PREDICTABILITY VERSUS FLEXIBILITY
Secrecy in International Investment Arbitration

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THERE is long-standing debate over the appeal of publicly transparent international institutions. The shared provision of information, it is thought, helps to set norms and stabilize expectations around which actors can organize complex and politically challenging domestic policies.[1] Transparency can encourage participation and accountability and lend legitimacy to governance institutions.[2] Information can tie hands by raising the cost of reneging on agreements, an idea that is central to most theories that explain how international institutions facilitate the creation of credible commitments.[3] These logics help to explain why most international tribunals on boundary disputes are required to rule publicly when they settle zero-sum matters such as

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[1] Keohane 1982; Keohane 1984.

[2] Buchanan and Keohane 2006; Keohane 1998.

[3] Fearon 1997.

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shifting borders—decisions that would be nearly impossible for governments to implement without credible, visible external pressure.[4] They also explain why all World Trade Organization (WTO) dispute panel decisions are publicly released, a practice based in part on the logic that countries will find it easier to make domestic policy adjustments after their hands are publicly tied.[5] Yet open-door negotiations can also create strong incentives for parties to posture in public.[6] Publicity can raise transaction costs and impede the negotiations needed to resolve entrenched disputes.[7] It can also make it harder to hide and manage the fallout of inconvenient decisions.[8]

Nowhere is the debate over the function of public information within international institutions more heated or economically consequential than in regards to the regulation of foreign direct investment (FDI).[9] Firms that invest in foreign countries fear that obsolescing bargains and time inconsistency problems put their investments at risk of expropriation or other harmful treatment by host governments.[10] To mitigate this fear and attract FDI, governments have created an expansive legal regime designed to boost investor confidence, handle particular disputes efficiently, and create a more predictable environment for investors.[11] The keystone to this regime is binding independent arbitration that provides direct access to an international resolution mechanism and that, in theory, depoliticizes the process and subjects decisions to objective legal criteria.[12] Nearly all of the existing bilateral investment treaties (BITs), and some trade agreements, such as the North American Free Trade Agreement (NAFTA), allow private investors to invoke arbitration by filing complaints when they feel wronged by a foreign host government. By most accounts, the promise of arbitration helps countries to credibly signal their commitment to investor-friendly policies.[13] The regime is being replicated in major new trade and investment agreements, such as the Trans Pacific Partnership (TPP), so that

[4] Allee and Huth 2006.
[5] Davis 2012; WTO 2014.
[6] Stasavage 2004.
[7] Rabinovich-Einy 2002.
[8] Kurizaki 2007; Levenotoğlu and Tarar 2005.
[9] For recent work on investment, see Milner 2014 and the special issue of *World Politics* that it introduces.
[10] Rose-Ackerman and Tobin 2005; Tobin and Busch 2010; Büthe and Milner 2014.
[11] See Milner 2014. There is debate over whether investment treaties actually increase FDI. See Neumayer and Spess 2005; Rose-Ackerman and Tobin 2005; Büthe and Milner 2008.
[12] Norris and Metzidakis 2010.
[13] See Büthe and Milner 2008; Büthe and Milner 2014; Haftel 2010; Neumayer and Spess 2005; Tobin and Busch 2010; Tobin and Rose-Ackerman 2011; Poulsen and Aisbett 2013; Simmons 2014. See Allee and Peinhardt 2014 for an alternative view.

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investor-state arbitration has become ubiquitous in debates over the future of international economic institutions and has given firms new powerful roles in shaping economic relations.[14] This article focuses on the World Bank's International Centre for Settlement of Investment Disputes (ICSID), the world largest mechanism for investor-state arbitration.

As a device for sending credible information about a country's commitment to protect investors, ICSID (along with most other investment arbitration mechanisms) has a peculiar feature: the filing of disputes is a matter of public record, but the official outcomes of negotiations and the final rulings need not be. ICSID registers publicly all the disputes that it handles, but for most ICSID cases any of the involved parties can formally choose to hide the results of arbitration (the award) or the preaward settlement from the public, which includes other governments and investors. In two-fifths of the 246 investment cases concluded from 1972 to the beginning of 2012 at ICSID, there is no official public record as to whether or why a government was found liable for harming an investor or of the contents of settlements. This concealment of information can be costly for the disputing parties and for the system of arbitration itself. It makes it difficult for potential investors and other parties to determine whether a government actually honors its commitments and reduces the predictability of the arbitration process and outcomes. It also prevents determination of whether the law is being applied consistently and effectively.[15] The risks associated with making investments thus rise, which can deter, rather than attract, FDI.[16] As one arbitrator put it, "Transparency generates certainty; ignorance panic."[17]

Mindful of these costs, a wave of attempted reforms has aimed at reducing secrecy in arbitration. Since the early 2000s, when international arbitration over a series of publicly controversial investments began to tread into the domain of national regulatory policy on issues such as environmental protection and access to water, there has been growing pressure from certain governments, the arbitral institutions themselves, and civil society on parties undergoing arbitration to make the full record public and thus further raise the costs of engaging in secret arbitration.[18] Yet secrecy remains pervasive, diluting the broader signal

[14] On TPP, see Unites States Trade Representative 2015, Article 9.23. On firms, see Burke-White and von Staden 2010, 317.

[15] de Lotbinière McDougall and Santens 2006; Tahyar 1986.

[16] Brown 2001.

[17] Hernandez 2013, 27.

[18] Parra 2012, chp. 10.

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that arbitration provides a credible commitment to protect investor rights, and possibly also inspiring a public backlash against the use of arbitration.[19]

We argue that secrecy in the context of investment arbitration works like a flexibility-enhancing device, similar to the way escape clauses work in the context of international trade.[20] To attract and preserve investment, governments make commitments to provide investor-friendly policies such as contractual promises to submit to binding arbitration in the event of a dispute. But they know at the time they make these commitments that political situations may arise that create incentives for them to renege on their promises. Host governments also know that the credibility of their investment agreements may decline if investors publicly accuse them of unlawfully undermining investments; if the claims are upheld, then the erosion of the host government's credibility could deepen. Other investors will shun the country, and the host government may also avoid new commitments to inconvenient investment contracts and treaties. Secrecy provides some measure of flexibility in precisely those situations where hiding information about a host government's wrongdoing would be immediately beneficial to all the parties in a dispute.

Our starting point for identifying such situations, consistent with other work on bargaining,[21] is the assumption that bargainers in a dispute care both about the substantive outcome of a particular bargain as well as the impact of the process on their public reputation.[22] Both affect how the parties assess their future investment strategies. As we argue, secrecy can affect substantive outcomes by creating the flexibility to allow hard bargains that would otherwise be impossible, and make it possible for the investor and host country to prolong their relationship. Secrecy can also have an impact on how the process of arbitration affects reputation, since it allows governments to hide information about their poor treatment of investors that could undermine the credibility of their broader public commitment to investor rights more generally.

We see at least two broader implications of this argument for world politics. First, the decision to engage in secrecy may at once facilitate hard bargains and prevent posturing over politically sensitive disputes while

[19] Waibel et al. 2010.

[20] Rosendorff and Milner 2001; Mansfield and Milner 2012; Milner, Rosendorff, and Mansfield 2011.

[21] Stasavage 2004.

[22] While we draw upon Stasavage's assumption, our focus in this article is different from his work.

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blunting the ability of governments to signal their broader commitment to investor-friendly policies in the most contentious cases. As the strictures of investment law expand and deepen across the global economy, such contentious cases may become more numerous. Second, the incentives for secrecy help to explicate why the public is least informed about cases where investors and host governments do not want to be held publicly accountable for politically difficult decisions. These implications elucidate why the legitimacy of investment-state arbitration remains highly controversial. Despite many efforts to promote transparency, we see no statistical evidence that those efforts have altered the underlying incentives for secrecy. These insights may also, we speculate, help explain the empirical finding that BITS do not always increase FDI.

We develop this argument in several steps. Several institutions handle the burgeoning caseload of investment disputes, but ICSID, the empirical focus of this article, has emerged as the dominant venue and accounts for more than 60 percent of all investor-state arbitrations.[23] We begin by explaining the core features of the ICSID process that relate to the decision to conceal a case, a decision that is made prior to the final ruling.[24] Next, we develop our theoretical arguments to explain when arbitration is most likely to be concealed—any party to arbitration can unilaterally demand secrecy—and then provide an account of the efforts to reform the ICSID process with the explicit goal of reducing the instances of secrecy over time. Empirically, we focus on the secrecy of arbitral outcomes, the awards that are the final substantive decision from a panel of arbitrators, as well as preaward settlements that also terminate the arbitral process, but we are aware of similar debates over secrecy in proceedings, access for third parties, confidentiality of documents, and other related topics.[25] We focus on awards and settlements because they represent successfully resolved disputes—the outcome from arbitration that has the greatest substantive importance for governments and investors alike. We evaluate the observable implications of our argument on a new data set we collected from all cases registered

[23] There is no reliable universe of arbitrations and thus this fraction is based on the most reliable estimates from UNCTAD, which reports on treaty-based cases through 2011. UNCTAD 2012. Recent discussions with practitioners have confirmed this number.

