

# Investment Law’s Transparency Gap

Sebastian Puerta<sup>†</sup> & Tim R Samples<sup>‡</sup>

One of the fastest growing areas of international law in recent times is also one of the most controversial. Between 1990 and 2010, the number of investment treaties surged from less than 500 to over 3,000. Through this expansion, foreign investors gained extensive rights to sue sovereign states directly through investment treaty arbitration (ITA). The result: a remarkable transfer of sovereign power to a semi-private supranational adjudication system. Once investors confronted governments through the ITA system, bringing hundreds of claims, backlash ensued. Cases in which foreign investors challenged public interests—such as health regulations and emergency financial management—amplified outrage.

Adjudicating disputes between foreign investors and sovereigns involves assertions of private rights in matters of public interest. ITA is, in a sense, “peak” globalization because it involves the intrusion of international law into domestic spheres. Yet, despite ITA’s direct and compelling consequences for public interests, ITA transparency is persistently low. Our study uses predictive modeling to shed light on ITA activity. We calculate the dimensions of overall ITA activity, combining known amounts with an estimate of unknown claims and awards. In doing so, we illustrate the “transparency gap” in investment law, which we estimate as an unreported USD \$186 billion in claims and USD \$15 billion in awards. We conclude by assessing the implications of this transparency dilemma.

<b>Introduction</b> .....	10
<b>I. Transparency in the ITA System</b> .....	14
A. Investment Law and Investor-State Disputes .....	15
1. <i>The Mechanics of ITA</i> .....	15
2. <i>The Rise of International Investment Law</i> .....	19
3. <i>Investment Disputes Since 1990</i> .....	22

---

<sup>†</sup> Beinecke Scholar and Ph.D. Student, Economics, University of California, Berkeley. BA/MA, Economics, University of Georgia.

<sup>‡</sup> Associate Professor of Legal Studies, Terry College of Business, University of Georgia with a courtesy appointment at the University of Georgia School of Law.

Our thanks to colleagues at the Columbia Center on Sustainable Investment (CCSI), the IIA Team at the United Nations Conference on Trade and Development (UNCTAD), and the American Society of International Law (ASIL) International Economic Law Interest Group for insightful conversations and feedback. Special thanks to Susan Franck, Olabisi Akinkugbe, Rachel Wellhausen, Julian Arato, Fernando Dias Simões, Richard Chen, Brooke Guven, Lise Johnson, Stephen Park, and Lisa Sachs for their comments. Prior versions of this Article were presented at the annual conference of the Academy of Legal Studies in Business, the Roundtable on International Business Law at Brooklyn Law School, and the Fourth Conference on Law & Macroeconomics at Yale Law School. All errors and omissions are our own.

B.	Structural Factors in Transparency . . . . .	24
1.	<i>The Legacy of Confidentiality</i> . . . . .	24
2.	<i>Asymmetrical Transparency</i> . . . . .	26
C.	Progress Towards Transparency . . . . .	28
1.	<i>The Impact of NAFTA</i> . . . . .	29
2.	<i>Multilateral Efforts</i> . . . . .	31
II.	<b>The Transparency Gap</b> . . . . .	35
A.	Data . . . . .	35
B.	Methodology . . . . .	37
C.	Findings . . . . .	38
III.	<b>Transparency Dilemmas</b> . . . . .	42
A.	Ethical and Systemic Dilemmas . . . . .	42
B.	Parallel Dilemmas . . . . .	46
	<b>Conclusions</b> . . . . .	50

## Introduction

The Cochabamba Water War is a vivid tale of globalization and its discontents. The story begins in Bolivia's third largest city, Cochabamba, with a privatization of water utilities in 1999.<sup>1</sup> The privatization deal was governed by a forty-year concession between Bolivia and a multinational consortium named Aguas del Tunari (AdT).<sup>2</sup> A series of unpopular rate hikes and restrictions—including prohibitions on community wells and rainwater cisterns—were implemented once AdT took over the city's water operations.<sup>3</sup> The deal was quickly engulfed in intense controversy. Protests erupted across the country, and, at one point, the entire city of Cochabamba was blockaded.<sup>4</sup> Facing immense pressure, the Bolivian government rescinded the USD \$2.5 billion concession just five months into the contract.<sup>5</sup>

Pursuant to an investment treaty between Bolivia and the Netherlands, AdT brought claims of over USD \$25 million against Bolivia in an arbitration action through the International Centre for Settlement of Investment Disputes (ICSID), a division of the World Bank.<sup>6</sup> As an ICSID arbitration,

1. See William Finnegan, *Leasing the Rain*, NEW YORKER (Mar. 31, 2002), <https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain> [https://perma.cc/3P6B-TZ6U].

2. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 52-57, 61 (Oct. 21, 2005) (describing the factual background of the concession and ownership structure of the multinational entities); Nicholas Miranda, *Concession Agreements: From Private Contract to Public Policy*, 117 YALE L.J. 510, 518-21 (2007) (noting low transparency in the process that awarded the concession).

3. See Amanda L. Norris & Katina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 HARV. NEGOT. L. REV. 31, 37-41 (2010) (providing an extensive factual history of *Aguas del Tunari*).

4. Finnegan, *supra* note 1.

5. Norris & Metzidakis, *supra* note 3, at 41.

6. See Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 51-52 (2010) (explaining the role of ICSID in ITA).

the claim bypassed the Bolivian judicial system, still provoking more controversy.<sup>7</sup> When civil society coalitions attempted to participate in the proceedings as third-parties—essentially through amicus curiae briefs—their requests were denied.<sup>8</sup> Although the case never reached the merits stage, *Aguas del Tunari* left a lasting mark on international investment law, elevating awareness about public-private tensions in globalization and the reach of investment treaty arbitration (ITA).<sup>9</sup> As an early test for civil societal participation in ITA proceedings, *Aguas del Tunari* also sparked debates about human rights in the investment law system.<sup>10</sup> Both sets of issues overlap profoundly with the question of transparency in ITA.<sup>11</sup>

By nature, the ITA system generates intrusions of international law into domestic spheres of governance.<sup>12</sup> Public-private tensions are inherent in such intrusions, where the private rights of foreign investors intersect with public interests and sovereign powers.<sup>13</sup> ITA claims frequently challenge sovereign authority to regulate energy, health, natural resources, and other areas of public interest.<sup>14</sup> Public health management during the COVID-19 pandemic, for instance, was identified as a concerning potential frontier of ITA liabilities.<sup>15</sup> In the words of Chief Justice John Roberts, remarking on the extraordinary transfer of adjudicatory power in the ITA system, a state “grants to private adjudicators not necessarily of its own choosing, who can meet literally anywhere in the world, a power it typi-

7. See Fernando Dias Simões, *Amicus Curiae in the Trans-Pacific Partnership*, 54 AM. BUS. L.J. 161, 170 (2017) [hereinafter Simões, *Amicus*]; see also Norris & Metzidakis, *supra* note 3, at 42-43.

8. Simões, *Amicus*, *supra* note 7, at 170-71.

9. See, e.g., Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551, 555 (2018) (referencing the “global civil society campaign” sparked by *Aguas del Tunari*).

10. U.N. ECOSOC, Human rights, trade and investment—Report of the High Commissioner for Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/9, ¶¶ 51-52 (2003).

11. *Id.*

12. See Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279, 281, 299 (2017) (noting that investor-state disputes pit “private interests against those of governments that have traditionally enjoyed a national policy prerogative”); see also Janet Martinez, *International System Design: Shoals and Shifting Goals*, 2020 J. DISP. RESOL. 343, 356 (2020) (observing that such tensions stem from the “public-private hybrid nature of investor-state disputes”).

13. See Martinez, *supra* note 12, at 356.

14. See Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 10-12 (2019) (observing the impact of international investment law in domestic private law); see also Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 B.C. L. REV. 2791, 2804 (2018) (arguing that the ITA system “conflates a private and a public dimension”).

15. See, e.g., Ben Heath, *Guest Post: Suspending Investor-State Arbitration During the Pandemic*, INT'L ECON. L. POL'Y BLOG (May 12, 2020, 8:57 AM), <https://ielp.worldtradelaw.net/2020/05/guest-post-suspending-investor-state-arbitration-during-the-pandemic.html> [https://perma.cc/B9CZ-HBBR]; Nathalie Bernasconi-Osterwalder, Sarah Brewin & Nyaguthii Maina, *Protecting Against Investor-State Claims Amidst COVID-19*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 2020), <https://www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> [https://perma.cc/S2XD-RSLA].

cally reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts.”<sup>16</sup> Put differently, ITA involves an extraordinary transfer of sovereign power to a system for semi-private supranational adjudication.<sup>17</sup>

Cases like *Aguas del Tunari* are a byproduct of the frenzied expansion of international investment law which started in the early 1990s as a sustained boom in economic globalization produced thousands of trade and investment treaties.<sup>18</sup> The vast majority of those treaties contained procedural and substantive grounds for ITA—effectively semi-private international arbitration—as a mechanism of dispute resolution.<sup>19</sup> Since then, foreign investors have initiated over 1,000 investment claims through the ITA system, demanding billions in damages against sovereign states.<sup>20</sup> Tensions with sovereign power, combined with the secretive nature of arbitration, turned a previously obscure area of international law into a politically inflammatory acronym.<sup>21</sup> Even amid growing backlash against the global economic establishment, ITA—commonly referred to as investor-state dispute settlement (ISDS)—stands out as particularly unpopular, claiming enemies across the political spectrum.<sup>22</sup>

Despite its scale and importance, ITA exists in something of a “transparency desert” at the international level.<sup>23</sup> That is, a non-trivial portion of ITA activity—claims against sovereign states with profoundly public implications—is essentially clandestine. A startling number of ITA claims

---

16. *BG Grp. plc v. Republic of Argentina*, 572 U.S. 25, 58 (2014) (Roberts, C.J., dissenting).

