to change even for determined governments—asymmetries in power, for

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<sup>92</sup> See table 1 in J. Mark Ramseyer & Eric B. Rasmusen, *Are Americans More Litigious? Some Quantitative Evidence*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* 69 (2013).

<sup>93</sup> DEBORAH HENSLER, ET. AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN*, Santa Monica, CA: RAND, (2000). DEBORAH HENSLER, CHRISTOPHER HODGES & MAGDALENA TULIBACKA, *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* (forthcoming 2016).

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example, are not readily erased although policy can have an impact on the extent to which the powerful have preferential access to information. Much of the policy reform effort has focused on formal rules—such as rules on the standards for allowing sealed settlements. Policy might also affect the private incentives for secrecy—reforms in liability rules, for example, are designed in part to manipulate the private incentive for litigiousness.

	<b>Environmental Conditions</b>	<b>Individual Preferences</b>
<b>Easy to Affect with Policy</b>	Rules for disclosure	Litigiousness
<b>Hard to Affect with Policy</b>	Asymmetries of information & power	Avoidance of the public eye

**Table 1:** Factors That Explain Settlement

This matrix offers a starting point for examining the factors that might explain secrecy and settlement at the international level. Doing that requires attention to the many differences between national and international proceedings, such as the role of precedent. The desire to shape precedent may give parties in national legal proceedings strong incentives to manipulate the information that formally enters the legal record. In most international legal cases—including investor-state proceedings that are the subject of this paper—the handling of individual disputes does not formally create precedent. Yet such differences are easy to overstate—and where precedent may not formally exist, prior international decisions are nonetheless extremely important because they can coalesce into a “*jurisprudence constant*” that guides adjudicative bodies to resolve similar cases in similar ways.<sup>94</sup>

<sup>94</sup> Laurence Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464, 471 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2014). United States—Final Anti-Dumping Measures on Stainless Steel from Mexico [2008] WT/DS344/ AB/R [160] (Anti-

## III. INTERNATIONAL ADJUDICATION: THE CASE OF ICSID

In this section, we explain the basics of ICSID and investor-state arbitration. That creates the foundation for exploring how ICSID has balanced the private incentives that often favor settlement and secrecy against the larger public benefits of transparency.

## A. ICSID and Investor-State Arbitration

ICSID is one of the five organizations of the WB and is the result the ICSID Convention of 1965.<sup>95</sup> ICSID was designed to facilitate the resolution of disputes between States and foreign investors and is considered “a major step toward . . . stimulating a larger flow of private international capital.”<sup>96</sup>

The ICSID Convention establishes a secretariat and contemplates the creation of uniform procedural rules for arbitration and a methodology for appointing arbitrators. ICSID tribunals adjudicate a wide range of disputes arising out of cross-border investments, many of which are energy-related disputes, often ranging in the billions of dollars.<sup>97</sup> ICSID’s secretariat provides administrative support for such disputes originating mostly under a network of international investment treaties

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Dumping Measures). The WTO’s Appellate Body has been bolder in stating that “the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. See US—Tax Treatment for Foreign Sales Corporations, WT/DSB/M/149 ¶ 20 (July 8, 2003).

<sup>95</sup> *Convention for the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (‘ICSID Convention’). The five organizations of the WB group are: IFC, MIGA, IBRD, IDA and ICSID.

<sup>96</sup> REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, Sec. III, ¶ 9, IBRD, (Mar. 18, 1965), [hereinafter REPORT OF THE EXECUTIVE DIRECTORS]. ICSID was given a simple organizational structure consisting of an Administrative Council and a Secretariat. The Administrative Council is comprised by one representative of each Contracting State and is chaired by the President to the World Bank. The Secretariat, consisting of limited number of staff and responsible for ICSID’s day-to-day work, is headed by a Secretary-General a position that until very recently was held by the General Counsel of the Bank. The Secretary-General acts as registrar and provides information, albeit limited, on all proceedings registered before the institution.

<sup>97</sup> See e.g., *Ecuador Must Pay \$1.76 billion US to Occidental for Expropriation of Oil Investment*, IAREporter, (Oct. 5, 2012), [www.iareporter.com](http://www.iareporter.com)

("BITs") and investment chapters of regional trade agreements (e.g., NAFTA or DR-CAFTA), but also international investment contracts and foreign investment laws.<sup>98</sup>

To be sure, ICSID is an arbitration facility and is not properly an international court. The ICSID Convention offers a standing facility to resolve disputes for qualifying investors of State members who enjoy a private right of action under an investment instrument. Such investors can trigger a process if their investments are affected by a harmful, unfair, discriminatory or expropriatory conducts by a host State member of ICSID.<sup>99</sup>

Established in 1967, the institution struggled to build a caseload. The first dispute submitted to ICSID was registered in 1972.<sup>100</sup> In 1978, with only five cases in its docket all related to investment contracts,<sup>101</sup> the institution created the Additional Facility system in an effort to increase its caseload.<sup>102</sup>

While in the 80's the expansion was modest, in the 90's, the Soviet collapse and the rapid proliferation of BITs and free trade agreements that often provide for consent to arbitration by the

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<sup>98</sup> Antonio Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REVIEW - FOR. INV. L.J. 55 (2007).

<sup>99</sup> Puig *supra* note 17.

<sup>100</sup> Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 127-28 (1980) (discussing *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1); *See also* ICSID, ANNUAL REPORTS (1972).

<sup>101</sup> In addition to *Holiday Inns*, disputes included: *Adriano Gardella S.p.A. v. Côte d'Ivoire* (ICSID Case No. ARB/74/1), Award, 29 August 1977, 1 ICSID REP. 283 (1993); *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2 (July 26, 1975), excerpted in 4 YEARBOOK COMMERCIAL ARBITRATION 206, 206-08 (1979); *Kaiser Bauxite Co. v. Jamaica*, ICSID Case No. 74/3, Decision on Jurisdiction of 6 July 1975, 1 ICSID REP. 296, 303 (1999); *Reynolds Jamaica Mines and Reynolds Metals Company v. Jamaica*, Cases ARB/74/2, 3 & 4. *See also* ICSID, NEWS FROM ICSID 13-14 (Summer 1984).

<sup>102</sup> These rules created a mechanism to secure recourse to ICSID for those cases where only one of the States involved in the dispute is a party to the Convention, expanding the number of possible ICSID-based disputes. Although the Additional Facility arbitrations would not result in awards that benefit from the self-contained and delocalized enforcement scheme that shelters ICSID awards from the scrutiny of national courts (two fundamental features of ICSID), the cases could nevertheless benefit from nearly identical Arbitration Rules at ICSID and the administrative support and processes offered by ICSID. ICSID, *ICSID Additional Facility Rules*, ICSID Doc. ICSID/11 (Apr. 2006) [hereinafter *ICSID Additional Facility Rules*]; Aron Broches, *The 'Additional Facility' of the International Centre for Settlement of Investment Disputes (ICSID)*, 4 YEARBOOK COMMERCIAL ARBITRATION 373 (1979).

parties brought relevance to ICSID.<sup>103</sup> This was an era when market-oriented economic organization, based on the assumption of efficiency in private enterprise, triumphed over alternative forms of economic organization; it led many developing countries to embrace BITs as a way to signal that market-oriented reforms were credible. ICSID was widely seen as the linchpin to that credibility as transnational corporations perceived arbitration as less biased against them compared to national courts. Investors, reassured by the credibility and enforceability of this international mechanism, would invest.<sup>104</sup> However, the practical utility of BITs plus ICSID clauses to stimulate the flux of foreign investment continues to be fiercely debated.<sup>105</sup>

Today, there are about 201 cases ongoing, with about 327 more concluded.<sup>106</sup> Almost all cases in the last two decades have relied on treaties and around one-third involved Latin American countries. This trend was propelled after aggravated investors moved to seek reparation for the measures taken by Argentina following the 2001 political and economic crisis.<sup>107</sup> The growth in the number of cases has supported ICSID's claims of the success of the institution and legitimacy of its arbitration process.<sup>108</sup> It has also exposed some problems with the institutional framework, including, as we now discuss, its transparency policies.<sup>109</sup>

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<sup>103</sup> NEWS FROM ICSID 6 (Summer 1993) (e.g., announcing that with Russia and other former Soviet States there were 118 signatories of the Convention).

<sup>104</sup> Kenneth J. Vandavelde, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010). Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567 (2005). Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 *INT'L ORG.* 401 (2011). Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*. 51 *VA. J. INT'L L.* 397 (2010). Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*. 25 *INT'L. REV. L. & ECON.* 107 (2005).

<sup>105</sup> For a summary of the multiple articles on this issue, see Christian Bellak, *How Bilateral Investment Treaties Impact on Foreign Direct Investment: A Meta-analysis of Public Policy*, Prepared for 2013 MAER Network Colloquium (2013), [www2.gre.ac.uk/](http://www2.gre.ac.uk/).

<sup>106</sup> See ICSID, *THE ICSID CASELOAD-STATISTICS*, Issue 2014-2 (2014).

<sup>107</sup> See ICSID, *THE ICSID CASELOAD-STATISTICS*, Issue 2011-2 (2011).

<sup>108</sup> See ICSID, *ANNUAL REPORT* (2011).

<sup>109</sup> William W. Park, *Arbitrator Integrity*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 189, 191 (Michael Waibel et al., ed., 2010).

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*B. ICSID and Transparency**i. Between Private and Public Domains*

ICSID and investor-state arbitration navigate the contours of private and public law, contractual and general rights and obligations, individual and State participation, and national and international law. This 'hybrid' environment has propelled useful adaptations to respond to concerns from government, civil society, and scholars. Chief of these concerns has been transparency, notably when disputes involve challenges to public law and policy such as taxation, environmental, health and social regulation.

Change has not come easy, in part, because the foundation of ICSID included a strong presumption against the disclosure of decisions, which "shall not be published without the consent of the parties." Such presumption against the disclosure of decisions reflects—perhaps—the concerns of designers to avoid creating a strong informal rule of legal precedent because proceedings are invoked almost always by private parties.

The main legal consequence of such presumption is that unless the instrument establishing jurisdiction to the Centre (*e.g.*, BITs) provides otherwise, the parties to the dispute control the access to most of the information about proceedings. Within those constraints, the Parties to ICSID have periodically modified the institution's rules and regulations (but not the ICSID Convention), and ICSID itself has also modified its general practice.<sup>110</sup>

*ii. A History of Limited Transparency*

ICSID, perhaps because it is part of the World Bank, has been under constant pressure to disclose information on its operations.<sup>111</sup> The organization's leadership has responded to these pressures with a series of reforms that began in the 1980s and continue to the present day. For instance, in 1984 then-Secretary-General Shihata ordered the first extensive revision of the ICSID rules and regulations—yielding modest changes in the access to documents and record keeping formats. More significantly, Shihata commissioned studies of ICSID jurisprudence for the purpose of

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<sup>110</sup> Any amendment to the ICSID Convention requires the ratification, acceptance or approval by all contracting States. The modification of ICSID Rules and Regulations instead only approval by 2/3 of Administrative Council.

<sup>111</sup> Parra, *supra* note 16, 138-141, 323.

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verifying its consistency as yet another “confidence-building measure.”<sup>112</sup> Chief among the efforts was the decision to open the archives to select scholars, leading notably to a 2001 book that was the first comprehensive scholarly account of how ICSID actually operates.<sup>113</sup>

A surge in the late-1990’s of cases relying on treaties (as opposed to contracts<sup>114</sup>) and in sectors such as communication, water and sanitation, and transportation created a challenging wave of criticisms against the organization. Once shielded from mainstream politics, ICSID (and BIT-based dispute settlement more generally) became an important part of the focus of civil society organizations and NGOs due to the high profile of some disputes, primarily under NAFTA.<sup>115</sup> Such cases included claims by investors seeking compensation for the Canadian government’s ban on the import and inter-provincial transportation of the fuel additive MMT (Ethyl),<sup>116</sup> Mexico’s denial of a permit to construct a facility for the disposal of hazardous waste (Metalclad),<sup>117</sup> or alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE for environmental reasons

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<sup>112</sup> ICSID, ANNUAL REPORT 4 (1984) (“I believe that it would be proper for the Secretariat to prepare a digest of the legal principles applied by ICSID tribunals insofar as these principles relate to the interpretation and the implementation of the ICSID Convention. This can be done in abstract fashion, without comments or disclosure of any factual information. I believe that such a careful publication will help the general development of the law applicable to investment disputes and as such will serve an important public purpose.”).

<sup>113</sup> See CHRISTOPHER SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001) [hereinafter Schreuer I].

<sup>114</sup> During the first 25 years, with the exception of three cases, all the disputes before ICSID originated in international investment contracts (mining, oil, and other similar concessions). The exception cases are *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* 30 I.L.M. 577 (1992). *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 8 ICSID REV. FOREIGN INV. L. J. 328 (1993). *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID REPORTS 162.

<sup>115</sup> ICSID, ANNUAL REPORT 5 (2000).

<sup>116</sup> *Ethyl Corp. v. Canada*, UNCITRAL (NAFTA) was settled for \$13 million after an Award on Jurisdiction was issued on June 24, 1998, and after a domestic panel found Canada in breach of the inter-provincial Agreement on Internal Trade. See Industry Minister John Manley & Environment Minister Christine Stewart of Canada, Joint Press Release (20 July 1998).