[24] We model the choice for secrecy, which any party can make, rather than transparency, which requires the joint decision of all parties. We do this because secrecy is the outcome that most concerns ICSID, which has made public claims to the effect that secrecy is in decline, and also because the total number of cases limits our ability to precisely model the strategic interaction between claimants and responding governments that would be essential to assessing transparency. We return to the question of transparency in the empirical analysis.

[25] E.g., Parra 2012; Kinnear, Obadia, and Gagain 2013; Waibel et al. 2010; Yackee and Wong 2010.

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at ICSID from 1972 to 2011 (and the first twelve in 2012).[26] We offer as illustration a unique case that was intended by the parties to remain secret but was leaked, which allows us to observe what officially should have been unobservable. We conclude by considering some of the most important implications of this research.

ICSID IN A NUTSHELL

ICSID was created in 1966 as a forum within the World Bank where firms and individuals could resolve disputes with governments related to private investments. The architects of this institution allowed investors to bring cases directly to international arbitration, in some cases avoiding national courts that could be biased, slow, or more expensive to use. It was created to address what was seen as a major challenge for economic development—the need to entice high levels of private investment into developing countries—by making arbitration more efficient and the awards more enforceable.[27] The institution's architects were less worried about whether or how ICSID cases would create precedent or shape public opinion, and more concerned with protecting the interests of investors and states while boosting investment. Secrecy was seen as a way to facilitate bargains, and it was the norm in the commercial arbitration systems that were partial models for ICSID. Although this foundation was laid in the late 1960s, ICSID and similar institutions did little until the seeds of economic globalization sprouted in the 1980s and foreign investment soared. ICSID has attracted the largest share of investor-state arbitration because of its expertise, low transaction costs, and perceived efficiency.[28]

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

[26] For other efforts to collect data on arbitration see Caddel and Jensen 2014; Shultz and Dupont 2014; and Franck 2007. Caddel and Jensen are interested in which parts of a government are involved in investment disputes and have coded 163 of the 264 cases completed through the end of 2012. Franck looks at all public awards before 2006, the vast majority of which are ICSID-based. We extend these by making the claimant the unit of analysis, incorporating more home- and host-country features, including nonpublic cases in our analysis, and, where feasible, relying on leaked documents for information. Other work that relates to investment treaties, such as Elkins, Guzman, and Simmons 2006; Simmons 2014; Allee and Peinhardt 2010; Allee and Peinhardt 2011; and Allee and Peinhardt 2014, take BITs as their dependent variable or primary independent variable.

[27] Parra 2012, 17.

[28] Allee and Peinhardt 2014; Parra 2012; Puig 2013.

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modern BITs include a resort to binding treaty-based dispute resolution such as arbitration available through ICSID.[29]

Four kinds of actors play central roles in ICSID investor-state arbitration—claimants, respondents, arbitrators, and the ICSID Secretariat. Claimants are investors (individuals or firms). They launch arbitration with the primary goals of receiving compensation for a lost or degraded investment or hastening a settlement with the accused government. Since many claimants invest in multiple countries, they also care about reputation in the other places where they do business. Respondents are the accused governments that host foreign investors. The respondents' interest is not only to limit monetary damages but also, usually, to create a reputation for winning to deter future arbitration. A reputation can also encourage future FDI.[30] Claimants and respondents typically rely on outside counsel, a cadre of individuals and specialized law firms, for advice and representation at proceedings.[31] There are almost always three ICSID arbitrators per panel. Most decisions follow the majority of the arbitrators. In our coding, which we describe in detail in the empirical discussion, we assign "wins" and "losses" by looking to the majority. The ICSID Secretariat, which carries out the institution's daily operations, manages the process and assists in the constitution of the arbitral tribunals and supports their operations. The secretariat also proposes and implements major reforms to the arbitration process and administers the proceedings and finances of each case.

This article focuses on the central outcome of arbitration, the resolution of a dispute through issuance of an award or settlement.[32] Figure 1 illustrates the ICSID process, which begins when a claimant registers a dispute. Hearings begin with an array of procedural matters, including

[29] See Poulsen and Aisbett 2013. See Büthe and Milner 2014 for a discussion of dispute settlement in preferential trade agreements.

[30] Büthe and Milner 2008; Büthe and Milner 2014; Haftel 2010; Jensen 2003.

[31] Future research might focus more on these individuals (as well as on arbitrators) as explanations of outcomes. For example, in this study we find it striking that so few cases whose outcomes are intended to be kept secret are actually leaked, despite strong incentives for some parties to reveal that information. That outcome might be explained by networks of counsel who are keen to preserve their reputations for privacy so they can serve future clients. There may also be important patterns in how parties, notably respondent states, rely on in-house versus outside counsel; in many cases, but not all, the identity of the counsel is known.

[32] There are important processes that can extend beyond the initial award that are outside the scope of this article. Notably, if the respondent disagrees with the panel's decision, it can file for an annulment—leading to the constitution of a new panel. For purposes of our analysis, for the few cases in which an annulment phase is ongoing, the case is coded based on the existing award. In our data sample, a small portion (less than 20 percent) of cases undergo further annulment proceedings (rarely successful); see, also, Hafner-Burton, Puig, and Victor 2015 for a detailed analysis of settlement in the context of ICSID arbitrations. According to the most recent numbers from ICSID, the proportion of annulment proceedings has increased; see Behn 2015.

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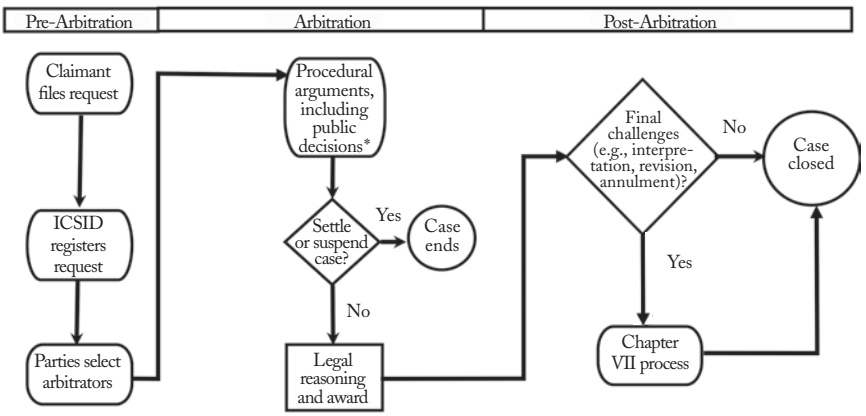


FIGURE 1
OVERVIEW OF ICSID CASE PROCESS

*Decision on secrecy of award made here.

decisions to keep the outcome secret. By "secret" we mean that with the consent of the parties, the full final award of the arbitral panel or the content of the settlement is not officially released through ICSID or other official channels. Under ICSID arbitration proceedings, the decision for secrecy can be obtained two ways. First, if a tribunal proceeds fully to the issuance of an arbitral award, either of the parties to the dispute may decide to withhold consent for publication. Unless the instrument that grants jurisdiction to ICSID, usually a bilateral investment treaty, speaks to this matter, the parties have the discretion to determine whether or not to disclose rulings. This choice is typically made at the first meeting with the tribunal. The second path to secrecy is to terminate a case through settlement.[33] In our analysis, a settlement is considered secret unless the details of the settlement, analogous to the substantive outcome of an award, are made public. The majority (64 percent) of secret cases in our sample are settlements and of those, only 6 percent were eventually made fully public, a finding similar to other studies in the field.[34] A case whose outcome is leaked is officially still considered secret.

Crucially for our analysis, in secret cases ICSID will register publicly the names of the parties and the arbitrators in addition to other procedural milestones, such as decisions on jurisdiction or whether the arbitration

[33] As a procedural matter, what we call settlement 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.

[34] For example, Schultz and Dupont 2014.

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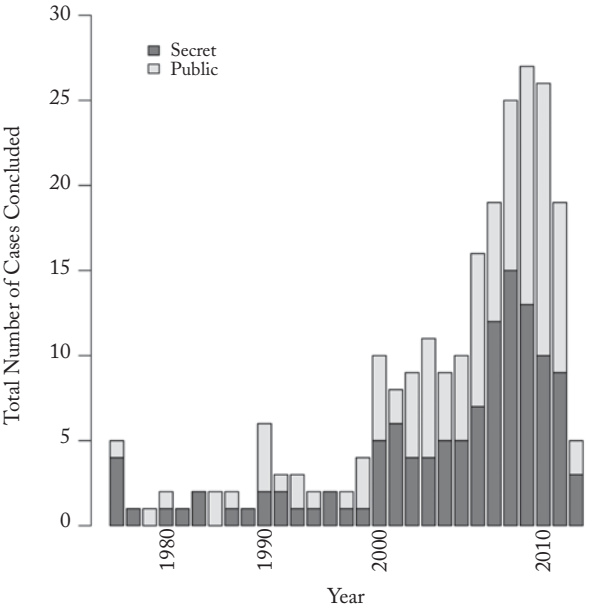


FIGURE 2
SECRECY AT ICSID OVER TIME

is settled or terminated through other means. As mentioned above, during the early procedures, before the outcome is known, either party to the arbitration can unilaterally and privately demand secrecy (see Figure 2).[35] Once a case is designated secret, the parties are required to keep the outcome confidential. The initial choice for secrecy is binding by practice and enforced by the relatively small cadre of arbitration professionals. This norm appears robust. Over the course of ICSID's history, only a handful of secret cases have ever been fully leaked—a topic we discuss in the case study below. Why more arbitral awards are not leaked when parties may have incentives to do so is puzzling, and a subject for future research.

In addition to core arbitration, which is available when the claimant's home country and the respondent are both members of ICSID, the institution also manages two other processes—conciliation, a rarely used form of mediation, and additional facility (AF), which is used when at least one of the countries involved is not a member of the ICSID Convention.[36] Because AF cases involve countries that have not necessarily aligned their national laws and procedures with ICSID, they can be harder

[35] See, e.g., Rule 20 of the ICSID Arbitration Rules. ICSID 2006a, 111; ICSID 2010.
[36] ICSID 2006b.

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to enforce, whereas cases that involve ICSID members are automatically enforceable. AF cases may require greater use of national courts for enforcement; this step almost always requires public disclosure of information because most national legal systems require a definitive, public ruling before an award can be enforced.[37]

Explaining Secrecy at ICSID

As shown in Figure 2, about 40 percent of ICSID cases are kept secret. We argue that secrecy in the context of investment arbitration works like a flexibility-enhancing device in situations where diluting the public signal that a government has harmed investors would be most beneficial for both of the disputing parties.

One source of flexibility is the ability to work out bargains behind closed doors—deals that would be hard for either party to accept in a public space. We argue in particular that investments in industries marked by long-lived projects, where the parties have strong incentives for continued, long-term interaction, and may also be more vulnerable to corruption, are especially likely to benefit from closed-door bargaining.

Consider a hypothetical financial investor, an example of an investment we do not consider long-lived. When an investor goes to a foreign country and starts a bank, the investment is over if the firm suffers expropriation. By the time the machinery of arbitration can be mobilized and a final decision reached (most cases run one to five years), the present discounted value of the remaining investment will have evaporated. This dynamic is especially true for cases that tend to take longer to arbitrate. In such cases, arbitration is one of several means for obtaining compensation, but beyond payment of damages there is no necessary ongoing interaction between the claimant and the respondent, and the cost of arbitration may outweigh the lost investment.

Investments in projects that tend to be long-lived differ. In these cases, firms cannot readily exit and rival firms cannot readily enter. Such investments include the building of infrastructures—roads, electricity grids, networks of mines, or airports—that have elements of natural monopoly, and profitability hinges on tariffs that are heavily regulated by government. Government then has readily available means and incentives to impose politically popular tariffs or other regulatory

[37] Parra 2012, 145. See also ICSID 2006b, Article 3. There may be other differences in AF cases, such as a lower incidence of cases involving governments that are not ICSID members and thus weaker pressures on reputation from repeated play. We thank a reviewer for this point.

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interventions that could be catastrophic for investors. From the investor's perspective, there are incentives to accommodate and adjust to these government pressures rather than walk away from a project prematurely.[38] Both parties in such cases benefit from the successful continued operation of these assets. From this perspective, arbitration is part of a larger process of bargaining over the allocation of rents from the ongoing operation of the assets.

The bargaining perspective on investor-state arbitration suggests that parties might initiate formal arbitration as a way to bargain under the shadow of the law rather than resort to it only after other remedies and cooling off periods have been exhausted.[39] This view of legal machinery is hardly unique to investor-state arbitration. In the WTO, for example, there are important interactions between formal adjudication and the ongoing commercial and political bargaining between parties.[40]

These kinds of long-lived investments gave rise to classical theories of the obsolescing bargain that underpin the logic of international investment regimes and arbitration and the need for host governments to send credible signals.[41] For an investment to be made, the investor and host government must have reached an agreement that initially favored the venture. As the investor sinks more assets into the host country the bargaining power shifts to the host government and in the extreme turns fixed assets into liabilities. In industries marked by long-term investments that sink capital, there are particular incentives for host countries to adopt policies, like requirements for new royalty payments once a mine comes into operation, that are tantamount to expropriation.[42]

A long, ongoing relationship with high stakes for the investor that requires messy, secret bargains to keep the investment afloat financially may also increase the risk of corruption. And where corruption may be involved, both the investor and the host state may face additional incentives to keep the details of their relationships secret—a topic we explore further in the first hypothesis.

[38] See Reisman and Digón 2009. The standard model for foreign investment in infrastructure projects—roads, tunnels, airports, power plants, ports, railroads and such—is "build operate transfer" (BOT), in which the investor builds the facility, operates it for a period, and then the asset reverts to the host state. A typical infrastructure BOT project runs fifteen to twenty-five years—much longer than the duration of a typical ICSID dispute (see Tam 1999). The argument we outline here is a standard one for networked infrastructures, and our coding reflects that logic.

[39] See Schreuer 2005 and Peters 1997 for relevant commentary. The preponderance of settlement—35 percent of concluded cases were concluded via settlement—may suggest that arbitration is a component of an investor's bargaining strategy and that triggering arbitration is not necessarily a signal that an investor seeks to exit a country.

[40] Davis 2012.

[41] Vernon 1971.

[42] Kobrin 1987; Brewer 1992.

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In cases of long-lived investment, secrecy is a valuable device to create the flexibility to reach a bargain that might be unachievable in the absence of a formal arbitral proceeding. It allows the content of the bargain needed to resolve a dispute to be hidden from the public. Both sides may need to make concessions that would have substantial audience costs for each if they became publicly known. For example, the financial viability of power plants hinges on the cost of electricity sold, and electricity tariffs are highly visible to the public and often politicized.[43] The investor must find satisfaction in less lucrative rents due to government policies that it hopes will not spread to other countries where it also does business. Host governments may need to back down from aggressive, anti-foreign public rhetoric, and compensate investors for past wrongs. Secrecy makes these high-stakes bargains easier to reach and implement by reducing incentives for posturing or taking uncompromising positions in front of shareholders or constituents.[44] In short, secrecy can help to extend the shadow of the investment in dispute as well as the relationship between the investor and host government.

This argument has an analogue in game theoretic models of quiet diplomacy.[45] In the same way that secrecy insulates leaders in a diplomatic crisis from domestic political consequences if they capitulate to a challenge to avoid an unwanted war, secrecy in investment arbitration helps to shield governments from the negative domestic consequences of publicly capitulating to a foreign investor that has long-term sunk costs in the country.

Thus, we expect the patterns of disclosure to differ depending on the kind of investment at stake. For long-lived investments, we expect that investors and host states will be more likely to favor secrecy because their goal in arbitration is to shape negotiations over deals that keep a costly investment intact. Making those deals feasible requires secrecy because at least one party (often both) must be able to abandon publicly declared positions. By contrast, the audience costs for a foreign investor who starts a bank are much lower because once an investment is financially dead, the odds of an ongoing relationship between the investor and host country plummet—as do the benefits of secrecy.

> —H1: Arbitration of disputes over long-lived investments is more likely to remain secret.

[43] Eden, Lenway, and Schuler 2004.
[44] Stasavage 2004.
[45] Kurizaki 2007; Stasavage 2004.

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Secrecy can also have an impact on how the process of arbitration affects reputations since it allows governments the flexibility to hide information about instances where they have violated the rights of investors—information that if revealed could undermine the credibility of their broader commitment to protect investor rights. Secrecy creates an avenue to lessen the blow of arbitration on governments, which do not have a say in whether they are the targets of dispute. Arbitration affects reputations. For host governments, a bad reputation can negatively affect future investment in their state. For example, when a government is publicly judged to be in violation of the law and the investor is awarded compensation for the government's wrongdoing, the governments' ensuing reputation will make it more difficult to attract foreign investment.

Concern for reputation more broadly creates heightened incentives for secrecy when governments expect ex ante to lose a case. Being charged publicly with a violation is bad for a country's ability to attract FDI, but public defeat is even worse.[46] Although some governments might gain in popular support from suffering defeat at the hands of foreign tribunals, most states behave as if they want to conceal damaging information about the abuse they inflict on investors.[47] Moreover, arbitral awards often include blunt language about egregious, even corrupt, behavior by the losers. For example, a series of cases in 2006 and 2007 concerned Western firms that had invested in the aluminum, oil, and gas industries of Azerbaijan, sectors of the economy that had been controlled by former Economic Development Minister Farhad Aliyev. When Aliyev was jailed in 2005 for conspiracy to overthrow the government, the backlash against his allies undermined these investments and led the Western firms to seek millions of dollars in damages. Information revealed during the proceedings had an impact on one of the core functions of government: survival of leaders. Normally dry arbitral proceedings were brought to a standstill when one of the witnesses for the claimants testified about state bribery. The cases were settled, with special attention paid to how much information and what claims of wrongdoing could be released—a matter of special sensitivity to the Azeri government, which was concerned about harm to potential future investment.[48]

[46] Allee and Peinhardt 2011.

[47] We later examine empirically whether countries such as Argentina and Venezuela, which are at various stages of withdrawing from the institution, behave differently.

[48] Peterson 2009, 12–13.

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For parties that are subject to legal strictures against corruption, such as the US Foreign Corrupt Practices Act and European Union anticorruption legislation, and a growing array of broader multilateral anticorruption agreements, such as the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, evidence of corruption can cause serious legal jeopardy. In a case launched by Siemens A.G. against Argentina, for example, public scrutiny led to revelations about how Siemens obtained its contracts in Argentina through corruption. These facts later forced Siemens to abandon its ICSID award against Argentina and were harmful to the firm across the region and to the government of Argentina, which has been the recurring target of disputes.[49] For respondent states, corruption claims can lead to unwanted international scrutiny, and government officials charged with corruption may face prosecution at home. Thus, when host states see signs that defeat is probable, they have strong reasons to proceed in secrecy in an effort to preserve future investment in the country.