<sup>117</sup> *Metalclad Corp. v. Mexico*, ICSID Case. No. ARB/97/1, Award (Aug. 30, 2000), reprinted in 40 I.L.M. 36, 48-49 (2001) [hereinafter *Metalclad*] (finding a denial of a construction permit for a hazardous waste landfill on the basis of environmental concerns to be a breach of NAFTA provisions).



(Methanex).<sup>118</sup> Metalclad, in particular, fanned fears that investor-state arbitration was insensitive to the public interest while supplanting national prerogatives on important topics, such as environmental policy; it contributed to a backlash against international institutions.<sup>119</sup> Numerous NGOs argued that investor-state arbitration represented the bankruptcy of public policy and a form of undemocratic international law-making,<sup>120</sup> a point echoed with prominent news accounts leading to calls for more oversight and transparency.<sup>121</sup> Adding insult to injury, then-General Counsel of the WB Ko-Yung Tung was quoted suggesting that transparency in the proceedings was less important than “increased foreign investment [and] protecting investors.”<sup>122</sup>

At the same time, a broader movement inside multilateral development organizations was also pushing for transparency. While it is hard to date when this movement exactly took off, the inflection point led to several reforms to the practice of NAFTA investor-state arbitration between 2001 and 2003. These reforms informed the 2006 amendments to ICSID’s rules and procedures which included provisions allowing non-disputing parties to attend oral hearings if the disputing parties do not object, the prompt publication of excerpts of legal reasoning in non-public awards as well as other provisions to make decisions more accessible.<sup>123</sup> Those reforms, however, did not modify in any way

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<sup>118</sup> Methanex Corp. v. United States, UN Doc A/31/98, Final Award (Aug. 3, 2005) (describing wherein a \$1 billion claim was made by a Canadian investor for alleged injuries resulting from a California ban on the use or sale of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE).

<sup>119</sup> See JANET THOMAS, *THE BATTLE IN SEATTLE: THE STORY BEHIND AND BEYOND THE WTO DEMONSTRATIONS* (2000). See also Antonio Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, NEWS FROM ICSID 10 (Fall 2000) (referring to concerns of “entrusting [the application of treaty standards] to investor-to-state arbitration” by NGOs).

<sup>120</sup> Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (2001) at [www.citizen.org/documents/ACF186.PDF](http://www.citizen.org/documents/ACF186.PDF); HOWARD MANN, *PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS* (2001). See also Vicki Been, *Does an International ‘Regulatory Takings’ Doctrine Make Sense?* 11 N.Y.U. ENVTL. L.J. 49 (2002).

<sup>121</sup> Anthony De Palma, *NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, N.Y. TIMES (Mar. 11, 2001) at 1.

<sup>122</sup> *Id.*

<sup>123</sup> Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REVIEW 449 (2006). While the publication of excerpts helps to provide some additional information about cases, it nonetheless makes it impossible to figure out reliably important information such as the exact

the ability of parties to stop disputes with settlements nor the ability to easily keep those settlements, even if they embodied large amounts of information and effort from arbitral proceedings, from being kept secret.

#### IV. SECRECY AND SETTLEMENT AT ICSID: STATISTICAL EVIDENCE

In this Part, we introduce our dataset of all cases filed and concluded before ICSID until April 20, 2012.<sup>124</sup> Our focus (the unit of analysis) is the claimant-case.<sup>125</sup> Our first dependent variable, *Secret*, describes whether the full final outcome of a concluded case was formally disclosed with the consent of the parties (0) or concealed (1). Our second dependent variable, *Settlement*, describes whether the case was concluded by settlement (1) or by a formal decision or award (0).

We use these variables to analyze long-term patterns of secrecy and make two main points. First, we observe that recent efforts, including with policy reforms at ICSID, to create a norm of transparency are not associated with a noticeable reduction in the overall probability of secrecy over time. Second, we evaluate the four factors that the literature on national settlements and secrecy have identified as important—and we show that some of the same factors that explain secrecy more broadly can also explain settlement.

##### A. Historical Patterns of Secrecy

Our first observation and the impetus for writing this article is a counterintuitive finding: while the pressure for transparency is higher than ever before, a large fraction of the awards (about 40%) are still kept formally secret. Figure 1 illustrates the historical patterns to secrecy as they have developed over time.<sup>126</sup> As ICSID has concluded a growing number of cases over the years, secrecy

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legal reasoning used by a panel that could be crucial to establishing precedents as well as how arbitral panels weigh competing claims. For purpose of this study, we define a transparent outcome as one in which essentially the full text—the outcome and the legal reasoning—of the award are published.

<sup>124</sup> For full details of the dataset and coding, see Emilie M. Hafner-Burton, Zachary Steinert-Threlkeld, & David G. Victor *supra* note 20 and Annex 1.

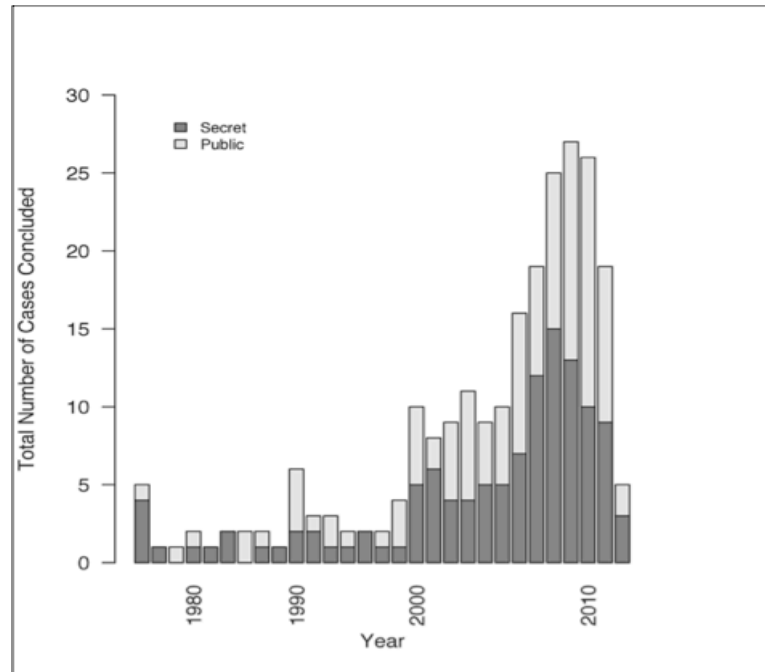
<sup>125</sup> Approximately one-third of the observations in our data involve multiple claimants.

<sup>126</sup> The figure includes a handful of the first cases concluded in 2012. Thus, the last is not representative of the full roster of cases in that year.

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too has risen.



**Figure 1:** Historical Patterns of Secrecy at ICSID, 1975-2012

Under ICSID arbitration proceedings, secrecy can be obtained in two fashions. First, if a tribunal is allowed to proceed fully to the issuance of an arbitral award, one of the parties to the dispute may decide to withhold consent for publication. Unless the instrument that grants jurisdiction to ICSID speaks to this matter,<sup>127</sup> the parties have the discretion to determine whether to disclose rulings—a choice typically made at the first meeting with the tribunal.<sup>128</sup>

<sup>127</sup> See Rule 13. Most litigation under ICSID so far has not fallen under such instruments since national-level policy reforms aimed at transparency in international arbitration are a relatively recent practice. In our dataset, only 35 ICSID cases emanating from treaties requiring the public disclosure of the award have resulted in awards, most of them under NAFTA.

<sup>128</sup> If the parties do not agree at that point, they can always agree to make the award public at any point of the dispute, or even after the arbitration has been concluded and all remedies exhausted (revision (Article 51), annulment (Article 52) or supplement its award (Article 49(2))) or even years after the decision was issued by the tribunal. However, this is not typically the case since a party, often the losing party, can veto such release with complete knowledge of an adverse outcome. We can also imagine a scenario where the contract giving ICSID

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About 25% of secret cases in our dataset are concealed through this fashion.

The second, and much more common, way to secrecy is to terminate a case prior to a final decision by the tribunal. As a procedural matter, this is what we code as *Settlement* and can arise in three distinct ways: first, the parties agree to an actual resolution of the dispute; second, the parties agree to discontinue the proceeding without a formal settlement; and, third, one party to the dispute requests that the case be discontinued and there is no objection from the other party.<sup>129</sup> Additionally, a case may be discontinued if a party to the dispute fails to take any steps in the proceeding for six consecutive months, for instance, if it stops paying the fees to carry out the proceedings.<sup>130</sup>

Most *Settlements* in our dataset are of the first two types—both of which are handled under ICSID Arbitration Rule 43.<sup>131</sup> Two distinctions are important. First, the parties can agree to discontinue a proceeding without formally resolving a dispute. In fact in at least two cases in our dataset the parties agreed to discontinue the proceeding and continue the dispute under a different set of arbitration rules and institutional support.<sup>132</sup> Other rules and institutions are often less accommodating to transparency concerns, but we assumed—unless we found evidence to the contrary—that the cases discontinued were actually settled and did not proceed under different rules.

Second, not all settlements under Rule 43 are completely private. In fact, the parties to a proceeding can agree to embody a

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jurisdiction includes a confidentiality clause that limits the release of the award. However this is not widespread practice.

<sup>129</sup> The second and third ways may not be settlements in the strict sense but rather the case is settled where the defendant agrees to some or all of the claimant's claims in exchange for termination of the proceedings. We group these methods, though, because they are all ways that parties agree not to fight the matter in "court" (Arbitration Rules 43-45).

<sup>130</sup> We excluded this small proportion of cases from the analysis because the ultimate fate of these cases is very hard to track, and the portion of the total caseload that meets this fate is extremely small. Such cases may reflect many factors, such as underlying financial problems with the claimant. Only 16 cases have been discontinued on this basis, most of them for failure to pay the arbitration fees. In such case, a discontinuance is pursued under Article 14(3)(d).

<sup>131</sup> ICSID, ICSID CONVENTION, REGULATION AND RULES (2006).

<sup>132</sup> *Cargill v. Poland (US-Poland BIT (UNCITRAL))*, Award (Feb. 29, 2008); *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia*, No. 08 Civ. 4247, 2008 WL 2940583 (S.D.N.Y. July 30, 2008).

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settlement in an award and decide to make some or all of that information public; only two of such settlements in our data are not concealed (only one as an excerpt).<sup>133</sup>

In the third type of settlement, handled under ICSID Arbitration Rule 44, a party may request the discontinuance and, where there is no objection, discontinuance is granted.<sup>134</sup> Approximately 15% of settled ICSID proceedings in our dataset have been terminated this way. In our statistical models, which we introduce below, we also identify this type of discontinuance as *Settlement* because we simply consider it a different way of achieving settlement-like outcomes.<sup>135</sup> In our analysis, however, we take care to ensure that our findings are not the result of a rather broad definition of settlement.<sup>136</sup>

Figure 2 illustrates the historical patterns of settlement over time. It shows the number of secret cases terminated each year through settlement and those concluded by parties that refused to allow ICSID to publish the final arbitral award. It also shows that settlements have been commonly made since the early days of arbitration.

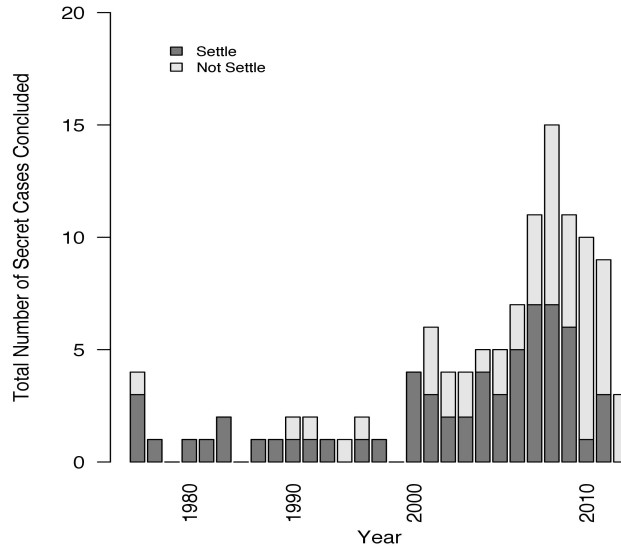
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<sup>133</sup> For practical purposes, a settlement embodied in an award gives the parties assurances that the settlement reflected would be treated as binding and hence oblige the local courts to recognize the award.

<sup>134</sup> ICSID, *supra* note 131.

<sup>135</sup> The existence of a settlement is easy to observe even if its contents are not publicly known because ICSID records the discontinuance under Rule 43.

<sup>136</sup> The difference between Rules 43 and 44 is that Rule 44 is based on the actions of a single party and in some cases has been used to shift a case from ICSID to other forums. Rule 43, by contrast, is more closely related to the classic legal notion of a mutually negotiated termination.



**Figure 2:** Settlements at ICSID, 1975-2012

### *B. Statistical Models: Explaining Secrecy and Settlement*

The literature from domestic legal systems suggests specific factors involved in settlements. Here we work through all four factors (rules, asymmetries, avoiding the public eye, and litigiousness), arraying them as a contest between public incentives for transparency and private incentives for secrecy.

In assessing our argument, we must account for the fact that not all settlements are kept secret and not all secret outcomes are settlements. Because the decision to maintain secrecy usually precedes the choice of the exact mechanism for secrecy, we first evaluate which factors explain secrecy by estimating the following *logit* model:

#### Equation 1

$$Pr(\text{Secret}=1) = f(\beta_0 + \beta_1 \text{Reform} + \beta_2 \text{AdditionalFacility} + \beta_3 \text{BriberyConventionCR} + \beta_4 \text{DemocracyR} + \beta_5 \text{GDPCR} + \beta_6 \text{InwardFDIR} + \beta_7 \text{LongLived} + \beta_8 \text{LossesR} + \beta_9 \text{PublicCasesR} + \beta_{10} \text{LitigiousC} + \epsilon)^{137}$$

<sup>137</sup> Subscript C refers to the claimant's home government, while subscript R refers to the respondent government.