Yet it can take time and experience before states recognize these telltale signs. Governments facing arbitration operate with a great deal of uncertainty about the eventual outcome of the negotiation. International investment laws are imprecise, often highly contested, and subject to multiple interpretations.[50] There are no formal precedents and the kinds of informal precedents that have surfaced in other areas of international law, such as dispute settlement at the WTO, have been slower to emerge in investment arbitration because so many awards are secret.[51] There is also evidence to suggest that governments act like "narcissistic learners," making commitments to investment agreements without seriously considering the associated future risks until they are brought into arbitration and learn from the process.[52] It is not until governments are both indicted and found to be in the wrong that they begin to more accurately evaluate the risks associated with submitting to or losing arbitration, ultimately electing secrecy to avoid the costs associated with a public loss.

As respondents, most governments defend themselves more than once, and they can look at their own rate of past losses as a rough guide for the future. For claimants, looking to their own history is less predictive because most only file one case. We expect that respondents with a

[49] E.g., Yackee 2012. See ICSID Case No. ARB/02/8. See http://www.italaw.com/cases/1026.
[50] Levinson and Goldsmith 2009.
[51] Pelc 2013.
[52] Poulsen and Aisbett 2013.

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history of past public losses will be more inclined to keep future arbitration secret. Having already lost a case, a government is prone to fear it may lose again and might even believe, as Venezuela and Argentina have publicly argued, that the system is stacked against them. Moreover, respondents may be especially concerned that public knowledge of their losses is harmful to their reputation as a credible host for investment.

> —H2: Arbitration of disputes against respondents with a history of past public losses is more likely to remain secret.

We are mindful that although we focus here on the reputational effects of public losses, governments may be balancing many different factors that are difficult to measure with precision, and that they may also learn from their own history of past secret losses, which we cannot observe.

The Movement against Secrecy

There are potential costs to secrecy, which help to explain why not all cases are kept secret. When results are kept confidential, it is difficult for actors to establish public reputations, making it harder to deter future accusations and to attract FDI.[53] For investors and host governments alike, opting for secrecy can spur pressure for information that creates focal points for public dissent. Confidential awards can draw public ire against international tribunals steeped in secrecy and lacking accountability. Secret settlements may be even more costly than such awards because they focus public ire on the parties to the settlement itself. Interestingly, with confidential awards, ICSID releases only excerpts of the legal reasoning; with secret settlements, it releases essentially only procedural information related to the arbitration. Some of the costs of secrecy, including the erosion of confidence in well-functioning international institutions, are collective in nature. Secrecy prevents public scrutiny of arbitrator conduct and conclusions,[54] and makes it harder to develop a shared body of interpretations of international investment law.[55] Secrecy may also impede the formation of legitimacy that arises when legal institutions operate effectively in the public eye.[56] Indeed, some scholars argue that secrecy undermines the long-term viability of

[53] Büthe and Milner 2008; Haftel 2010. On the costs of secrecy in the context of the WTO, see Kucik and Pelc 2015; and Johns and Pelc 2014.

[54] Rabinovich-Einy 2002; Waibel and Wu 2011.

[55] Roberts 2010.

[56] Finnemore and Toope 2001; Risse 2000; Yackee and Wong 2010.

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arbitral institutions such as ICSID.[57] Excessive use of secret settlements can curtail the development of a public legal order by allowing parties to these legal processes to obtain expedient private resolution at the expense of public information and scrutiny—a familiar problem in the three-decades-old debate about settlements within national legal systems.[58] Because these potentially pernicious effects of secrecy arise with both awards and settlements, we treat them together in this article. In other work, we explore in more detail whether settlements create distinct challenges.[59]

For all these reasons, the past few decades have witnessed growing pressure to make international organizations more transparent.[60] No arbitral institution has experienced a greater shift in formal rules and procedures around secrecy than ICSID, which has experienced pressure from four fronts to make secrecy both more difficult to achieve and more costly for parties in arbitration. First is the World Bank, which hosts ICSID. In tandem with other Bretton Woods institutions, it was in the cross hairs of the anti-globalization movements of the 1990s, which were partly animated by concern that closed-door negotiations shut out civil society and prevent public accountability. Because key staff members in the ICSID Secretariat were drawn from the bank, the pressures spread to ICSID.[61] For example, Ibrahim Shihata, ICSID's longest serving secretary-general, simultaneously served as the bank's general counsel and was centrally involved in the bank's own reform movement while seeking to make ICSID more transparent.

Second, a growing group of nongovernmental organizations (NGOs) has become more attentive to investment law and its possible social impacts. These organizations routinely shame both the investors and the governments involved in arbitration. In particular, large segments of the NGO community were galvanized around the dangers of private investment law by *Metalclad Corporation v. The United Mexican States*. In 2000 an ICSID panel decided the case in favor of a US corporation that claimed that Mexico's state environmental laws undermined the value of the corporation's foreign investment.[62] Although the Metalclad case was not kept secret, it entrained many of the issues that resonated with the NGO-based transparency movement, including concern that

[57] Puig 2013; Waibel et al. 2010; Hafner-Burton, Puig, and Victor 2015.
[58] Fiss 1984; Cohen 2009.
[59] Hafner-Burton, Puig, and Victor 2015; Hafner-Burton and Victor 2016.
[60] Keohane 1998; McGee and Gaventa 2010.
[61] Parra 2012, 138–41, 323.
[62] ICSID 2000.

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international institutions would encroach on national sovereignty.[63] In response, NAFTA's member governments adopted several reforms, including a July 31, 2001, decision by its Free Trade Commission that reinterpreted the treaty in ways that allowed any party to a dispute to disclose the outcome without universal consent of all the parties, thus making disclosure more likely for the subset of ICSID cases based on NAFTA.[64]

Third, some governments have altered their own foreign investment laws in ways that facilitate more public participation. A growing number of investment treaties now require disclosure of arbitral awards. For example, since 2004 the US Model BIT, the template that the US government uses when negotiating new BITs, has included provisions that favor disclosure. That model BIT was based on the 2002 Trade Promotion Authority Act, and the disclosure provisions in CAFTA (finalized in 2004 and adopted into law the next year under the same trade promotion authority), are very similar to the 2004 Model BIT.[65] A few other BITs, notably the 2006 BIT between Spain and Mexico (which has generated only seven fully concluded ICSID cases in our data set), have disclosure rules as well.

Fourth, the ICSID Secretariat has pursued a wide array of institutional reforms aimed at making itself more transparent and encouraging the parties to a dispute to inform the public of the dispute's outcome. ICSID staff has played a central role in articulating how secrecy is harmful to the institution's legitimacy.[66] In the 1980s, the secretariat began publishing excerpts of the legal reasoning in nearly all cases, even when the parties refused to release the full details of a case.[67] In tandem with these reforms, former ICSID Secretary-General Shihata opened ICSID's archives to select scholars.[68]

The secretariat also masterminded the institution's most extensive formal transparency reforms, adopted in 2006, and took the unprecedented steps of publishing the proposals that led to the 2006 reforms and soliciting external comments, notably from NGOs. The reforms gave arbitral panels more flexibility in making information public and in soliciting additional views from nonparties. They would not have been adopted without the support of a large number of ICSID-member

[63] Choudury 2008.
[64] NAFTA 2001.
[65] E.g., Gantz 2007.
[66] Kinnear, Obadia, and Gagain 2013.
[67] Puig 2013.
[68] Schreuer 2001.

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governments that were under similar domestic pressure for transparency.[69] Indeed, according to ICSID Secretary-General Meg Kinnear, ICSID is "at the forefront of the trend toward increased transparency in the conduct of investment arbitration."[70] Alongside ICSID's own efforts, other institutions that handle investor-state arbitration have also undertaken reforms aimed at transparency.[71]

> —H3: Arbitration of disputes is less likely to remain secret in the post-reform period (after 2000).

We offer this hypothesis as a first step in assessing whether rates of secrecy have changed in the face of institutional reforms aimed at increasing transparency. We are aware that actual patterns of secrecy will respond to many factors, including those that we might not measure in this study.

Empirical Analysis

We evaluate the argument on a newly collected data set of all cases filed with ICSID from January 1, 1972, to April 20, 2012. Because we are interested in characteristics of the claimants, of which there can be multiple per case, and the respondents, as well as the nature of the dispute, our unit of analysis is the claimant-case.[72] Our dependent variable, *Secret*, describes whether the full final outcome of a concluded case was formally disclosed (0) through ICSID or through other official sources with the consent of the parties or concealed (1). Unfortunately, no existing single source of information on disclosure and the content of awards is complete or adequate. We thus have compiled data from various sources, mainly the ICSID website and the Investment Treaty Arbitration (ITA) website,[73] the most widely employed public sources of information on arbitration, using consistent rules that reflect what the parties could reasonably expect would be disclosed at the time they made key decisions during the arbitration process.[74]

[69] Parra 2012; Puig 2013.

[70] Kinnear, Obadia, and Gagain 2013, 109.