*i. Rules and Procedures*

Here, we assess how the rules and procedures could affect both secrecy and the specific choice of settlement. While ICSID rules allow secrecy, a growing number of treaty rules require the disclosure of awards. Thus, one should expect that when the underlying instruments that serve as the basis for the arbitration require disclosure—as, for example, the treaty based on the Model U.S. BIT or Canada’s Foreign Investment Promotion and Protection Agreement—then secrecy should not be the outcome.<sup>138</sup> We therefore identify, and exclude from our analysis, all cases where the agreement used as the basis for arbitration requires disclosure.

Procedural rules can also affect transparency because they affect how arbitral outcomes are enforced. One of the strengths of the ICSID Convention cases is that its awards are automatically enforceable and insulated from scrutiny by domestic courts. Claimants can obtain compensation directly from the respondent State while both sides, if they so choose, can still keep the award secret. However, when one country is not a member of the Convention then ICSID’s Additional Facility (AF) rules can be used to conduct the proceedings. A central difference between the AF Rules and ICSID’s Convention cases is that AF awards are not automatically enforceable. Instead, they are often referred to domestic courts for additional scrutiny and ultimate enforcement.<sup>139</sup> Knowing this, we estimate, litigants will more often agree to public disclosure because national courts may require a definitive, public ruling before the award is enforced. Thus, we also identify *AFProceeding* (as a binary variable) proceedings—which account for about 10% of all cases—and expect that these proceedings will create an incentive for parties to

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<sup>138</sup> See, e.g., 2012 U.S. Model Bilateral Investment Treaty arts. 19, 29, (2012), <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter 2012 U.S. Model BIT]; Canada Model Agreement for the Promotion and Protection of Investments arts. 38, 49, (2004), <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [hereinafter 2004 Canadian Model BIT];

<sup>139</sup> To ensure the enforceability of the awards, Article 19 of the AF Rules mandates all proceedings to be held in a party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL at [www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf). Such provisions require, among others, the party applying for recognition and enforcement to supply “[t]he duly authenticated original award or a duly certified copy thereof.”

disclose awards.

In order to determine whether secret arbitration declined after the reforms in ICSID rules and practices began to take effect, we code *Reform* as the number of years from the year 2001. This measure is at best an approximation because we have no way to directly measure transparency related reform other than to differentiate between pre- and post-reform periods. Although ICSID's own efforts began in the 1980s, the most substantive reforms pivot roughly around the year 2001 (when NAFTA introduced the transparency requirements) and gain prominence over time, such as with the 2006 formal reforms to ICSID rules. They include efforts to disseminate information more widely through newsletters, the ICSID website, and specialized publications, as well as greater access for third parties.

Rules and procedures within countries might also explain why some parties can readily keep information secret. 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 measure the respondent's level of *Democracy*.<sup>140</sup>

#### *ii. Asymmetric Information and Power*

To account for the often-substantial power imbalances between respondent or host and claimant's states, we measure the *log* of both States' GDP per capita as well as the respondent's inward FDI as a proportion of GDP.<sup>141</sup> These are imperfect measures, to be sure, but they are a first place to begin exploring whether the logic of asymmetries that figures prominently in the domestic literature also applies to international arbitration and settlement.

Low income could correspond with immature public institutions and a large role for the state in the economy—all of

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<sup>140</sup> Our measure of democracy is a 21-point scale collected by: Center for Systemic Peace, *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2013*, [www.systemicpeace.org/polity/polity4.htm](http://www.systemicpeace.org/polity/polity4.htm).

<sup>141</sup> Our measures of GDP and FDI come from the World Bank, *World Development Indicators*, <http://data.worldbank.org/data-catalog/world-development-indicators>.



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.

*iii. Privacy and Desire to Avoid the Public Eye*

There are many reasons why parties to arbitration might want to keep as many of the details of their cases away from broader public view. Here we explore three main reasons why claimants or respondents (or both) might want to avoid the public eye.

First, a central factor in public disclosure of outcomes, we suggest, is the type of investment at stake. As we elaborate below, the type of investment may reflect the asymmetries and changes in bargaining power between the state and the investor in particular industries.

We estimate that incentives for secrecy tend to be stronger for parties in disputes over investments that have long time horizons or industries that are highly sensitive to changes in local regulation and taxation. These types of investments involve long-term management and relationships that are necessary for investor and host country, alike, to sustain. The deal making needed to sustain such investments is often “messy” and involves bargains and concessions, such as changes in tariffs or tax laws or payments to investors that parties would like to keep private. If visible to domestic audiences, such deals would be costly to sustain. However, litigation is a method for clarifying the exact letter of the law (treaties, legislation or contracts) and its consequences. Under that shadow of the law, marked by uncertainty in legal interpretation because there is no formal *stare decisis* and many past arbitral outcomes are shrouded in secrecy, a claimant that has committed resources to an investment that has gone sour has to decide whether to rescue the project or walk away.

This choice—negotiation or exit—will depend in part on the expected lifetime of the project and the incentives for both sides to accommodate the needs of the other. 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 heavily regulated, highly visible, and often hotly contested.

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These costs can deter the parties from making awards (or even the proceedings) transparent. Indeed, one of the seminal insights into the challenges of foreigners investing abroad is Raymond Vernon's idea that capital-intensive investments are under a constant *shadow of obsolescence*.<sup>142</sup> Hardware bolted to the ground is ripe for expropriation, and one of the central functions of investments backed by independent adjudication is to temper the host country's incentive to expropriate.<sup>143</sup>

We cannot directly measure the intended or actual lifespan of an investment under dispute. Thus, to evaluate this claim, we identified disputes pertaining to *LongLived* investments, such as electricity and electric infrastructure, hydrocarbon supply and infrastructure, mining, ports and airports and roads, railroads and transport infrastructure and distinguished them from all other investments.<sup>144</sup>

A second factor, we suggest, is reputational. For several decades, political scientists have sought to explain how bargaining within international institutions is affected by incentives at the national level. Central to that work has been the idea that "games" at the international level are often played with an eye to how information revealed or hidden has impacts (costs) for important domestic audiences.<sup>145</sup> Equally central is the role of reputation.

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<sup>142</sup> RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF US ENTERPRISES* (1971); Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 NYU J. INT'L L. & POL. 121 (2006).

<sup>143</sup> W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV.-FOR. INV. L.J. 185, 185-92 (2009) ("A common feature of foreign direct investment is that the investor has sunk substantial capital in the host [s]tate, and cannot withdraw it or simply suspend delivery and write off a small loss as might a trader in a long-term trading relationship.").

<sup>144</sup> For each case, ICSID provides summary information including subject matter. We coded *LongLived* from ICSID's identified subject matter. Approximately 50% of disputes in our study involve long-lived investments. For further information, see Hafner-Burton, Steinert-Threlkeld, & Victor, *supra* note 20.

<sup>145</sup> Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); PETER B. EVANS, HAROLD K. JACOBSON, & ROBERT D. PUTNAM EDs., *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (1993); ROBERT O. KEOHANE & HELEN V. MILNER EDs., *INTERNATIONALIZATION AND DOMESTIC POLITICS* (1996); HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997). For a review see Emilie Hafner-Burton, David Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47 (2012).

That's because most international institutions have minimal capacity to muster direct benefits and costs. Instead, these relatively "weak" systems of governance work by creating credible expectations about how nations will behave. Since the institution itself cannot police those expectations aggressively, the participants in these systems shape expectations through reputation.

Reputational concerns translate in different ways in investor-state arbitration. For instance, predictions of victory are shrouded in uncertainty since investor-state arbitration is a complicated process; legal standards are still unfolding; tribunals are convened one-off for each case; and many prior awards are not published, which can make it particularly difficult to know how any new case would be decided. However, respondents can lift the fog, a bit, by looking to their own 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. Hence, 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 that the system is stacked against them.

To assess the role of secrecy and reputation, we evaluated whether respondents with a history of losing are more likely to shroud arbitration in secrecy. To do so, we identified the *Losses* for all of a respondent's previous public cases. Some countries—notably Argentina and Egypt—have gone into arbitration with a history of many public losses. To identify these losses, we read the text of each case and observed the votes of each arbitrator. We code a respondent as having lost if two or more arbitrators reject the state's main arguments. The wording of arbitration awards is quite clear on which party's claims it upholds. If a case is dismissed on jurisdiction grounds, the respondent has 'won.'<sup>146</sup>

To isolate the effect of past losses from the effect of public ICSID experience more generally, we also take into consideration the respondent's total previous number of *Public Cases*. This allows us to distinguish statistically between respondents that have never lost a previous case.

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<sup>146</sup> In our data, about one-third of all states targeted by investors had previously (and publicly) lost one or more cases.

Third is corruption. The risk of revealing information about corruption during an ICSID case could be a powerful incentive for one or more of the parties to keep the proceedings secret that outweighs other benefits of transparency, such as earning a reputation for compliance with investment laws. While the need to account for corruption is clear, actually doing that is very difficult. Standard corruption indexes do not have the time coverage or the focus on corruption related to foreign investment that would be needed for this purpose.

Here, our approach is to identify whether either the respondent (*Bribery<sub>R</sub>*) or the claimant's (*Bribery<sub>C</sub>*) home governments had ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions at the time the dispute was registered at ICSID. The Convention does not set detailed standards for anti-corruption policies. Rather, it requires that governments adopt and implement laws that make bribery of foreign public officials a criminal offense, including "dissuasive criminal penalties."<sup>147</sup>

*iv. Litigiousness*

Finally, we believe that, for investors, the incentives for disclosure will depend on expectations of how arbitral outcomes will affect not just the case at hand but also future prospects and its credibility.

Firms do business in many countries and vary enormously in how they use the courts and other legal mechanisms to advance their interests. Anecdotal evidence suggests that firms do vary in the extent to which they use adjudication to signal resolve or to obtain compensation.<sup>148</sup> Some use legal systems only as a final recourse – when all other options, notably negotiation, have failed. Such firms will bear the cost of bringing such cases only when they are confident of a win. Other firms are highly litigious. For a litigious firm – that is, a firm that as a matter of strategy uses

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<sup>147</sup> OECD, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, Article 3 (1997).

<sup>148</sup> For example, after Venezuela changed its tax laws on oil exploration and production, some companies – namely, Exxon and Conoco – immediately announced they would leave the country and launched a variety of litigation and arbitration claims against the government for fear that if other governments saw them back down then similar changes would occur elsewhere in the world. Others such as Chevron attempted to maintain good relations with the host state. See STEVEN COLL, PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER (2012).

adjudication to signal resolve—the purpose of filing a case is to show a willingness to bear costs and to impose costs on others. For litigious firms, the game of arbitration is about earning a reputation for being tough and creating favorable case law, not necessarily for winning *that* case.

To evaluate this idea, we assess the impact of *Litigiousness* by claimants. We do so by identifying the number of times an investor had brought a case to ICSID over the course of our study—some, had done so as many as six times. This measure is admittedly imperfect but is a best first effort to capture the 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.<sup>149</sup>

### C. Statistical Results

Table 2 presents these statistical results exploring the likelihood that a case formally remains secret (Column 1), as well as the likelihood of any kind of settlement (Column 2) and of a secret settlement (Column 3).<sup>150</sup> In Annex 1 we complement the analysis and discuss the robustness of these findings with a wide array of additional statistical tests.

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<sup>149</sup> In our study, approximately 25% of claimants have filed more than once at ICSID and are to some degree litigious. The most litigious investors are based in Western democracies such as Italy, the Netherlands and the United States.

<sup>150</sup> Column 1 presents the logit estimates from Equation 1 predicting *Secret* arbitration. Column 2 presents similar estimates predicting *Settlement*. Column 3 presents estimates of *Settlement* from a restricted model that constrains *Secret* to a value of 1 in order to identify only those settlements that are kept secret. We interpret the estimates in Column 3 with caution given the scarcity of data.

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**TABLE 2.** Predicting Secret Arbitration at ICSID, 1972-2012

	Secret	Settled	Secret Settlement
<i>LongLived</i>	0.742** (0.268)	0.767** (0.277)	0.24 (0.523)
<i>Losses<sub>R</sub></i>	1.234*** (0.303)	0.830** (0.300)	1.076 (0.762)
<i>PublicCases<sub>R</sub></i>	-0.818*** (0.238)	-0.546* (0.237)	-0.806 (0.544)
<i>Litigious</i>	0.401** (0.149)	0.569*** (0.152)	0.798* (0.376)
<i>Reform</i>	0.209*** (0.063)	0.098 (0.061)	-0.004 (0.101)
<i>Additional Facility</i>	-2.405*** (0.684)	-1.785* (0.777)	-1.032 (1.39)
<i>Bribery<sub>R</sub></i>	-1.074* (0.457)	0.091 (0.440)	2.719* (1.302)
<i>Bribery<sub>C</sub></i>	-1.429*** (0.417)	-1.093** (0.411)	-0.356 (0.849)
<i>GDP<sub>R</sub> (Log)</i>	0.219 (0.138)	0.089 (0.140)	-0.043 (0.23)
<i>GDP<sub>C</sub> (Log)</i>	0.746** (0.268)	0.514* (0.254)	-0.178 (0.453)
<i>Polity<sub>R</sub></i>	0.042 (0.026)	-0.013 (0.027)	-0.106* (0.048)
<i>Polity<sub>C</sub></i>	-0.143* (0.073)	-0.094 (0.059)	-0.006 (0.083)
<i>FDI<sub>R</sub> (Log)</i>	-0.139 (0.122)	-0.109 (0.118)	0.023 (0.189)
<i>Intercept</i>	-8.848*** (2.622)	-6.467* (2.576)	2.467 (4.780)
N	339	339	132
Log Likelihood	-181.25	-177.06	-58.71
Prob > chi2	0.000***	0.000***	0.0033**
Pseudo R <sup>2</sup>	0.2	0.1712	0.2091

Standard errors in parentheses (\*\*\*) p&lt;0.01, \*\* p&lt;0.05, \*p&lt;0.1)

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*i. Rules and Procedures*

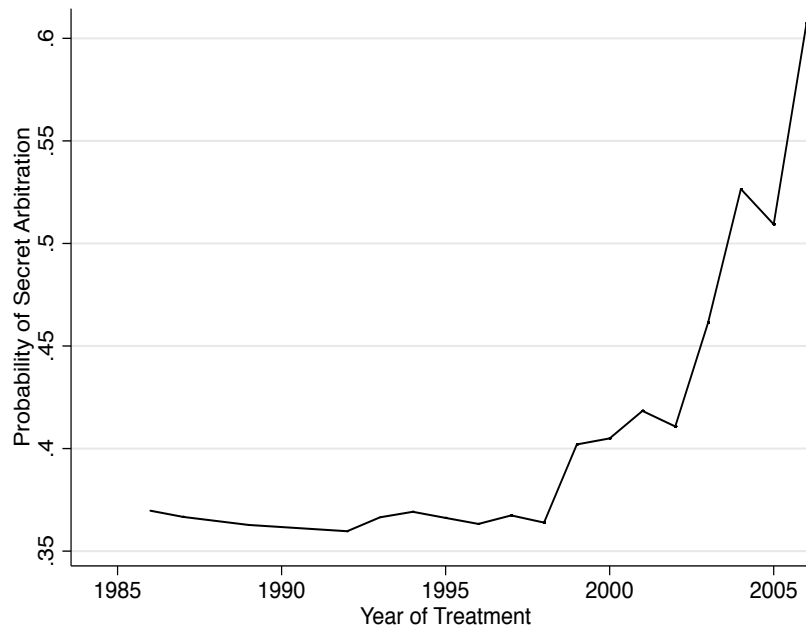
As expected, cases brought under the ICSID AF Rules are much less likely to be concealed, and they are also less likely to be concluded through settlement.<sup>151</sup> However, contrary to our expectation, ICSID's own *Reform* efforts to create a norm of transparency as well as supporting procedures are not associated with a reduction in the overall probability that arbitration is concluded with secrecy over time. In fact, the occurrence of the transparency reforms beginning in 2001 corresponds with a likelihood of more secret outcomes than prior to the reform efforts, and they bear no relationship to settlement.

In order to ensure that this finding is not simply a false artifact of our decision to code ICSID's reforms beginning at a particular point of time, we also plot the predicted probabilities of secret outcomes at different points of time – what we refer to as the year of reform “treatment.”<sup>152</sup> For example, Figure 3 shows that cases filed on or after 1995 had about a 35% statistical probability of being kept secret; after 2005 that probability rose to 50%. In effect, the probability of secrecy became more likely precisely when ICSID launched its most intensive efforts to reform its rules and regulations. In simple terms: while ICSID has tried to increase the public disclosure of the awards and decisions, those reforms have not been followed by a consistent reduction in secrecy over time.

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<sup>151</sup> The coefficients for the *Additional Facility* are negative and statistically significant at conventional levels as reported in Columns 1 and 2.

<sup>152</sup> These predictions were calculated from the estimates in Column 1, varying the onset year of *Reform* while holding all other variables constant at their means.



**Figure 3:** ICSID Transparency Efforts: Rolling Reform Treatment

To be sure, from this graph and our analysis we cannot distinguish whether this finding is causal. It is impossible from this study to know whether reform efforts have somehow backfired, increasing the benefits of secrecy to parties in dispute over time or whether this trend simply reflects ICSID's growing efforts to respond to an inevitable trend towards secrecy. While we cannot determine whether ICSID reforms have had any impact, we can conclude that the overall probability of secrecy has not declined over time despite the efforts and expectations.

*ii. Asymmetric Information and Power*

Table 2 provides only mixed evidence for the role of asymmetric information and power. Contrary to our expectations, neither the respondent government's GDP per capita nor their dependence on FDI are significant predictors of either secrecy or settlement.

However, claimants headquartered in wealthier countries are more likely to engage in secret arbitration and to be involved in



cases that settle, whether publicly or privately.<sup>153</sup> This may reflect that claimants from these countries are trying to use their position of power to keep more information secret – and perhaps they have greater means, such as through counsel, in finding ways to do that. But it may reflect an array of other factors as well, such as variation in the quality of cases brought – giving one party a strong incentive to settle before a final award. We look more closely at possible impacts on case quality below when we discuss litigiousness.

*iii. Privacy and Avoidance of the Public Eye*

The statistical analysis reported in Table 2 suggests that the logics leading to avoidance of the public eye are strongly at work. First, historical experiences matter in ways that suggest parties are worried about reputation. Respondent states are much more likely to be parties to secret cases when they have previously experienced public *Losses<sub>R</sub>*, even when taking into consideration the number of public *Public Cases<sub>R</sub>* they have experienced.<sup>154</sup>

The statistical effects are quite substantial. A State with no previous experience of losing has less than a one in five probability of a secret proceeding. A State with two previous public losses is likely to be a party to a case with a secret outcome about half of the time, whereas a state that has lost four or more past public cases is predicted to engage in secret arbitration nearly all of the time.<sup>155</sup> 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.

We also evaluate the relationship between past public losses and settlement in Column 2. We found that respondents with previous public losses are both more likely to engage in secret arbitration and also statistically more likely to settle cases. It is plausible that states that have experienced the financial and reputational consequences of a visible loss would prefer a sure private settlement to a risky public loss. It is possible that firms are

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<sup>153</sup> The coefficients for *GDP<sub>C</sub> (Log)* reported in Columns 1 and 2 are positive and statistically significant at conventional levels.

<sup>154</sup> The coefficient for *Losses<sub>R</sub>* reported in Column 1 is negative and statistically significant at conventional levels.

<sup>155</sup> These predictions were calculated from the estimates in Column 1, varying the value of *PastCases* while holding all other variables constant at their means.

constantly assessing whether countries are good hosts for investments – an assessment that can be influenced by information about whether arbitrators have found the country to be in violation of its obligations. Hence, concerns about audience costs and reputation may also point in the direction of settlement.

Of course, there could be many other factors at work. For example, a few governments might prefer transparency in the face of many historical losses in order to claim, with domestic political audiences in mind, that international institutions are biased against them. Governments with a contested relationship to ICSID and other international organizations may be in such position.<sup>156</sup> However, these situations are probably rare. For most governments, the prospect of losing creates incentives for secrecy due to fear of a decrease in FDI that may follow from visibly losing cases.<sup>157</sup> Settlement is one way of achieving such goals.

When we constrain the analysis (Column 3) to only those subset of cases with secret outcomes, the coefficient for past *Losses* remains negative but falls out of conventional statistical significance – the growing standard error likely reflects the scarcity of this data subsample for which we have only 132 observations.

Second, the results reported in Table 2 above, and illustrated graphically in Figure 4, also suggest that secrecy is in fact a function of the kinds of investment under dispute.<sup>158</sup> Long-lived investments in highly regulated industries (shown in black), such

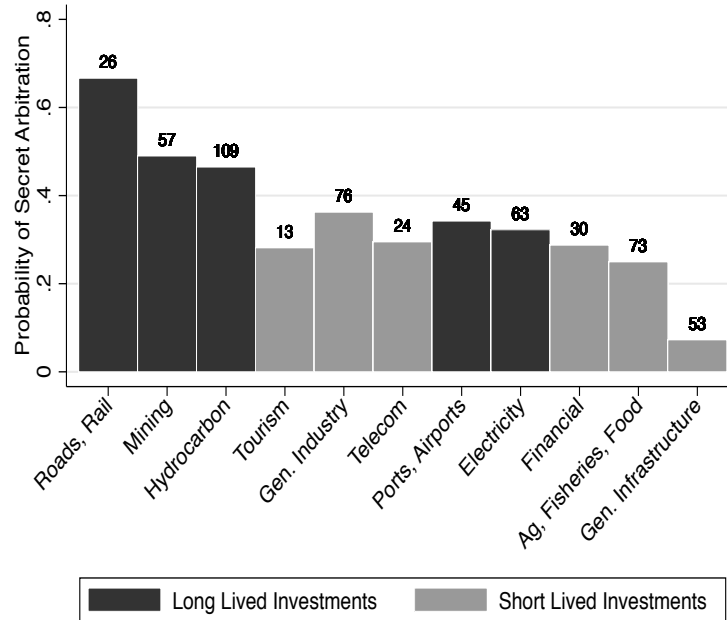
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<sup>156</sup> Examples of this behavior could include Ecuador, Argentina and Venezuela, all countries that have been the subject of many ICSID disputes and are presently at various stages of withdrawing from the organization. Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 *LAW & BUS. REV. AM.* 409, 410 (2010).

<sup>157</sup> In fact, the confidentiality of arbitration proceedings was initially defended by states acting as respondents in an attempt to see their government's reputation unaffected by investment disputes. In *AMCO, Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/ 81/1, Award, ¶ 102 (Nov. 20, 1984), reprinted in 24 *I.L.M.* 1022 (1985). See also *Metalclad Corporation v. Mexico*, ICSID Case No. ARB/(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case (Oct. 27, 1997), (Mexico asked the tribunal to issue an order declaring that the proceedings were confidential).

<sup>158</sup> In order to create this Figure, we re-estimated Equation 1 to include fixed effects for the type of industry and exclude *LongLived*. This allows us to ensure, in particular, that countries with high numbers of public losses are not differentially attracting long-lived investment. We then graph the predicted probabilities of secrecy by each industry, holding the other variables in the model constant at their means.

as rail, mining and hydrocarbon, are more likely to conclude in secrecy and in settlement. In fact, the parties to long-lived disputes are nearly twice as likely to conceal the outcome of arbitration as the parties to disputes over investments that are short-lived. In these types of cases, we believe, 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.



**Figure 4:** Probability of Secret Arbitration by Industry

However, in our constrained analysis (Column 3), they appear no more prone to be held secret through the mechanism of settlement than through the decision to conceal the final award.<sup>159</sup> This may reflect the still small (statistically) number of cases handled at ICSID or the fact that unlike in national legal systems it is relatively easy to allow a case to run to completion and yet still keep the main outcomes essentially secret—especially when the investor and the host country, alike, have a strong incentive to avoid the public eye. For now, our dataset reveals both patterns at work—the running of cases to their conclusion and settlement—

<sup>159</sup> While the coefficient for *LongLived* in Column 3 is positive, it is not a statistically significant predictor.

but as the experience at ICSID rapidly accumulates this proposition should soon be more reliably testable statistically.

In addition, we find that anti-corruption institutions also predict against secrecy. Investments that occur in settings where the relevant countries have taken steps to reduce corruption—such as by respondent states being parties to the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*—are those with less damning information to be held from public view.<sup>160</sup> However, while cases brought against respondent governments that are parties to the Convention are significantly less likely to be kept secret, among those subset of cases that are hidden from public view (Column 3), they are more likely to be kept secret through settlement.

*iv. Litigiousness*

The analysis reported in Table 2 suggests that more litigious claimants are in fact also more likely to prefer secrecy, to prefer all forms of settlement, and to prefer to attain secrecy through settlement.<sup>161</sup> For an average case, the predicted probability of secret arbitration varies across levels of litigious behavior by claimants. A litigious investor filing four or more cases over the lifetime of the firm is predicted to be a party to secret arbitration more than half of the time. By contrast, investors that bring only a single case over the course of our sample, on average, are predicted to be a party to a secret case only a quarter of the time.<sup>162</sup> The use of settlement in such cases is also statistically significant. Highly litigious claimants are more likely to engage in secrecy and are more likely to conceal the results of arbitration through settlement.

This outcome may reflect that litigious firms use the filing of a case as a means of signaling resolve or forcing new bargains, not simply as a method for recovering compensation. By this logic, the classic view of investor-state arbitration—as a mechanism of last resort to be used only after all other remedies have been exhausted—may be too narrow for some claimants. For repeat

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<sup>160</sup> The coefficients for *Bribery<sub>R</sub>* and *Bribery<sub>C</sub>* reported in Column 1 are negative and statistically significant at conventional levels.

<sup>161</sup> The coefficients for *Litigiousness* reported in Columns 1 and 3 are all positive and statistically significant at conventional levels.

<sup>162</sup> These predictions were calculated from the estimates in Column 1, varying the value of *Litigious* while holding all other variables constant at their means.

players, the greatest value lies in filing cases since, we believe, simply launching a case—an act that is publicly visible since all cases are registered openly by ICSID—may force the respondent to agree on new terms for the investment in dispute. By contrast, firms that bring just one case in their lifetime will be more likely to choose the best case from their portfolio of grievances and to use that case as a mechanism for obtaining reparation for actions that undermine their investment. Overall, however, settlement is an efficient means of achieving a desired outcome at the cost of the public good of transparency.