[71] Notably the reforms at UNCITRAL, although those are so recent that they probably have no impact on the time period in our analysis. UN General Assembly Resolution 69/116 2014. Future research might also explore interactions between investor-state arbitration and other forms of arbitration, such as purely commercial arbitration, which might alter incentives for transparency.

[72] Approximately one-third (126 out of 372) of the observations in our data involve multiple claimants: forty-five involve two claimants; thirteen involve three claimants; eight involve four; and only four cases involve more than four claimants (with twelve being the highest number).

[73] www.italaw.com.

[74] We have also consulted the highly selective printed record, *ICSID Reports*, to cross-check information, and thank Leslie Johns and Andrea Vilan for their assistance. See also the supplementary

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To evaluate when arbitration is likely to be kept *Secret,* we first (Table 1, column 1) estimate a logit model:

$$Pr(Secret=1)=f(\beta_0+\beta_1 LongLived+\beta_2 Losses_R+\beta_3 PublicCases_R+\beta_4 Reform+\beta_4 AdditionalFacility+\phi X+\varepsilon),$$

and then (in column 2) include *X,* a vector of control variables.

Our first hypothesis is that disputes over long-lived investments in infrastructure (for example, roads and tunnels), or industries such as electric power and mining, are more likely to conclude in secrecy than disputes over investments that are intrinsically shorter in duration and involve less ongoing interaction between investor and regulator over the lifetime of the project. We cannot directly measure the intended or actual lifespan of an investment under dispute. Thus, to evaluate this claim, we code *LongLived* (1) for disputes pertaining to industries where foreign investment practice has focused on investments of this type (electricity and electric infrastructure; hydrocarbon supply and infrastructure; mining; and ports, airports, roads, railroads, and transport infrastructure). Power plants and mining networks are typical of such industries. The value of these investments comes from operation over many decades. Once the capital is sunk, the investor cannot readily exit without abandoning the investment altogether. The host government depends on the operational expertise and continued involvement of the investor to obtain the maximum local value from the project. All other investments (agriculture, food, drinks, forestry, financial, general industry, general infrastructure, telecommunications, tourism, and a residual "other" category) are coded *LongLived* (0).[75] We also code separate binary variables for each category of industry in dispute (details are included in the supplementary material).[76] Approximately 50 percent of the disputes in our study involve long-lived investments.

To evaluate our second hypothesis (governments with a public history of losing are more likely to shroud arbitration in secrecy to reduce the reputational and material harm of another loss), we code $Losses_R$ for all of a respondent's previous public cases. The measure varies from 0 to 9, indicating that some countries, notably Argentina and Egypt, have

material that maps data from ICSID to our category codes. Hafner-Burton, Steinert-Threlkeld, and Victor 2016.

[75] For each case, ICSID provides summary information such as claimant, respondent, date of registration, etc. One piece of information provided is "subject matter." We coded *LongLived* from ICSID's identified subject matter. See the supplementary material for our mapping from ICSID's information to our categories. Hafner-Burton, Steinert-Threlkeld, and Victor 2016.

[76] Hafner-Burton, Steinert-Threlkeld, and Victor 2016.

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TABLE 1
PREDICTING SECRET ARBITRATION AT ICSID, 1972–2012

	Base	*Full*	*Industry FE*
LongLived	0.928***	0.816***	
	(0.239)	(0.264)	
$Losses_R$	0.872***	1.156***	1.288***
	(0.252)	(0.291)	(0.320)
$PublicCases_R$	−0.576***	−0.753***	−0.818***
	(0.196)	(0.226)	(0.251)
Reform	0.0574	0.200***	0.217***
	(0.0409)	(0.0617)	(0.0658)
Additional Facility	−2.006***	−2.539***	−2.454***
	(0.638)	(0.681)	(0.761)
$Bribery_R$		−0.925**	−0.740
		(0.439)	(0.473)
$Bribery_C$		−1.391***	−1.426***
		(0.412)	(0.435)
GDP_R (Log)		0.256*	0.0932
		(0.136)	(0.151)
GDP_C (Log)		0.776***	0.874***
		(0.266)	(0.292)
$Polity_R$		0.0413	0.0765***
		(0.0260)	(0.0294)
$Polity_C$		−0.136*	−0.160**
		(0.0722)	(−0.740)
FDI_R (Log)		−0.133	−0.125
		(.121)	(.129)
Intercept	−1.047***	−9.014***	−8.905***
	(0.221)	(2.602)	(2.781)
Industry FE	no	no	yes
Log likelihood	−215.777	−185.006	−177.154
Pseudo R^2	0.103	0.184	0.225
N	359	339	342

Standard errors in parentheses; * p<0.1, ** p<0.05, *** p<0.01

gone into arbitration with a history of many public losses (defined as being in breach of a treaty or contractual provision as determined by an arbitral panel). To code $Losses_R$, we read the text of each case and observe the votes of each arbitrator. We code a respondent as having lost if two or more panelists reject the state's arguments.[77] The wording of

[77] A very small number of cases have only one arbitration panelist. Typically, the claimants and the respondent each appoint one arbitrator, and the third, the president of the arbitral panel, is chosen by agreement of the parties, by agreement of the party-appointed arbitrators, or from a roster of arbitrators that the ICSID Secretariat manages.

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arbitration awards is quite clear on which party's claims it upholds.[78] If a case is dismissed on jurisdictional grounds, the respondent has won.

More than one-third (36 percent) of all states targeted for arbitration by investors had previously and publicly lost one or more cases. To isolate the effect of past losses from the effect of public ICSID experience more generally, we control for the respondent's total previous number of public cases ($PublicCases_R$), which varies from 0 to 13. This allows us to distinguish between respondents that have never lost a previous case because they have always won and those that have never lost because they have never previously been the targets of a public arbitration. While we are mindful that respondents may also learn about the odds of prevailing from their own history of secret losses, we are unable to directly measure these outcomes because they are concealed.

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

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

In column 2, we account for certain characteristics of the claimant and respondent states that could influence the decision to conceal arbitration. To account for power imbalances between host and claimant

[78] For example, the three panelists in *Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil vs. The Republic of Estonia* find "All of Claimants' claims are dismissed" (ICSID Case No. ARB/99/2, p. 96). In our binary coding of cases, we assign the "win" to the party that wins the majority of the claims.

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states,[79] we control for the claimant's (log GDP_C) and respondent's (log GDP_R) GDP per capita, and the respondent's inward FDI (log FDI_R) as a proportion of GDP—all based on data from the World Bank's World Development Indicators. (All wealth figures are reported in constant 2011 US dollars.) Low income could correspond with immature public institutions and a large role for the state in the economy, both of which could make it easier for actors to keep information secret. Respondents with low dependence on inward FDI might also be less inclined to reveal arbitral results publicly because they are less vulnerable to the consequences of gaining a bad reputation for their behavior in international arbitration. Similarly, a lack of well-developed democratic institutions may correspond with a lack of domestic legal requirements and expectations of public transparency, as well as a dearth of independent pressure groups; such factors would allow governments to pursue secrecy when it is convenient. Indeed, a move toward democratic rule is widely associated with greater disclosure of information related to the conduct of public institutions and public policy. We thus control for $Polity_C$ and $Polity_R$, which range from −10 to 10.[80]

We also include information on whether either the respondent or the claimant's home government had ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions *(Bribery)* at the time the dispute was registered at ICSID. We use this measure as a proxy for the presence of domestic institutions specifically designed to curtail and expose corruption related to international business transactions. The convention is a procedural one. It does not set detailed standards for anticorruption policies, but requires that governments adopt and implement domestic laws that make bribery of foreign public officials a criminal offense, including official enforcement procedures that are "effective, proportionate and dissuasive criminal penalties" (article 3). We expect arbitration is less likely to be kept secret among parties where governments have ratified this convention because fraud, a key incentive to hide a loss, is less likely. Table 1, column 2, reports estimates from this extended model. Descriptive statistics and correlations are reported in the supplementary material.[81]

[79] Allee and Peinhardt 2014.
[80] See www.systemicpeace.org/polity/polity4.htm.
[81] Hafner-Burton, Steinert-Threlkeld, and Victor 2016.

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Hypothesis 1: Long-Lived Investments

The estimates reported in Table 1, columns 1 and 2, indicate that secrecy is partly a function of the kinds of investment under dispute—the coefficient on *LongLived* is a positive and statistically significant predictor of secrecy. In these types of cases, it is in the interest of both parties to conceal results to reduce incentives for public posturing that can lead to breakdowns in negotiations.

In column 3 we include fixed effects for the type of industry to ensure, in particular, that countries with high numbers of public losses are not differentially attracting long-lived investment. This gives us variation within industries that allows us to show that our specification of long-lived is not driving the significance of the other variables, which we discuss below. We graph the predicted probabilities of secrecy by each industry in Figure 3, holding the other variables in the model constant at their means. The numbers above each bar represent the total number of claimants in each industry. The black bars represent industries where we have determined that investments tend to be long-lived, and show that the probability of secret arbitration is higher for disputes regarding these industries. The predictions are statistically significant for roads and rail, mining, and hydrocarbon.