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In summary, our analytical framework guides us to evaluate how secrecy and settlement are historically related and are affected by rules and procedures, bargaining asymmetries, as well as other private incentives such as concerns for privacy, audience costs, or reputation. Most cases that are kept secret are done so through settlement. Cases where rules and procedures push toward disclosure are in some circumstances less likely to engage in secrecy and in other circumstances perhaps even more likely. On the other hand, cases that involve long-lived, highly regulated industries favor secrecy because keeping those investments viable may require deal-making on terms that both investors and host countries will prefer to keep secret. Disputes that involve respondents with a history of losses also lead to secrecy since these governments are prone to want to avoid another public loss. Finally, litigious firms will likely choose secrecy since conspicuously losing bad cases would undermine the central value of litigation to business strategy—to manipulate perception and gain favorable terms for litigious investors. Once the decision has been made to keep a case secret, highly litigious claimants in particular are more likely to conceal arbitral results through settlement.

In the following section, we complement this statistical analysis with three case studies to highlight the operation of the identified incentives that favor secrecy.

#### V. SECRECY AND SETTLEMENT IN ACTION: THREE CASE STUDIES

The previous section demonstrated that there are systematic patterns in secrecy and that in a large fraction of those cases the parties obtain secrecy through settlement. The strength of a statistical analysis is the ability to identify robust, systematic

patterns. A weakness is the dependence on variables that are difficult to construct, measure, and use to establish cause-and-effect relationships. To complement the statistical analysis we use three case studies – each of which focuses on a different underlying incentive – allowing us to look more closely at the factors at work.

The first case study focuses on one of the most litigious claimant in our database – an Italian construction firm that has operations worldwide. It reveals the interaction between litigiousness – which gives the firm a strong incentive to file cases, even low quality cases, and then settle – with other pressures on the firm such as the ongoing desire to do business in the country it is suing. The second focuses in closer detail on privacy and the kinds of costly information that can be revealed during arbitration. This case concerns efforts by a German firm, Siemens, to recover a lost investment in Argentina. Along the way, information leaked about corruption in the original contract and that, in turn, put Siemens into legal jeopardy. The third case study focuses on gas infrastructures in Bangladesh and looks at the messy process of negotiations that are necessary to keep claimant and respondent focused on the management of long-lived and highly regulated investments.

A. *A Litigious Claimant: Salini-Impregilo S.p.A. and the Matanza-Riachuelo Basin Environmental Restoration Project.*

The first case study involves *Salini-Impregilo*, an Italian-based large infrastructure conglomerate that is one of Europe's largest engineering and general contracting groups, specializing in water and sewerage, and environmental management.<sup>163</sup> The firm has a large overseas business, and like most in the industry it seeks to protect its investments through investment contracts that often contain explicit clauses assigning jurisdiction to ICSID or by ensuring that the investment purpose vehicle is protected by a BIT.

In the history of ICSID, the firm has brought seven cases, five of which were discontinued pursuant to Arbitration Rules 43(1) or 44.<sup>164</sup> In spite of its history of litigation, *Salini-Impregilo* has

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<sup>163</sup> The company was formally known as *Impregilo S.p.A.* and, through mergers with different companies, including *Salini Costruttori SpA*, it has reached its current form.

<sup>164</sup> Five of cases brought by *Impregilo* and two by *Salini*. See, e.g., *Impregilo v. Pakistan* "Claimant had, for itself and on behalf of Ghazi-Barotha Contractors (GBC) agreed to "withdraw, discontinue and terminate all claims and disputes

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continued operations in all of the five countries it brought before ICSID tribunals: Argentina, Pakistan, United Arab Emirates, Morocco, and Jordan.<sup>165</sup>

Two of Impregilo's recent cases involved Argentina. In the first case, Argentina was found liable in a water-concession dispute.<sup>166</sup> Like many ICSID cases involving Argentina, the core of the dispute rests on the failure to honor contracts when the country's financial crisis undermined the ability of public agencies to raise funds and pay tariffs for infrastructure that foreign investors had installed and operated. In this particular case, a 2011 award by an ICSID tribunal determined that Argentina breached the fair and equitable treatment obligation under the Argentina-Italy BIT. Moreover, Argentina was ordered to pay Impregilo some US\$21 million plus interest as compensation, the amount invested by Impregilo.<sup>167</sup>

In October 2008, while the water concession claim was still pending before the tribunal, Impregilo brought a second case, involving the construction and highway concession in the city of Córdoba. Again, the financial crisis had changed the economic facts on the ground. The claimant filed the ICSID case after negotiations over adjusting the terms of the concession failed. After the tribunal was constituted the parties settled the case. The settlement agreement, now published by Decree, reveals very favorable terms for the province. Trumpeted in the Province and Argentina as a victory, the settlement allowed the province to take back control of the concession at a fraction of the amount requested by Impregilo in the case it had filed at ICSID.<sup>168</sup>

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against the Respondent before ICSID on a 'with prejudice basis,'" after reaching settlement and payment.

<sup>165</sup> See *Worldwide*, SALINI IMPREGILO, <http://www.salini-impregilo.com/en/group/worldwide.html> (last visited December 30, 2015).

<sup>166</sup> In the Province of Buenos Aires, Impregilo was an indirect minority shareholder in Aguas de la Gran Buenos Aires (AGBA), a company that operated a water and sewage services concession. Shortly after AGBA obtained the concession in 1999, and partly as a result of Argentina's financial crisis, the concessionaire struggled to raise necessary financing, collect fees from customers, and meet its contractual obligations to invest in, expand and improve water and sanitation services in the concession area.

<sup>167</sup> An Annulment Committee confirmed this decision in January of 2014. ICSID, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment (January 24, 2014).

<sup>168</sup> The settlement agreement also mandated the discontinuance of the case before ICSID, which was duly filed pursuant to ICSID Arbitration Rule 43(1).

Behind the scenes, however, the settlement revealed a different relationship between the claimant and respondent—parties that spent endless efforts negotiating in such a way that their mutual dependence could continue. The Italian company had a long tradition and presence in Argentina and was keen to maintain operations. Argentina had limited access to capital and knew the importance of a mutually beneficial solution. While the parties have never confirmed any connection between these events, to officials knowledgeable of the issue,<sup>169</sup> the subsequent \$473 million contract with Argentina's water utility Agua y Saneamientos Argentinos S.A. awarded to Impregilo came as no surprise. The contract involved a twelve-kilometer so-called underwater effluent diffuser as part of a remediation plan for the Matanza-Riachuelo basin in Buenos Aires. The initiative has a significant value and is the first part of a wider program, financed by the World Bank, for sustainable development aimed at the environmental restoration of the Riachuelo River, considered among the most polluted in the world. While the settlement of the Cordoba case allowed Argentina to boast its strategic and negotiating skills, the quiet settlement allowed Impregilo to maintain operations in a strategically important market and allowed Argentina to attract the much needed investment as well as to re-access financing from the World Bank.

*B. Inconvenient Disclosures: Siemens A.G., and the Foreign Corrupt Practices Act Investigation*

Our next case also takes place in the context of Argentina's severe economic crisis of 2001, which resulted in widespread discontent and fatal public demonstrations. In this context the Argentine government defaulted on its debts and adopted a series of emergency fiscal and monetary policy measures that affected economic actors, including foreign investors.<sup>170</sup>

From the perspective of foreign investors, these measures had

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<http://web2.cba.gov.ar/web/leyes.nsf/85a69a561f9ea43d03257234006a8594/ea95b121d6634d1e03257bab0050f90c?OpenDocument>.

<sup>169</sup> Phone Interview with Argentine Official, January 16, 2015.

<sup>170</sup> Martin Feldstein, *Argentina's Fall: Lessons from the Latest Financial Crisis*, 81 FOREIGN AFF. 8 (March/April 2002) (noting among other measures, the "corralito" included limits on cash withdrawals from bank accounts and prohibitions on transfers of funds out of the country, as well as the "pesification" abolishing the preexisting convertibility regime.)



grave impacts on the value, expectations, and legal security of their investments in Argentina. In fact, the measures resulted in the greatest number of investor-state claims against a single state, including the first ever investment mass claim (brought by 180,000 Italian holders of Argentine bonds).<sup>171</sup> Among many others, Siemens brought a proceeding alleging that Argentina's actions breached the Argentina-Germany BIT affecting the value of a large national identity card contract with the central government. The ICSID tribunal found that Argentina's actions over the course of the crisis constituted a "creeping" or regulatory expropriation and a violation of the fair and equitable treatment obligation of the referred treaty. Siemens, after 5 years of legal dispute, won an arbitral award of \$217 million in 2007 and was kept secret. At the time, this was only the third decision condemning Argentina to pay damages after the measures adopted during the economic crisis. By that time, four more adverse decisions against Argentina were expected to be released that same year and a dozen tribunals had ascertained jurisdiction over further investor claims.<sup>172</sup>

Shortly after the arbitral decision was issued, authorities in Germany and the US discovered that Siemens had engaged in acts of systematic bribery around the world, including in Argentina.<sup>2</sup> The issue of corruption never arose during the ICSID proceedings. However, as recounted by the US Department of Justice in the Notice of Designation of a corruption investigation under the FCPA statute, the \$1 billion contract procured through bribery, triggered:

"[an] arbitration between Siemens and the Argentine government...[but] Siemens did not assert or imply during

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<sup>171</sup> Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 44 (2004). For a list of pending cases, see List of Pending Cases, INT'L CENTRE FOR SETTLEMENT INVESTMENT DISP., <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>. For a list of concluded cases, see List of Concluded Cases, INT'L CENTRE FOR SETTLEMENT INVESTMENT DISP., <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>

<sup>172</sup> Sylvia Noury, *Latin America: Another ICSID Arbitration Against Argentina Passes the Jurisdictional Hurdle*, 1 GLOBAL ARB. REV. 42 (2006).

the arbitration that the project was tainted by corruption, despite the confidential record to the contrary.”<sup>173</sup>

In other words, while the lawyers for Argentina before ICSID may or may not have had knowledge of the corruption (although some Argentine officials certainly knew), Siemens had full knowledge of such events prior to the issuance of the award.

Later in 2008 Siemens voluntarily disclosed the revelations to the US and German authorities and eventually made public the arbitral award. However, this happened only after the company began its own internal investigation into the matter and started negotiations with the US (and German) authorities about a potential settlement. Once aware of the corruption scandal, Argentina petitioned the ICSID Tribunal for a “revision” under Article 51(1) of the ICSID Convention on the grounds that the new evidence on corruption should decisively affect the outcome of the case. The revision procedure was never resolved.

It is now widely known that Siemens settled with U.S. and German authorities, paying nearly \$1.6 billion in penalties and discontinued the revision proceeding before ICSID, foregoing the arbitration award.<sup>174</sup> The parties’ decision to discontinue the proceeding was perhaps based upon a broader reputational concern by Siemens and Argentina’s preference to resolve the conflict without paying the award. Interestingly, the choice of ‘settlement’ after finding Siemens in violation of corruption reveals important counterfactuals and was publicly disclosed: without the corruption scandal, other things being equal, Argentina and Siemens probably would have kept the case secret or Argentina might have revealed the outcome to underscore an ICSID bias against it. But with the revelation of corruption, Siemens invoked settlement to save face while Argentina walked away from a hefty penalty.

*C. Long-Lived Project in Highly Regulated Industry: Chevron, Petrobangla, and the Gas Transit Fees Re-negotiations*

The final case, while more complex, illustrates secrecy in

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<sup>173</sup> U.S. v Siemens S.A. (Argentina) Statement of Offense, Dec 15, 2008, <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/16/siemens-argentina-stmt.pdf>.

<sup>174</sup> Eric Lichtblau & Carter Dougherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES, December 16, 2008, at B8.

investments concerning long-lived highly regulated industries—in this case, complex and costly natural gas infrastructures that are necessary to move gas from areas of production to facilities where it is burned. The case took place after the Indian economy began to grow in the 1990's, along with its demand for energy.<sup>175</sup> Seeing this, a wide array of foreign firms including Unocal, sought ways to supply the country's fuel and electricity—for Unocal, that meant extracting gas in neighboring Bangladesh and piping it west into India.<sup>176</sup> Working with other partners, it acquired three major exploration blocks in Bangladesh and began drilling for gas.

Unocal and Petrobangla, a Bangladeshi state-owned company, entered into a Production Sharing Contract (PSC) in 1995 and subsequently entered into several Gas Purchase and Sale Agreements (GPSA). 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 a transit fee. The contract between the two companies included provisions referring disputes to ICSID. In addition, Unocal incorporated its investment into a series of Bermuda-based companies—allowing ICSID arbitration under the U.K.-Bangladesh BIT.

Political relations between India and Bangladesh soured just as these new gas supplies were being produced; 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 (its only customer in the region) at lower prices. Chevron, meanwhile, kept finding and producing more gas and 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.

After Chevron had sunk considerable capital in the project, Petrobangla began charging Chevron a 4% transit fee on gas sold to Petrobangla (not to India) and transmitted through Petrobangla's pipelines. Chevron disputed that the transit fee should not be applied in such context.<sup>177</sup> Unable to reach a

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<sup>175</sup> Rahul Tongia & V.S. Arunachalam, *Natural Gas Imports for South Asia: Pipelines or Pipedreams?* 34 *ECON. & POL. WEEKLY* 2032 (1999).

<sup>176</sup> Martha Olcott, *International Gas Trade in Central Asia: Turkmenistan, Iran Russia, and Afghanistan*, in *NATURAL GAS AND GEOPOLITICS: FROM 1970 TO 2040* (David G. Victor, Amy M. Jaffe, & Mark H. Hayes eds., 2006).

<sup>177</sup> US Embassy Dhaka, *Chevron's International Arbitration*, August 6, 2007. WIKILEAKS.

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resolution on the matter, Chevron continued to pay the tariff but threatened with arbitration.<sup>178</sup> Chevron believed the fee was in breach of the GPSA and unfairly affected its investment.<sup>179</sup> By the time Chevron brought a case against Bangladesh before ICSID in April 2006 the firm had invested more than US\$850 million in the gas fields.<sup>180</sup>

In the face of many legal difficulties, Chevron sought help via the U.S. Embassy in Dhaka.<sup>181</sup> A cable dated August 6, 2007 revealed that the President of Chevron Bangladesh, Steve Wilson, met with Bangladesh's Energy Secretary and Petrobangla's President in the summer of 2007, both of whom expressed to Wilson a desire to settle the situation.<sup>182</sup> For its part, the U.S. Embassy began to bring attention to the dispute by publicly and privately citing the Chevron-Petrobangla case as an example of Bangladesh's negative treatment to foreign investors.<sup>183</sup>

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<sup>178</sup> In fact, according to the file, Chevron continued to pay without further communication until 2003 when a second GPSA was signed, followed by a third in 2004 whose language regarding the transit fee modeled the first agreement. See *Chevron Bangladesh Block Twelve Ltd and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. V. People's Republic of Bangladesh* (ICSID Case No. ARB/06/10).

<sup>179</sup> MI Farooq, Sajed Sami, & Taslima Yasmin, *Impact of International Arbitration Proceeding: Governmental Approach and Investment Climate in Bangladesh* Working Paper 1/2010 Investment Climate Series, Economic Research Group (2010).

<sup>180</sup> *Id.*

<sup>181</sup> The executives at Chevron emphasized that it was not seeking help with the merits of the case, but rather to ensure that the proper process was followed to bring the case before ICSID. US Embassy Dhaka, *supra* note 177.

<sup>182</sup> US Embassy Dhaka, *supra* note 177. However, both officials felt powerless to settle the lawsuit given the country's current anti-corruption environment for fears that it would appear that they were paid off by Chevron. As revealed in another cable from the US Embassy in Dhaka dated August 16, 2007, released by Wikileaks, a letter was drafted 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." Public records do not reveal whether this letter was actually sent. In that same cable, Chevron expressed its concern that the high profile of Petrobangla's attorney would impede an amicable settlement for fears of accusations of impropriety and bribery. US Embassy Dhaka, *Action Request in Chevron/Petrobangla Arbitration*, August 16, 2007. WIKILEAKS.

<sup>183</sup> US Embassy Dhaka, *supra* note 177. For example, in a September 2007 meeting between the US Deputy Assistant Secretary of the State for South and Central Asian Affairs John Gastright and the Chief Advisor in Bangladesh, Gastright stated that Chevron's ongoing dispute with Petrobangla could affect investor confidence, to which the Chief Advisor promised to look into the situation. US

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In May 2010, the ICSID tribunal ruled in favor of Bangladesh. Surprisingly, Petrobangla was not forced to repay past transit fees nor to stop charging them in the future, totaling an estimated worth of US\$400 million.<sup>184</sup> This unexpected win may help explain why news of the outcome leaked immediately in the local press<sup>185</sup> and was soon picked up by the international oil and gas press.<sup>186</sup> For Bangladesh, the good news would have played well locally. For Chevron, whose audience costs were now greater following this loss, silence remained the rule.<sup>187</sup> The parties never agreed to release the results publicly and thus ICSID, to this day, lists the case as private and has issued only minor procedural details.

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 project.<sup>188</sup> 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.<sup>189</sup> Also in 2010, after Chevron identified additional gas production capacity, Petrobangla announced that it would use its own money to construct a 100 km pipeline worth US\$250 million for Chevron use.<sup>190</sup>

## VI. AN INCENTIVE COMPATIBLE STRATEGY FOR ENHANCING TRANSPARENCY

What can be done? Despite massive reforms aimed at boosting transparency in ICSID there are incentives that lead parties to favor secrecy in some circumstances. Yet the need for

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Embassy Dhaka, *DAS Gastright urges Bangladesh caretaker government to stick to the road map*, September 26, 2007, WIKILEAKS.

<sup>184</sup> *Pipeline Construction Underway to Take Gas from Chevron Fields*, PRIYO NEWS, August 14, 2010, <http://news.priyo.com/story/2010/aug/14/pipeline-construction-underway-take-gas-chevron-fields>.

<sup>185</sup> *Petrobangla set to allow Chevron install gas compression station*, August 24 2009, [www.thefinancialexpress-bd.com/2009/08/24/77056.html](http://www.thefinancialexpress-bd.com/2009/08/24/77056.html).

<sup>186</sup> *Chevron loses fight over costs*, UPSTREAM, May 28, 2010.

<sup>187</sup> 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.

<sup>188</sup> *Bangladesh: Chevron makes major new gas find*, ENERGY-PEDIA, September 23 2009.

<sup>189</sup> Press Release, Chevron, Chevron to Expand Bangladesh Natural Gas Project, ( July 30, 2012).

<sup>190</sup> PRIYO NEWS, *supra* note 184.

transparency is growing rapidly with the transformation of how public and private international law affect areas of social policy long reserved to nation states. For those concerned with the use of adjudication for its erosion of the public domain, the message is clear: there is a need for a more 'public law litigation' approach to international investment adjudication.<sup>191</sup> While we focused on ICSID, the concerns raised in this paper are also more generic and apply to a wide array of international institutions where outcomes can be kept secret or where parties stop processes through settlement—an obvious illustration is the WTO.

Reformers can create a better system. Below, we outline a strategy for reform that is aligned with the underlying incentives of the key players and of the institutions aimed at serving a broader public purpose. We view this incentive-compatible approach to reform as one of the insights that comes from the theory and methods offered in this article—work drawn from a blend of international law and political science approaches to studying international law.

#### *A. Against Settlement Without Disclosures*

The tensions resulting from the transformation of international law have not gone unnoticed and officials at ICSID (and at other international institutions) now know that transparency is a problem. But reformers have not dealt much with settlements—in part because settlements are often considered superior outcomes of international law adjudication. While this might be true and settlement may be optimal to the parties, our concern is that out-of-court settlements may be intrinsically implicated in creating delegitimizing spirals of international investment law.

In essence, when states expect to lose a case and have no rules towards disclosure states can keep outcomes secret by relying on settlement, reinforcing the asymmetrical nature of foreign investment relations. Moreover, large multinational companies that often act as repeat players in investment disputes have an incentive to skew the case law as they can reveal only those decisions that result in investor-friendly interpretations. All others, possibly bad cases, can be either kept secret or settled. The

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<sup>191</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (coining the term "public law litigation"). See also Harold Koh, *The Palestine Liberation Organization Mission Controversy*, 82 AM. SOC'Y INT'L PROC. 534, 546-50 (1988) (all noting the existence of transnational public law litigation).

combined outcome is more secret cases at a high social cost; it makes the adjudicatory process harder to establish the legitimacy of the decisions and reduce its practical import of elucidating the meaning of investment law.

Solutions are not so straightforward as it may seem. Varying stakeholders assess transparency differently depending on resources, capacity, influence, and attitudes toward international law, democratic values, or even the role of information in nurturing debate, accountability and good governance. Because of these differences, blanket policies attempting to foster transparency have not always been welcomed by all states and, at points, have even been resisted. In this sense, we propose a flexible toolkit guided by the core principle that settlement and secrecy interact as informed by our analysis. This does not mean a position against settlement, but rather a position *against settlement without disclosures*.

Before identifying how to implement reforms to our concerns, a key matter is what information advances the public role of international judicial institutions without undermining its benefits, including – in some cases – privacy.

It is a core belief that in well-functioning legal systems the public resolution of cases affords accountability and fosters public debate and confidence in the law.<sup>192</sup> While these concepts are appealing in the abstract, it is unclear what type of information is of general interest. We argue for the disclosure of a minimum amount of essential information that does not undermine settlements while also allowing for the benefits of the public good of transparency. Our suggestions look again to the U.S. domestic law experience, especially in the context of Shareholder Derivative Actions and Class Action Settlements, two contexts where we found mandates for the disclosure of settlement.<sup>193</sup>

To be sure, investor-state arbitration presents a very different institutional environment. Unlike these examples from U.S. law, where judges can oppose settlement terms to protect the public

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<sup>192</sup> As a court in the US observed, “[t]he public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.” *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

<sup>193</sup> For other contexts, *see e.g.* Notice of Pendency and Settlement of Shareholder Derivative Action ... pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934. *See also* Certification of Settlement Class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. These requirements are often based on due process arguments under U.S. Constitutional Law.

interest or some stakeholders of a proceeding, we do not believe arbitrators should interfere in the parties' right to settle a dispute.<sup>194</sup> In fact, they probably should encourage this process. In addition, we want to stress that balancing the parties' privacy and right to confidential settlements against the benefits of public information is a matter that may vary depending on the context of the dispute. Therefore, our proposed list of relevant information that follows should be understood as non-exhaustive and applied contextually:

- Background of the dispute, including identity of the parties, specific measure(s) challenged, issues in the dispute and legal basis for the dispute;
- Reasons for settlement, including history of the litigation and the settlement process;
- Terms of settlement, including benefits of settlement, obligations of the parties resulting from settlement, payments provided and pending claims (if any); and
- Information regarding attorneys and arbitrators involved, including names and firms as well as fees and expenses in connection to the case.

A second important matter is the different incentives across arbitral institutions. ICSID is just one of the many arbitral institutions involved in investor-state arbitration administration, all of which have different processes, policies and standards, especially when it comes to dealing with access to information and other features of case administration relevant for the public law view advanced in this article.<sup>195</sup> In fact, some arbitral institutions have been slow to adopt reforms and others see confidentiality as a comparative advantage. Hence, as ICSID is only an element in a larger institutional regime complex, the forms and modes of reform must take into account the spaces for strategic actions

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<sup>194</sup> See, e.g., High-Tech Employee Antitrust Litigation, 11-cv-02509, U.S. District Court, Northern District of California (San Jose) (rejecting a \$324 million settlement in a class-action antitrust case that accused leading high tech firms (Google, Apple, Adobe Systems and Intel) that colluded not to hire each other's employees, driving down wages for five years).

<sup>195</sup> See generally David D. Caron, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear*, 104 AM. SOC'Y INT'L L. PROC. 413 (2010) (Secretary-General describing ICSID as a business that competes with other arbitral institutions.)



resulting from this institutional competition.<sup>196</sup> While often welcome, this competition may allow arbitration parties to escape scrutiny.

With these two important caveats in mind, we now describe our normative prescriptions.

*B. Incentive Compatible Reforms: A Flexible Toolkit*

*i. Enhancing UNCITRAL Reforms*

As explained, ICSID is not the only setting under which international investment disputes are addressed.<sup>197</sup> ICSID is the dominant forum and offers many important benefits—such as lower fees and automatic enforceability of awards—but competes with other similar bodies. For example, the caseload of the Permanent Court of Arbitration (PCA), an intergovernmental organization originally devised to facilitate dispute resolution between States, now includes 52 investor-state arbitrations under bilateral or multilateral investment treaties or investment laws and 33 arbitrations under contracts or other agreements to which one party is a state, state-controlled entity, or intergovernmental organization.<sup>198</sup> The International Chamber of Commerce of Paris, an arbitral institution for private commercial disputes, reports that more than 11% of the 767 cases registered in 2013 involve a State or parastatal entity as one of the parties—a constant trend in the last few years.<sup>199</sup> Other private institutions such as the Stockholm Chamber of Commerce show similar trends.<sup>200</sup> Arbitrators may

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<sup>196</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004) (defining a “regime complex” as “an array of partially overlapping institutions governing a particular issue-area,” among which there is no agreed upon hierarchy).

<sup>197</sup> Yackee and Wong have argued that the difference in transparency treatment may result in claimants avoiding ICSID to use less transparent forums. Jason W. Yackee & Jarrod Wong, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, in *THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY* 233 (Karl Sauvant, ed. 2010).

<sup>198</sup> Permanent Court of Arbitration Cases, [www.pca-cpa.org/showpagea7cf.html?pag\\_id=1029](http://www.pca-cpa.org/showpagea7cf.html?pag_id=1029).

<sup>199</sup> *Statistics*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.

<sup>200</sup> The SCC reported that about 46 cases were registered with the institution under SCC Rules, UNCITRAL Arbitration Rules and ad hoc proceedings between

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even offer *ad hoc*, non-institutionalized proceedings often relying on the UNCITRAL Arbitration Rules but without the need of administrative services of institutions like ICSID or the PCA.<sup>201</sup>

The recent efforts taken by reformers can be described as an opt-in system.<sup>202</sup> This strategy has been simple: UNCITRAL—a body of the United Nations specializing in commercial law—has adopted rules aimed at fostering transparency in investor-state arbitration. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency"), comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application.<sup>203</sup> The Rules on Transparency are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in *ad hoc* proceedings, and when the respondent state adopts them. The rules also create a transparency registry for proceedings.