Hypothesis 2: Hiding Respondent Losses

Table 1 suggests, indirectly, that concern for reputation (avoiding public losses) also matters. About 48 percent of respondent states in our data set have been the subject of one or more previous public ICSID disputes, and 36 percent have previously publicly lost at least one case. Respondent states are more likely to be parties to secret cases when they have experienced public loss, even when we control for the number of public cases they have experienced.[82] Figure 4 illustrates the results for an average state by plotting the predicted probabilities of secrecy (generated from Table 1, column 2) as they vary by the number of previous $Losses_R$, holding all other variables constant at their means. The effects are substantial. For a state with no previous experience of $Losses_R$, the model predicts a less than a 14 percent likelihood of secret arbitration. A state with two previous public losses is likely to be a party to secrecy more than 60 percent of the time, whereas a state that has lost four

[82] Because $PublicCases_R$ is highly correlated with $Losses_R$, we reestimated the model (column 2, Table 1) removing $PublicCases_R$, and find consistent results. We also replace the count of a respondent's past public cases ($PublicCases_R$) with the count of the respondent's total number of past cases (whether public or secret). The results hold and the coefficient on total past number of cases is also a positive predictor of *Secret*.

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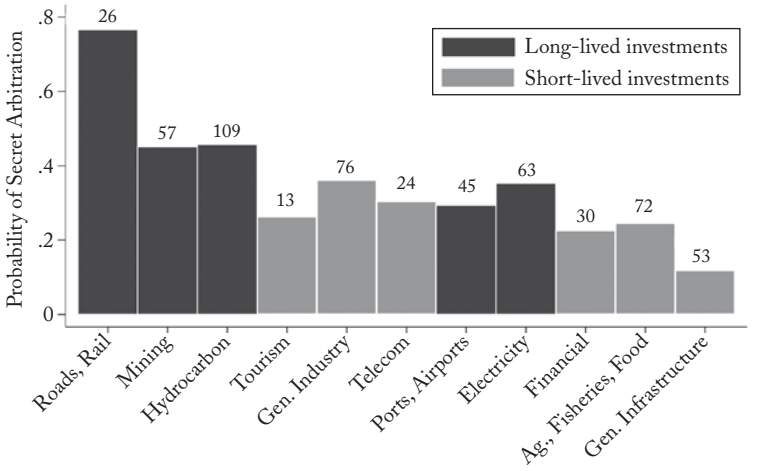


FIGURE 3
PROBABILITY OF SECRET ARBITRATION BY INDUSTRY

or more past public cases is predicted to engage in secret arbitration nearly 100 percent of the time. This suggests that, while a few governments may prefer to publicize a likely loss, most seek to hide the defeat, potentially to reduce the reputational and material harm from another loss.

HYPOTHESIS 3: REFORM AGAINST SECRECY

In this section, we investigate whether ICSID's own efforts to create a norm against secrecy correspond to a reduction in secret arbitration over time, as the many reforms aimed at putting ICSID at the forefront of transparency intend and as ICSID claims. We find, in fact, no clear evidence that the ICSID's efforts correspond to a reduction in the overall probability of secrecy over time. The coefficient on *Reform* predicts that, all else equal, the parties to recent disputes (after 2001) are more likely to conceal the outcome of arbitration than are the parties to disputes that took place prior to the start of ICSID's intensive efforts to increase transparency.[83]

To determine whether this finding is an artifact of our decision to code a *Reform* treatment as taking effect in 2001, we also evaluate alternative pivot years for the initiation of reform. We estimate a model

[83] When we consider only those cases than have been settled, we find no statistically significant relationship between the reform movement and settlements.

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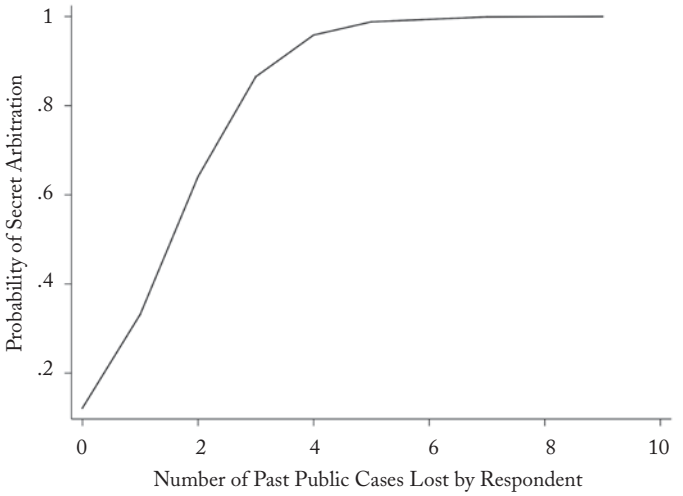


FIGURE 4
PROBABILITY OF SECRET ARBITRATION BASED ON PAST PUBLIC LOSSES

for every possible pivot year beginning in 1985, when ICSID launched its first transparency efforts, through 2006, when it changed its formal rules of procedure.[84] Figure 5 plots the predicted probabilities of secrecy at or after each potential reform treatment year. For example, the figure shows that cases filed on or after 1995 had about a 35 percent probability of being secret; after 2005 that probability increased to 50 percent. It illustrates that the probability of secrecy became more likely beginning in the early 2000s, precisely when ICSID launched its most intensive efforts for transparency. Although ICSID has worked to increase the probability of public disclosure, the reforms have not been followed by a consistent reduction in secrecy.

We cannot determine whether this finding is causal. Have reform efforts somehow backfired, increasing the benefits of secrecy to parties in dispute over time, or have they simply failed? It is plausible that ICSID's efforts to dampen secrecy are simply a response to a steadily growing interest by the parties to arbitration for secrecy. Claimants over time have brought more of the types of cases where the incentives to veil arbitration are strongest (see Figure 6). Beginning in 2000, claimants have been lodging a growing number of complaints over long-lived investments. Claimants also began to lodge more complaints against

[84] For more on the rule changes see Parra 2012.

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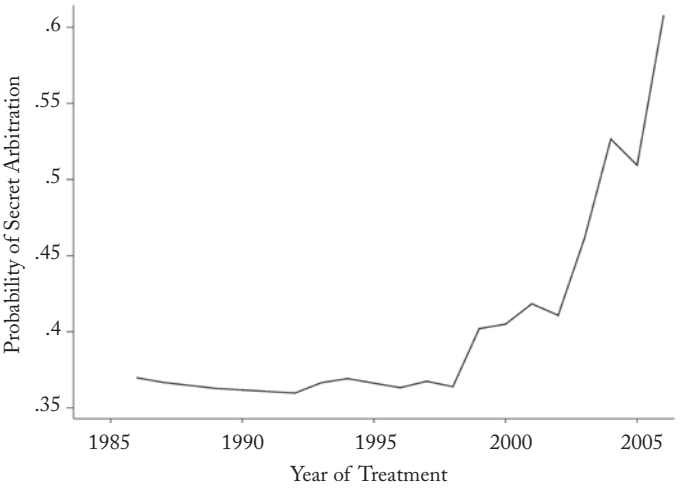


FIGURE 5
ICSID TRANSPARENCY EFFORTS: ROLLING REFORM TREATMENT

respondents with a previous history of losing at ICSID. In other words, alongside ICSID's growing efforts to reduce secrecy over time is another trend: the nature of the disputes brought for arbitration increasingly pull toward secrecy, although there is a great deal of variance from year to year.[85] Our statistical models of institutional reforms, plotted in Figure 5, control for these possibilities. Holding *LongLived* and $Losses_R$ constant, no matter in what year we measure the start of a reform treatment, ICSID's *Reform* efforts have not been followed by a consistent reduction in secrecy over time as ICSID leaders hoped they would. Although we cannot conclude that ICSID reforms have little real (or even negative) impact, we can conclude that the overall probability of secrecy has not declined over time despite reform efforts.

In contrast to *Reforms,* the ICSID *Additional Facility* is a highly significant predictor against secrecy. These cases are public in part because AF, unlike ICSID's core arbitration, does not lead to automatically enforceable awards. The OECD convention on bribery also predicts against secrecy. In cases where the host or investor governments of the disputing parties have ratified this convention, and thus require the adoption and implementation of domestic laws that make bribery of foreign public officials a criminal offense prosecuted publicly by state institutions, are less likely to be kept secret.

[85] The variance before 1995 reflects the scarcity of cases.