The UNCITRAL Transparency Rules do not apply to ICSID proceedings, unless the parties to the proceedings adopt them. Article 1(2) of the transparency rules makes clear that they will apply to existing treaties only if the parties to a given dispute grant consent to their use or if the contracting-parties to a given treaty agree to such application. To complement this situation UNCITRAL has also concluded the text of a Convention on Transparency (or the 'Mauritius Convention on Transparency') as well as the "unilateral model declaration on transparency." Both documents could be used by individual states wishing for the new

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2001 and 2012,  
[http://www.iisd.org/pdf/2014/investment\\_treaty\\_arbitration.pdf](http://www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf).

<sup>201</sup> See, e.g., NAFTA/UNCITRAL Canadian Cattle Claims - Award on Jurisdiction (January 28, 2008), <http://www.state.gov/documents/organization/99954.pdf>.

<sup>202</sup> In addition to our general concerns about the ICSID Convention's provisions regarding confidentiality of awards, as one of us has written, the prevailing institutional logic at this international organization is not conducive for an ambitious reform on this subject matter. See Puig, *supra* note 22.

<sup>203</sup> The new Rules will provide for open oral hearings, as well as the publication of key documents, including pleadings, transcripts, as well as all decisions and awards issued by the tribunal. In many ways, the rules mirror the NAFTA 'transparency' reforms of 2001-3 and go beyond the 2006 reforms of ICSID arbitration rules.

Rules on Transparency to apply to disputes arising under BITs concluded before their adoption, as well as proceedings under other rules, including ICSID Arbitration Rules. For a State adopting either of these instruments, the effects are clear: it commits itself to follow the transparency requirement even if the other party to the dispute is not bound by a similar requirement.<sup>204</sup>

While these reforms are important and avoid the difficulty of renegotiating signed BITs or the ICSID Convention (two complex tasks as we explain below), the UNCITRAL process, which included ICSID as an active participant, also reveals problems. In the policy discussions among the experts, the relationship between transparency and settlement of dispute was never formally debated. Nor is there an UNCITRAL rule directly applicable to the transparency of settlements. These shortcomings could be alleviated by including an obligation on signatory parties to report, in a standard form document, the basic terms of a settlement to the transparency registry created under UNCITRAL.

Certainly, concerns could be raised that including an additional obligation may hinder the success of these efforts. We understand that the careful balance resulting from thorough debates currently leaves no appetite to re-open these instruments. But the obligation to notify the general public on certain information regarding settlements certainly merits this endeavor.<sup>205</sup>

#### *ii. Adapting BITs*

With time and changes in the political environment, international judges have been given or have assumed a broad range of tasks other than to assist state actors in settling their disputes. Although the pace is slow, States are recognizing this transformation and including treaty clauses that adapt to this trend with some success. For instance, allowing open hearings, third-party participation, and non-disputing state party submissions to a tribunal has been successful in investor-state practice.<sup>206</sup> The same

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<sup>204</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html).

<sup>205</sup> Other only between states and investors of party members.

<sup>206</sup> NAFTA *supra*, Art. 1131 (2). See also 2004 U.S. Model BIT, articles 28–29 (access by non-disputing state to proceedings, including a right to commentary on draft awards); 2012 U.S. Model BIT articles 28–29 (same); See Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International*

can be said about provisions that allow third-party governments with a “substantial” or “systemic” interest to deliver written and oral testimony before the panels or the Appellate Body in the WTO.<sup>207</sup>

These changes are examples of the pressures created by the recognition that ICSID or the WTO do not handle private business matters. In fact, for many, ICSID still symbolizes how the confluence of the public and the private can be redefined in the shadow of national laws.<sup>208</sup>

In future treaties, governments could envision the incorporation of clauses demanding the mandatory disclosure of settlements or even the requirement for the parties to request the tribunal to embody the settlement in an arbitral award, consistent with the terms of Rule 43 of ICSID Rules of Arbitration (or its homologous under other arbitration rules). Future BITs could also establish more robust mechanisms in which parties to a dispute are obligated to notify the terms of a settlement. This approach, similar to the current WTO system (where solutions mutually acceptable to the parties must also be reported),<sup>209</sup> could render special

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*Investment Arbitration*, 23 ARB. INT’L 327, 328 (2007) (explaining the lack of a codified process for amicus participation in NAFTA tribunals under UNCITRAL Arbitration Rules); Loukas A. Mistelis, *Confidentiality and Third Party Participation*, 21 ARB. INT’L 211, 221–23 (2005) (“amicus curiae briefs” are not always welcome by tribunals).

<sup>207</sup> EC – Tariff Preferences, Panel Report, WT/DS246/R, adopted on 01-12-03; Appellate Body, WT/DS246/AB/R, adopted on 20 September 2004 United States-Import Prohibition of Certain Shrimp and Shrimp Products, panel report, WT/DS58/R, adopted on 15 May 1998, appellate body report, WT/DS138/AB/R, adopted on 12 October 1998. See also *Thailand and the Philippines in Turkey – Textile and Clothing Products*. See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 283–84 (2003) (describing the controversy over allowing amicus briefs in the WTO context). Nick Covelli, *Member Intervention in World Trade Organization Dispute Settlement Proceedings after EC – Sardines: The Rules, Jurisprudence, and Controversy*, 37 J. OF WORLD TRADE 673 (2003). Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 WORLD BANK ECON. REV. 287 (2005). Friedl Weiss, *Third Parties in GATT/WTO Dispute Settlement Proceedings*, in REFLECTIONS ON INTERNATIONAL LAW FROM THE LOW COUNTRIES (E. Denters & N. Schrijver, eds., 1998).

<sup>208</sup> Lydia Lazar, *NAFTA Dispute Resolution: Secret Corporate Weapon?*, 6 J. GLOBAL FIN. MARKETS 49 (2000).

<sup>209</sup> Unlike ICSID, the WTO does not allow the parties to settle their dispute on whatever terms they wish. Solutions mutually acceptable to the parties to the dispute must also be consistent with the WTO Agreement and must not nullify or impair benefits accruing under the agreement to any other Member (Articles 3.5

benefits in future multilateral agreements such as Transatlantic Trade and Investment Partnership currently under negotiation.

A reporting obligation of this nature increases the public law value of adjudication, but also reduces opportunities of discrimination via settlements. This feature can result in more actual transparency by establishing a monitoring mechanism (e.g., governments that raise concerns about the information disclosed may request more information), and could also result on the protection of the value of most-favored-nation (MFN) clauses in BITs (e.g., parties who are discriminated against by a settlement could request, in some circumstances, treatment no less favorable than a similarly situated investor).<sup>210</sup>

*iii. Reforming Rules and Procedures (ICSID and others)*

To the problem of different rules and institutions to conduct investor-state arbitration, the Convention provides that ICSID “shall not publish the award without the consent of the parties.” Since the process for reforming the ICSID Convention renders an amendment highly unlikely, such provision add some limitations to the potential reforms.<sup>211</sup>

In spite of the above, unlike the Convention, a modification of ICSID Rules is plausible, as they require passing the less hefty bar of a two-thirds approval by the Administrative Council as opposed to requiring all Contracting States to ratify, accept or approve the amendment. To this effect, the Rule 43 (Settlement and Discontinuance) could add a requirement for the Secretariat to publish the basic terms of a settlement with consent of the parties. While imperfect, this can be the basis for a better institutional practice. Notwithstanding the confidentiality provisions in the ICSID Convention (and many arbitration rules), a requirement to

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and 3.7 of the DSU). The system of notification of settlements of the WTO limits the use of this mechanism to nullify or impair benefits or grant preferential treatment to different members via commitments agreed on settlements. Mutually agreed solutions must therefore be notified to the DSB with sufficient information for other Members to identify if there benefits arising out the covered agreements remain untouched.

<sup>210</sup> *About the Transatlantic Trade and Investment Partnership (TTIP)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> (Last visited 10/30/2015) (TTIP is a trade and investment agreement under negotiation between the EU and the US. See also Stephen Castle & Jackie Calmes, *U.S. and Europe to Start Ambitious but Delicate Trade Talks*, N.Y. TIMES, June 17, 2013, at B2.

<sup>211</sup> ICSID Convention Article 48(5).

publish the terms of the settlement *without* the consent of the parties could be included within the rules.

*iv. Developing Best Practices*

In some limited cases, parties to litigation that involved the intervention of arbitrators made public statements after they settled their disputes. Some of these disclosures released the terms of the settlement, simply as a matter of good practice. Arbitrators could adopt a more robust practice in this regard by suggesting that the parties to an arbitration proceeding make public basic terms of the settlement. This practice could be built-on, during the first session of the tribunal, by obtaining the parties' consent to release the settlement terms or embody such settlement in the form of an award in the terms of Rule 43. While the parties to the case still have to consent, requesting such consent at the beginning of a case may be plausible, as arbitrators have some authority to induce parties to follow good procedural practices.

That arbitrators adopt a more proactive role to nudge parties into releasing settlement information should be encouraged. As the shortage of legitimacy of investor-state arbitration continues to be a source of anxiety, concerned stakeholders will keep demanding a public law approach to investment adjudication. This practice could be a good step in such direction.

*v. Experimenting with Unilateral Actions by States*

Governments should not rely on international instruments to inform their citizens of questions that implicate them. General obligations to report settlements could be included in domestic legislation, regulation or other similar normative instruments (as some states have done so with respect to other transparency requirements). Governments must notify the general public of certain information regarding public affairs and many governments recognize that this includes certain aspects of investment adjudication.<sup>212</sup> Less targeted options include covering settlement disclosures under the Freedom of Information Act (FOIA) (on the government) or Federal Securities Laws (on the

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<sup>212</sup> The Trade Promotion Authority Legislation of 2002 (TPA) enacted by Congress mandated that subsequent investment treaty negotiations included certain safeguards in the mechanisms used to resolve disputes. Similar objectives of the TPA were reflected in the 2004 and 2012 US Model BIT, the 2003 Canadian Model FIPA and Mexico's subsequent BITs.

investor).<sup>213</sup>

Among the disadvantages of this approach are the limitations to enforcement, an issue of purely domestic law. However, one can argue that a robust practice of gathering information on settlement is consistent with instruments that support transparency in other areas of international law, including human rights.<sup>214</sup>

#### CONCLUSION

*Against Settlement* is an important contribution to legal scholarship in large part because it reminds us of the significant role transparent adjudication plays in prompting debate and building the legitimacy of a legal system. These same concerns that animated Owen Fiss now arise, internationally. In this sense, international law is living a *Fissian* moment.

While we are not against settlement, we are for public disclosure of information. The interdisciplinary approach in this paper offers a framework and a model for understanding and evaluating statistically how those incentives work. Our concern is that the role of transparency in investor-state arbitration has been divorced from important practical and real life considerations. In fact, we believe that the concept of transparency has become a mantra for a generation of well-intentioned scholars who, while having effectively initiated an important conversation and brought important changes to the functioning of institutions, have also left important operational aspects unattended, including reframing the incentives to generate accurate information. Better governance does not arise simply out of good intentions, as actors, especially repeat litigants, are adept at adapting.

It is understandable that policy-makers, negotiators, government officials, NGOs and other stakeholders have tended to ignore what is, in our view, a fundamental variable in this debate.

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<sup>213</sup> At least in jurisdictions like the US, FOIA may already cover settlements before international courts. The question remains of international negotiations. See *CIEL v. DOC*. On the private side, the SEC type of disclosure considering a dispute with a foreign government a 'material' event for the purpose of disclosure.

<sup>214</sup> Some information rights have been recognized as human rights in international instruments Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Number 11 and Number 14 art. 34, June 1, 2010, C.E.T.S. No. 194. Organization of American States, American Convention on Human Rights art. 4(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144; African Charter on Human and People's Rights arts. 47-54, adopted June 27, 1981, 1520 U.N.T.S. 217.

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The omission is partly due to the fact that institutional designers have promoted the idea that a key function of international courts and tribunals (including ICSID tribunals) is to prompt disputants to settle their disputes before engaging in costly litigation, without much understanding of the public benefits that result from transparent litigation and settlement. While this pro-settlement bias in adjudicatory institutions would be more controversial in domestic contexts, the opposite may be true when it comes to international courts. In fact, states could easily argue that nations would be less willing to surrender sovereignty and submit themselves to a third-party adjudicator if they could not settle the dispute on their own terms without certain information of the settlement publicized. However, as we have argued, the transformation of international law demands a public law approach that can also help to legitimize certain fields.

While we are talking about investor-state arbitration here, in reality this is a wedge for a much larger discussion about international governance—a discussion that deals with the fact that firms are playing a bigger role in the development of international law. This is what global governance means in practice today—a system of nation states, increasingly constrained in what they can do by international institutions, and attentive (we hope) to the larger public benefits that will flow when they are designed to engage the public in transparency ways.