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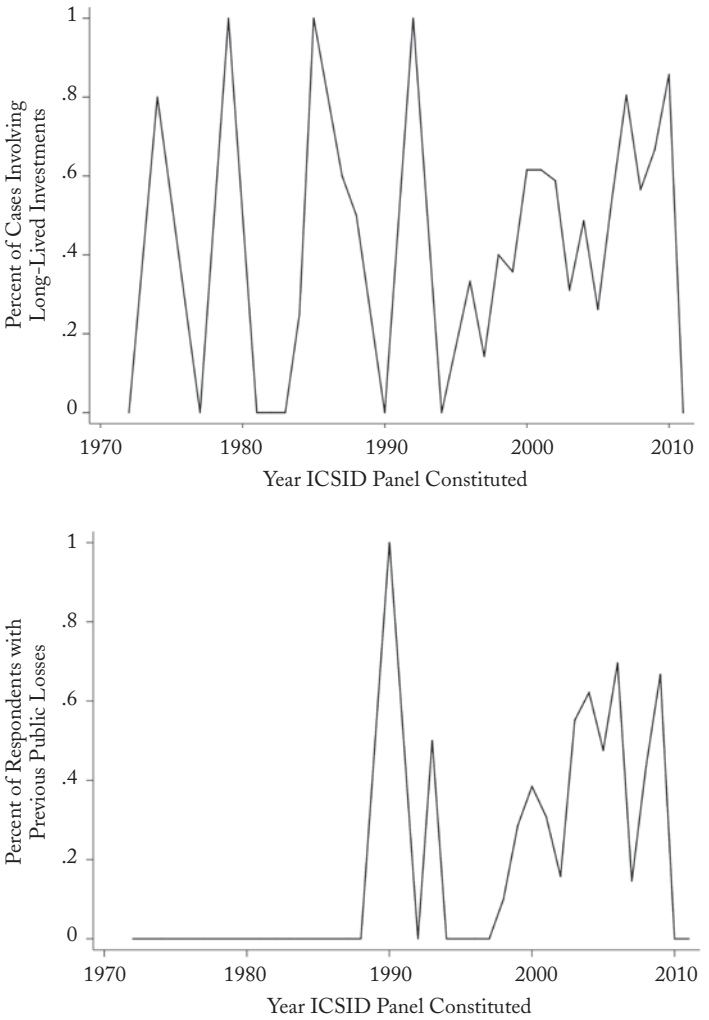


FIGURE 6
SECRET ARBITRATION TRENDS OVER TIME

ROBUSTNESS CHECKS

We take several additional steps in an effort to determine the robustness of our findings. In Table 2, column 1 we include fixed effects for each case. The findings are consistent. Column 2 includes fixed effects for time—specifically, the year in which the ICSID panel was constituted. This allows us to examine the effect of the variables between countries in a given year. The estimates remain consistent.

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TABLE 2
ROBUSTNESS CHECKS

	(1) Case FE	(2) Year FE	(3) Argentina	(4) ITA	(5) Experience	(6) Corruption	(7) Inflation	(8) Nat. Div. FDI
LongLived	.833***	1.01***	.786***	.837***	.816***	.981***	.814***	.748**
	(.265)	(.341)	(.266)	(.265)	(.263)	(.325)	(.267)	(.286)
$Losses_R$	1.21***	1.38***	1.17***	1.15***	1.15***	1.54***	1.14***	1.02***
	(.294)	(.378)	(.299)	(.292)	(.292)	(.353)	(.294)	(.295)
$PublicCases_R$	−.791***	−.927***	−.847***	−.742***	−.740***	−1.02***	−.756***	−.626**
	(.228)	(.288)	(.240)	(.227)	(.228)	(.272)	(.229)	(.229)
Reform	.211***	.222	.249***	.217***	.201***	.288***	.224***	.10
	(.062)	(.367)	(.691)	(.065)	(.062)	(.076)	(.064)	(.069)
Additional Facility	−2.39***	−1.69**	−2.58***	−2.61***	−2.55***	−2.19***	−2.76***	−2.00**
	(.681)	(.763)	(.691)	(.687)	(.681)	(.773)	(.705)	(.693)
$Bribery_R$	−909**	.182	−1.44***	−.962**	−.924**	−.305	−.947**	−.659
	(.441)	(.578)	(.526)	(.440)	(.440)	(.526)	(.443)	(.461)
$Bribery_C$	−1.33***	−.108	−1.57***	−1.45***	−1.40***	−.578	−1.41***	−.575
	(.413)	(.709)	(.429)	(.417)	(.413)	(.589)	(.418)	(.477)
GDP_R (Log)	.265*	−.075	.226	.266*	.257*	−.157	.342**	.088
	(.137)	(.191)	(.139)	(.137)	(.136)	(.218)	(.144)	(.144)
GDP_C (Log)	.786***	1.04***	.804***	.785***	.780***	.655	.746***	.896**
	(.266)	(.392)	(.271)	(.268)	(.267)	(.434)	(.267)	(.356)
$Polity_R$	.039	.037	.040	.039	.041	.075**	.035	.031
	(.026)	(.035)	(.026)	(.026)	(.026)	(.035)	(.026)	(.029)
$Polity_C$	−.1333*	−.279**	−.135*	−.136*	−.135*	−.200*	−.135*	−.122
	(.072)	(.128)	(.074)	(.073)	(.072)	.113	(.073)	(.096)
FDI_R (Log)	−.140	.038	−.133	−.138	−.132	−.124	−.184	.040
	(.122)	(.179)	(.122)	(.121)	(.121)	(.168)	(.130)	(.142)
$Argentina_R$			1.38**					
			(.665)					
ITA				−.462				
				(.473)				
$Experience_C$					−.101			
					(.298)			
$CorrControl_R$						.125		
						(.347)		
$CorrControl_C$						.136		
						(.340)		
$Inflation_R$						.001*		
							(.0007)	
FDI $Diversity_R$								−.136
								(.087)
Intercept	−9.68***	−9.15*	−9.05***	−9.16***	−9.05***	−5.75	−9.39***	−8.86**
	(2.63)	(4.89)	(2.65)	(2.615)	(2.609)	(4.16)	(2.62)	(3.23)
Case FE	yes	no	no	no	no	no	no	no
Year FE	no	yes	no	no	no	no	no	no
Log likelihood	−183.06	−136.94	−182.72	−184.52	−184.95	−135.05	−181.16	−161.66
Pseudo R^2	.192	.252	.194	.186	.184	.220	.197	.133
Observations	339	289	339	339	339	262	337	291

Standard errors in parentheses; * p<0.1, ** p<0.05, *** p<0.01

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Column 3 includes a control for investment disputes with Argentina, which accounts for more arbitration at ICSID than any other host government (and is likely one of the few governments that might actually benefit from publicly losing arbitration). This is important since the ICSID caseload has swelled over the past decade due to economic and political crises there. Controlling for disputes against Argentina does not improve the model fit or change the model's substantive results, though cases against Argentina are likely to be kept secret.[86]

Column 4 controls for cases we coded from ITA sources rather than ICSID sources to reveal whether our results might reflect a bias from the organizations that collect investment awards.[87] 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. The ITA by contrast can draw from a wider array of sources that might include cases that were leaked; that is, the parties did not intend for them to be revealed to the public. The 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 data set have prior public losses. We can, however, evaluate whether a claimant's history of bringing cases, their overall $Experience_C$, affects their secrecy decisions. $Experience_C$, measured as a count of the claimant's previous disputes (column 5), is negative and statistically insignificant while all other variables in the model remain consistent in sign and significance.

In column 6, we include additional information on *Corruption* measured by the Worldwide Governance Indicators. This measure captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as capture of the state by elites and private interests.[88] Unfortunately, these data are available only beginning in 1996, substantially reducing our sample size. The core findings nonetheless remain.

In column 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,[89] which

[86] There are a variety of other respondent governments that have several cases filed against them and, as with Argentina, those cases tend to cluster together in time. They include the Central African Republic, Ecuador, Hungary, Mexico, Peru, Ukraine, and Venezuela. When we include controls for these other countries, our core results do not change.

[87] Available at italaw.com.

[88] For more details, see http://info.worldbank.org/governance/wgi/index.aspx#home.

[89] Simmons 2014.

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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 inflation rate in the year an arbitration panel was constituted, $Inflation_R$. Inflation is a positive predictor of secrecy alongside the core findings, which remain significant.

In line with recent research on the conditions under which governments can break contracts with foreign firms,[90] 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, while the diversity of a country's FDI base has no effect on the likelihood that an arbitration outcome is secret.

Although our focus is the decision for secrecy, which can be made by any party unilaterally, we briefly explore joint decisions about the transparency of arbitral outcomes. According to the logic of our theory, transparency is most likely to occur when disputes are over short-lived investments *and* governments do not have a visible history of losing. This is what we see when we estimate the predicted probabilities of our model (Table 1, column 2) at different values of *LongLived* and $Losses_R$. Specifically, when the dispute is over a short-lived investment and the accused government has never previously publicly lost, the probability of secrecy is only 10 percent. By contrast, when the dispute is over a long-lived investment and the government has previously lost a case, that probability rises to 43 percent. It rises to nearly 90 percent if the government has previously lost three cases and to 100 percent with any further losses. These predictions are consistent with our argument.[91]

An Illustration: Leaked Secrets

So far we have discussed these matters with reference to the full universe of concluded cases that ICSID handled during the time period of this study. In this section we look at the single case in our data where the parties following the formal ICSID procedures intended outcomes to remain secret but those outcomes were leaked in ways that made it

[90] Wellhausen 2015.

[91] Additionally, we have controlled for contract-based, as opposed to treaty-based, arbitration. Our results remain substantively identical, though contract-based arbitration is insignificant. We do not report those results due to space limitations.

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possible to reveal the details of the case.[92] The case concerns Chevron's natural gas production in Bangladesh. Though it was intended to remain a secret, the case has now generated a substantial public record that helps to illustrate the ideas advanced in this article. As noted earlier, one puzzle for future research is why so many secret awards remain secret when parties may have incentives to leak. The case presented here is one of the few exceptions, and we leverage this example to determine whether it fits broadly with our theoretical expectations.