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## APPENDIX 1

**Table 3. Descriptive Statistics**

	<b>Obs</b>	<b>Mean</b>	<b>Std. Dev.</b>	<b>Min</b>	<b>Max</b>
<i>Secret</i>	372	0.38	0.49	0	1
<i>Settled</i>	372	0.32	0.47	0	1
<i>LongLived</i>	367	0.51	0.50	0	1
<i>Losses<sub>R</sub></i>	372	1.02	1.81	0	9
<i>PublicCases<sub>R</sub></i>	372	1.60	2.48	0	13
<i>Litigious</i>	372	1.38	0.89	1	5
<i>Reform</i>	372	3.67	3.05	0	11
<i>Additional Facility</i>	372	0.11	0.31	0	1
<i>Bribery<sub>R</sub></i>	372	0.22	0.41	0	1
<i>Bribery<sub>C</sub></i>	372	0.72	0.45	0	1
<i>GDP<sub>R</sub> (Log)</i>	370	7.90	1.24	4.70	10.72
<i>GDP<sub>C</sub> (Log)</i>	368	10.23	0.69	5.57	10.86
<i>Polity<sub>R</sub></i>	358	3.55	6.08	-10	10
<i>Polity<sub>C</sub></i>	369	9.19	3.11	-10	10
<i>FDI<sub>R</sub> (Log)</i>	366	0.87	1.13	-2.33	3.97
<i>Argentina<sub>R</sub></i>	372	0.13	0.33	0	1
<i>ITA</i>	372	0.09	0.28	0	1
<i>Experience<sub>C</sub></i>	372	0.12	0.43	0	4
<i>Corruption<sub>C</sub></i>	283	1.39	0.71	-0.97	2.53
<i>Corruption<sub>R</sub></i>	282	-0.41	0.66	-1.9	1.72
<i>Inflation<sub>R</sub> (Log)</i>	336	2.16	1.17	-1.93	8.24
<i>Nationality<sub>C</sub></i>	312	6.14	2.33	0	9.17

**Robustness Checks:**

Here, we take several additional steps in an effort to determine the robustness of the core statistical findings. Table 3 reports descriptive statistics of the central variables used in our analysis. Tables 4 and 5 each report nine additional tests on *Secret* and *Settlement*, respectively. In Columns 1, we include fixed effects for each case and determine that the findings are consistent. Columns 2 include fixed effects for time—specifically, the year in which the ICSID panel was constituted. This

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allows us to examine the effect of the variables between countries in a given year. The estimates remain largely consistent.

Columns 3 include 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 more likely to be kept secret.

Columns 4 control for cases we coded from Investment Treaty Arbitration (ITA) sources 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<sub>c</sub>*, affects their secrecy decisions. *Experience<sub>c</sub>*—measured here as a count of the claimant's previous disputes in Columns 5—are negative and statistically insignificant, while all other variables in the model remain consistent in sign and significance.

In Columns 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. Unfortunately, these data are available only beginning in 1996, substantially reducing our sample size. The core findings nonetheless remain.

In Columns 7 we estimate an alternative indicator for the strength of the respondent government. Recent work suggests a correlation between inflation and the occurrence of investment arbitration, which may indicate a more immediate source of weakness than the size of a respondent's GDP. Using World Bank data, we therefore control for the respondent's (log) inflation rate in the year an arbitration panel was

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constituted,  $Inflation_R$ . Inflation is not a predictor of secrecy—the core findings remain significant.

In line with recent research on the conditions under which governments can break contracts with foreign firms, we also include a measure in Column 8 designed to capture the diversity of the nationality of investors, which may affect the capacity of respondent governments to defend themselves. This measure is the inverse of the Herfindahl-Hirschman Index—a value of 1 means all of a country's FDI is from one other country and increasing values correspond to greater diversity. Controlling for this diversity, the main results are again statistically significant. Interestingly, as a country's FDI base increases its diversity, an arbitration outcome is less likely to stay private.

Finally, in Column 9 we distinguish those cases that have been settled through Rule 43 procedures, excluding the small minority that have been settled through Rule 44. All factors that predict settlement more generally also predict settlement through Rule 43.

**TABLE 4. Predicting Secret Arbitration at ICSID, 1972-2012: Robustness Checks**

	Case	Year	Argentina	ITA	Experience	Corruption	Inflation	Nationality	Rule43
<i>LongLived</i>	0.757** (0.270)	0.987** (0.342)	0.718** (0.270)	0.761** (0.269)	0.686* (0.271)	0.972** (0.326)	0.742** (0.271)	0.693* (0.290)	0.943*** (0.297)
<i>Losses<sub>R</sub></i>	1.288*** (0.305)	1.409*** (0.384)	1.232*** (0.308)	1.228*** (0.305)	1.170*** (0.299)	1.544*** (0.355)	1.214*** (0.306)	1.116*** (0.311)	0.665* (0.311)
<i>PublicCases<sub>R</sub></i>	-0.851*** (0.238)	-0.956*** (0.293)	-0.901*** (0.249)	-0.811*** (0.240)	-0.724** (0.232)	-1.030*** (0.275)	-0.822*** (0.241)	-0.707** (0.244)	-0.463+ (0.243)
<i>Litigious</i>	0.402** (0.150)	0.187 (0.196)	0.401** (0.151)	0.398** (0.149)	0.803*** (0.223)	0.111 (0.194)	0.400** (0.149)	0.379* (0.154)	0.478*** (0.146)
<i>Reform</i>	0.222*** (0.064)	0.188 (0.370)	0.255*** (0.068)	0.227*** (0.066)	0.237*** (0.065)	0.286*** (0.077)	0.234*** (0.065)	0.102 (0.070)	0.160* (0.064)
<i>AF</i>	-2.236*** (0.685)	-1.638* (0.766)	-2.434*** (0.692)	-2.473*** (0.690)	-2.411*** (0.682)	-2.094** (0.778)	-2.656*** (0.716)	-1.900** (0.697)	-2.288* (1.057)
<i>Bribery<sub>R</sub></i>	-1.045* (0.457)	0.049 (0.598)	-1.553** (0.536)	-1.099* (0.457)	-1.211* (0.478)	-0.367 (0.538)	-1.090* (0.460)	-0.805+ (0.475)	-0.041 (0.466)
<i>Bribery<sub>C</sub></i>	-1.36*** (0.418)	-0.128 (0.710)	-1.590*** (0.432)	-1.488*** (0.423)	-1.571*** (0.431)	-0.595 (0.588)	-1.443*** (0.423)	-0.611 (0.480)	-1.246** (0.447)
<i>GDP<sub>R</sub> (Log)</i>	0.223 (0.139)	-0.068 (0.191)	0.185 (0.142)	0.228 (0.139)	0.202 (0.141)	-0.153 (0.218)	0.308* (0.146)	0.068 (0.144)	0.017 (0.147)
<i>GDP<sub>C</sub> (Log)</i>	0.751** (0.268)	1.020** (0.391)	0.775** (0.274)	0.752** (0.270)	0.765** (0.272)	0.616 (0.438)	0.714** (0.269)	0.908* (0.364)	0.897** (0.318)
<i>Polity<sub>R</sub></i>	0.039 (0.026)	0.037 (0.035)	0.040 (0.027)	0.040 (0.026)	0.043 (0.027)	0.076* (0.035)	0.036 (0.027)	0.033 (0.029)	-0.007 (0.028)
<i>Polity<sub>C</sub></i>	-0.140+ (0.073)	-0.279* (0.128)	-0.143+ (0.074)	-0.143+ (0.073)	-0.140+ (0.073)	-0.201+ (0.113)	-0.142+ (0.073)	-0.135 (0.098)	-0.142* (0.068)
<i>FDI<sub>R</sub> (Log)</i>	-0.145 (0.122)	0.043 (0.179)	-0.136 (0.122)	-0.144 (0.122)	-0.132 (0.123)	-0.122 (0.168)	-0.191 (0.129)	0.044 (0.143)	-0.119 (0.123)
<i>Argentina<sub>R</sub></i>			1.382* (0.682)						
<i>ITA</i>				-0.452 (0.483)					
<i>Experience<sub>C</sub></i>					-1.140** (0.417)				
<i>Corruption<sub>C</sub></i>						0.185 (0.350)			
<i>Corruption<sub>R</sub></i>						0.112 (0.349)			
<i>Inflation<sub>R</sub> (Log)</i>							0.001* (0.001)		
<i>Nationality<sub>C</sub></i>								-0.142 (0.087)	
<i>Intercept</i>	-9.47*** (2.649)	-8.947+ (4.910)	-8.874*** (2.677)	-8.959*** (2.632)	-9.390*** (2.694)	-5.547 (4.160)	-9.243*** (2.635)	-9.110** (3.287)	-9.713** (3.165)
<i>N</i>	339	289	339	339	339	262	337	291	339
<i>Log likelihood</i>	-179.25	-136.493	-179.071	-180.808	-177.249	-134.887	-177.418	-158.606	-161.446
<i>Prob &gt; chi2</i>	0.000***	0.000***	0.000***	0.000***	0.000***	0.000***	0.000***	0.000***	0.000***
<i>Pseudo R2</i>	0.209	0.254	0.210	0.202	0.218	0.221	0.214	0.150	0.185

**Note: +p<.1, \*p<.05, \*\*p<.01, \*\*\*p<.001**

**TABLE 5. Predicting Settlement at ICSID, 1972-2012: Robustness Checks**

	Case	Year	Argentina	ITA	Experience	Corruption	Inflation	Nationality	Rule43
<i>LongLived</i>	0.776** (0.278)	1.199*** (0.356)	0.763** (0.278)	0.786** (0.278)	0.726** (0.279)	1.171*** (0.341)	0.723** (0.279)	0.755* (0.303)	0.767** (0.277)
<i>Losses<sub>R</sub></i>	0.893** (0.302)	.696* (0.353)	0.827** (0.301)	0.814** (0.302)	0.779** (0.295)	0.984** (0.34)	0.812** (0.301)	0.624* (0.296)	0.830** (0.300)
<i>PublicCases<sub>R</sub></i>	-0.586* (0.238)	-.413 (0.266)	-0.554* (0.240)	-0.53* (0.239)	-0.485* (0.233)	-0.643* (0.266)	-0.542* (0.238)	-0.347 (0.233)	-0.546* (0.237)
<i>Litigious</i>	0.585*** (0.154)	.521** (0.196)	0.568*** (0.151)	0.567*** (0.152)	0.799*** (0.213)	0.425* (0.191)	0.571*** (0.151)	0.487** (0.158)	0.569*** (0.152)
<i>Reform</i>	0.112+ (0.061)	-.153 (0.370)	0.104 (0.064)	0.117+ (0.064)	0.115+ (0.062)	0.093 (0.075)	0.11+ (0.061)	0.057 (0.071)	0.098 (0.061)
<i>Additional Facility</i>	-1.642* (0.777)	-.964 (0.870)	-1.774* (0.779)	-1.842* (0.779)	-1.799* (0.777)	-1.574+ (0.855)	-1.912* (0.790)	-1.613* (0.786)	-1.785* (0.777)
<i>Bribery<sub>R</sub></i>	0.142 (0.44)	.419 (0.609)	0.042 (0.479)	0.065 (0.44)	0.028 (0.450)	0.542 (0.542)	0.064 (0.442)	0.064 (0.474)	0.091 (0.440)
<i>Bribery<sub>C</sub></i>	-1.031* (0.412)	-.417 (0.728)	-1.109** (0.416)	-1.156** (0.417)	-1.156** (0.418)	0.141 (0.601)	-1.072** (0.414)	-0.386 (0.493)	-1.093** (0.411)
<i>GDP<sub>R</sub> (Log)</i>	0.092 (0.141)	-.145 (0.201)	0.084 (0.142)	0.097 (0.141)	0.076 (0.142)	-0.238 (0.224)	0.144 (0.146)	-0.026 (0.149)	0.089 (0.140)
<i>GDP<sub>C</sub> (Log)</i>	0.54* (0.255)	.516 (0.359)	0.514* (0.254)	0.513* (0.256)	0.521* (0.256)	0.608 (0.416)	0.494+ (0.254)	0.356 (0.335)	0.514* (0.254)
<i>Polity<sub>R</sub></i>	-0.017 (0.027)	.001 (0.035)	-0.014 (0.027)	-0.015 (0.027)	-0.013 (0.027)	0.016 (0.035)	-0.015 (0.027)	-0.006 (0.030)	-0.013 (0.027)
<i>Polity<sub>C</sub></i>	-0.094 (0.059)	-.170 (0.110)	-0.093 (0.059)	-0.092 (0.059)	-0.09 (0.059)	-0.244* (0.100)	-0.091 (0.058)	0.021 (0.085)	-0.094 (0.059)
<i>FDI<sub>R</sub> (Log)</i>	-0.114 (0.118)	-.007 (0.183)	-0.109 (0.118)	-0.115 (0.118)	-0.106 (0.118)	-0.097 (0.167)	-0.127 (0.121)	-0.077 (0.145)	-0.109 (0.118)
<i>Argentina<sub>R</sub></i>			0.159 (0.611)						
<i>ITA</i>				-0.511 (0.491)					
<i>Experience<sub>C</sub></i>					-0.690+ (0.405)				
<i>Corruption<sub>C</sub></i>						0.023 (0.361)			
<i>Corruption<sub>R</sub></i>						0.3667 (0.354)			
<i>Inflation<sub>R</sub> (Log)</i>							0.001 (0.000)		
<i>Nationality<sub>C</sub></i>								-0.125 (0.088)	
<i>Intercept</i>	-7.351** (2.627)	-2.127 (4.777)	-6.430* (2.583)	-6.512* (2.586)	-6.731** (2.617)	-4.78 (4.034)	-6.744** (2.586)	-4.774 (3.183)	-6.467* (2.576)
<i>N</i>	339	286	339	339	339	262	337	291	339
<i>Log likelihood</i>	-174.560	-132.913	-177.028	-176.505	-175.598	-129.372	-175.121	-151.021	-177.062
<i>Prob &gt; chi2</i>	0.0000***	0.0000***	0.0000***	0.0000***	0.0000***	0.0000***	0.0000***	0.0000***	0.0000***
<i>Pseudo R2</i>	0.183	0.232	0.171	0.174	0.178	0.198	0.174	0.136	0.171

**Note: +p<.1, \*p<.05, \*\*p<.01, \*\*\*p<.001**