After massive economic reforms in the early 1990s, the Indian economy began to grow quickly and so did its demand for energy.[93] Seeing this development, a wide array of foreign firms sought ways to supply fuel and electricity to India. Those firms included Unocal, a US-based company that specialized in the development of natural gas resources in Asia. It looked at a range of options, including piping gas from Turkmenistan across Afghanistan and Pakistan to India (a project infused with risk), as well as the seemingly easier task of producing gas in neighboring Bangladesh and piping it west into India.[94] Working with other partners, it acquired three major exploration blocks in Bangladesh and in 1998 discovered vast amounts of gas in what became known as the Bibiyana gas field. It found gas elsewhere, as well, and over time linked its various gas fields to become the largest single producer of gas in the country. Because it had its eyes on Indian prizes, Unocal carefully designed its contracts to give it flexibility in where it sold the gas so long as it paid Petrobangla, Bangladesh's state-owned hydrocarbon monopoly, a transit fee. And because it feared mistreatment in the local Bangladeshi courts, Unocal incorporated its investment into a series of Bermuda-based companies, which allowed it access to mandatory offshore arbitration under the UK-Bangladesh BIT.

In tandem with Unocal finding gas, political relations between India and Bangladesh soured, and the option of piping gas to the lucrative Indian market vanished. That left Unocal, which was bought by Chevron in 2005, with no serious option but to sell the gas to Petrobangla at prices low enough that the gas could be used there. Thus Petrobangla became Chevron's only customer, and as Chevron kept finding

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

[93] Tongia and Arunachalam 1999.

[94] Olcott 2006.

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and producing more gas, it became Petrobangla's largest supplier. Both sides were mutually dependent on each other in a long-lived, capital-intensive, and highly regulated venture to produce, pipe, and sell gas.

The dispute arose because in addition to buying the gas, Petrobangla also charged a large (4 percent) transit fee. Chevron contended that costly transit fees were justified only if Petrobangla moved the gas to other customers, not if the firm itself purchased the gas for its own reselling. Disputes of this kind are commonplace in the oil and gas industry because once an infrastructure is in place, both sides have an incentive to reap as large a fraction of the rents for themselves as possible.[95] We would expect both sides in this dispute to want to keep the dispute secret since both would need to engage with each other repeatedly after the dispute was over, and secrecy would reduce incentives to posture in ways that would threaten negotiations.

Although both sides favored secrecy, news of the case leaked. The leaked information reveals that both sides behaved in ways consistent with the theoretical propositions we argue in this article. Chevron sought to use offshore arbitration to force Petrobangla to agree on a reduced (ideally zero) transit fee. The government of Bangladesh, uninterested in negotiating on those terms, obtained a favorable ruling in the country's domestic courts to block international arbitration, and thus refused to participate in the proceedings. It also hired as its chief lawyer a member of the country's anticorruption commission, thus raising the specter of a high profile conflict between a leading authority on corruption and one of the country's largest foreign investors.[96] Bangladesh's concerns about international arbitration were understandable. In 2002, a dispute between Cairn Energy, a British-based oil and gas exploration firm, and Bangladesh on similar contractual matters had been decided in favor of the foreign investor.

In the face of all these difficulties, Chevron went so far as to seek help via the US Embassy in Dhaka, composing a letter on State Department stationary to senior Bangladeshi officials that included a warning that failure to engage with ICSID presented risks "to Bangladesh's commercial reputation, as other companies watch this case closely for signals about the sanctity of contract in Bangladesh and treatment of foreign investors." While the public record does not reveal whether that letter was sent to the Bangladeshis, disclosures on Wikileaks reveal the cable went from the US Embassy in Dhaka to Washington.[97]

[95] Woodhouse 2006.
[96] Embassy Dhaka 2007.
[97] Embassy Dhaka 2007.

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After Bangladesh engaged with ICSID, it won the case and was not forced to repay past transit fees or to stop charging them in the future. This unexpected win may help explain why news of the outcome leaked immediately in the local press[98] and was soon picked up by the international oil and gas news media.[99] For Bangladesh, the unexpected good news would have played well locally. For Chevron, whose audience costs were now greater following this loss, silence remained the rule. The company never issued a press release or a public filing for its investors on the outcome that, had it gone the other way, would have been worth hundreds of millions of dollars. The parties never agreed to release the results publicly, and thus to this day ICSID lists the case as private and has issued only rudimentary procedural details.[100] The inability of ICSID to release the case even though the outcomes are widely known underscores the strict institutional constraints under which it operates.

While this dispute affected the allocation of the rents from gas production in Bangladesh, it appears to have had little impact on the ongoing business relationship between Chevron and Bangladesh. In the midst of the arbitration, for example, in 2009 Petrobangla gave Chevron approval to invest in a $53 million gas compressor station that would allow a radically increased output from Bibiyana and nearby fields.[101] That same year, Chevron invested massively in new exploration for gas in the country, finding new deposits that were the largest on record for a decade.[102]

Conclusion

Scholarship on BITs and investor-state arbitration is beginning to flourish in political science.[103] The trend is welcome because these agreements have sparked important debates with large implications for theory and policy. Some scholars see BITs and arbitration as fair, efficient, and balanced mechanisms that help to facilitate higher levels of FDI—especially in the developing economies that need it most. Others are more skeptical, seeing international investment laws, and globalization more

[98] *Daily Star* 2010.
[99] *Upstream* 2010.
[100] ICSID 2011.
[101] *Energy-pedia* 2009.
[102] Chevron 2012.
[103] E.g., Allee and Peinhardt 2010; Allee and Peinhardt 2011; Elkins, Guzman, and Simmons 2006; Haftel and Thompson 2013; Jandhyala, Henisz, and Mansfield 2011; Milner 2014; Neumayer and Spess 2005.

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generally, as a source of exploitation of the developing world by wealthy corporations and a threat to transparent, democratic governance.[104] From either perspective, understanding how arbitration actually works is of vital importance.

In this article, we have shown how the parties to arbitration use secrecy as a means of obtaining flexibility in arbitration. Secrecy makes it easier to work out deals—under the shadow of the law—that leave investors and host states better off. It is a way to hide inconvenient information that, if a party knew might be exposed, could lead parties to avoid investment arbitration or investments altogether. We suggest that the use of secrecy be viewed within the larger framework of legalization and flexibility that has animated so much productive work at the intersection of international law and international relations in recent years.[105]

We are also mindful that the use of secrecy raises larger questions and trade-offs in the operation of public legal institutions. On one hand, widespread use of secrecy affects public deliberation and perhaps the broader legitimacy of international institutions. Many scholars who study international institutions have argued that public deliberation is an essential mechanism through which international institutions gain legitimacy and thus have a practical effect on behavior.[106] This line of scholarship has not focused squarely on dispute resolution and arbitration, but the logic applies equally: where arbitration plays a central role in how international legal obligations are interpreted in practice, secrecy prevents public deliberation about law. Our research shows that certain types of investment disputes tend to be hidden from public debate and could undermine an important function of adversarial legal processes—public deliberation—often in those cases where the most is at stake for the public. The enduring pressure for secrecy that results from firms and government interests has, not surprisingly, been one central element of the public backlash against investment law and arbitration.[107] It may also be a contributing factor to other elements of the backlash, such as legal inconsistencies and perceptions of bias and incompetence.[108]

On the other hand, secrecy may be essential to the efficiency of international institutions. We have suggested that it can reduce incentives

[104] E.g., Price 2005.
[105] Hafner-Burton, Victor, Lupu 2012.
[106] E.g., Finnemore and Toope 2001; for an alternative view, see Gilligan, Johns, and Rosendorff 2010.
[107] Waibel et al. 2010.
[108] Wells 2010.

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for political posturing that could ultimately harm the public interest if investors and governments adopt uncompromising positions so as not to appear to cave in.[109] In short, secrecy offers flexibility in some of the most sensitive disputes, but it also weakens the public signal of commitment to uphold investor rights in those types of cases. The tension between these two effects of secrecy—the undermining of debate and legitimacy and the promotion of efficient transactions—is an enduring element in the design of legal systems.

This tension may also help to explain one of the more disturbing policy implications of our findings: there is no apparent negative correlation between the adoption of transparency-oriented reforms and the actual practice of keeping awards and settlements secret. This finding could reflect many factors that future research should probe in more detail. One is that international investment law is becoming more demanding and covers many areas previously considered the sole prerogative of national law. This could be raising the demand for flexibility by investors and host countries alike and thereby create stronger pressures for secrecy. Moreover, it has been relatively easy for parties to obtain secrecy. Creating greater transparency will require deeper reforms at ICSID or in the agreements that authorize use of arbitration at ICSID and other institutions, such as BITs and investment chapters. The former route to reform would require the difficult task of building a politically supportive coalition of ICSID members; the latter could prove more expedient, and recent agreements such as the TPP and the US model BIT already reflect reforms of this type.[110] The reform process has focused disproportionately on formal awards—for example, ICSID has released excerpts of the legal reasoning in award cases even when the full award is kept confidential. But achieving more transparency will also require more attention to settlement cases since that is a common means of resolving disputes while keeping the outcome private.[111]

Supplementary Material

Supplementary material for this article can be found at http://dx.doi.org/10.1017/S004388711600006X.

[109] Stasavage 2004.

[110] The latter route to reform would also allow reformers to focus on investment agreements where transparency is needed because the handling of arbitrations can have larger impacts on public law and confidence. By contrast, for the tiny fraction (about 3 percent in our data set) of ICSID cases that are contract-based arbitrations, the broader public benefit from secrecy may be smaller.

[111] Hafner-Burton, Puig, and Victor 2015; Hafner-Burton and Victor 2016.

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