17. *See id.* at 57.

18. *See infra* Part I.A.2

19. *See infra* Part I.A.3

20. In this paper, the “ITA system” is understood as the body of investment treaties, arbitral rules, investment arbitration jurisprudence, and institutional frameworks. Together, they shape the environment for investor-state disputes. *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 *HARV. INT’L L.J.* 427, 431 (2010) (arguing that treaty frameworks constitute a global “regime” for investment law).

21. Anti-ITA sentiments have cropped up around the world, crossing ideological boundaries and development thresholds. Early on, ITA opposition was led by specialized constituencies, such as environmental interest groups. *See, e.g.,* Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 *AM. BUS. L.J.* 475, 479 (2001) (referencing environmental opposition to NAFTA’s investor-state provisions). Today, the backlash extends far and wide. *See, e.g.,* Langford & Behn, *supra* note 9, at 554–58 (charting the history of opposition to ITA); Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 *DUKE L.J.* 459, 474–80 (2015) (depicting the same).

22. Few policy issues unite the camps of Bernie Sanders, Elizabeth Warren, Hillary Clinton, and Donald Trump. *See, e.g.,* Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, *WASH. POST* (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html) [<https://perma.cc/MPG2-EF7F>]; Robert E. Lighthizer, *The Era of Offshoring U.S. Jobs is Over*, *N.Y. TIMES* (May 11, 2020), <https://www.nytimes.com/2020/05/11/opinion/coronavirus-jobs-offshoring.html> [<https://perma.cc/D6W7-9XB8>].

23. *See* Christina Koningsor, *Transparency Deserts*, 114 *Nw. U. L. REV.* 1461, 1466 (2020) (coining the term “transparency desert”).

and awards are simply inaccessible to the people most affected by them.<sup>24</sup> Consequently, deficient transparency is a common denominator in the legitimacy crisis facing ITA.<sup>25</sup> Multilateral efforts and nongovernmental organizations have responded by pushing for greater transparency in ITA.<sup>26</sup> Despite these efforts, low transparency persists in the ITA system, slipping through the cracks of international governance.<sup>27</sup>

Our contribution addresses that transparency deficiency. We illustrate the “transparency gap” in the investment law system, which we define as the difference between *known* ITA activity and our estimate of *probable* ITA activity.<sup>28</sup> More specifically, we measure a specific—and vital—component of transparency: *the availability of information about the results of the ITA system*. We estimate that the transparency gap in ITA claims is approximately USD \$186 billion and the gap for ITA awards is approximately USD \$15 billion. Our findings show that the transparency gap is non-trivial and persistent. While scholars have explored a variety of empirical questions in investment law, our findings offer the first comprehensive measurement of secrecy in ITA.<sup>29</sup> Our findings also underscore the importance of ongo-

24. See *infra* Part II.C (discussing the extent of inaccessible claim information in ITA disputes).

25. See, e.g., Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 358 (2017) (“[C]ritics of ISDS have long pointed to the lack of transparency, consistency, and overall legitimacy in the ISDS process”); U.N. Conference on Trade and Development, *Transparency: UNCTAD Series on Issues in International Investment Agreements II*, 25–26, U.N. Doc. UNCTAD/DIAE/IA/20116 (2012) (addressing connections between legitimacy and transparency in ISDS) [hereinafter UNCTAD, *Transparency: A Sequel*]; Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 424 (2018) (placing transparency priorities within the broader context of ITA reform initiatives).

26. See *infra* Part I.B (reviewing multilateral initiatives to enhance transparency).

27. See *infra* Part II.C (illustrating the extent and persistence of the transparency gap).

28. We focus our analysis on procedural transparency, the extent to which public visibility exists through the disclosure of documents, public access to proceedings, and availability of information about the results of ITA. See U.N. Comm'n on Int'l Trade Law, Rep. of Working Group II on Its Fifty-Fifth Session, U.N. Doc. A/CN.9/WG.II/WP.736, at 2 ¶ 2 (2012) [hereinafter UNCITRAL, *2012 Working Group*] (discussing third party participation as a component of transparency). Particularly important, in our view, are the bottom-line results of ITA: costs, the amounts of settlements and awards, legal fees and arbitration costs. See Tim R Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 167–68 (2019); see also *infra* Part II.B and Annex 5 (explaining the data and methodology used in our calculations).

29. See generally Hafner-Burton, Puig & Victor, *supra* note 12; Emilie M. Hafner-Burton & David G. Victor, *Secrecy in International Investment Arbitration: An Empirical Analysis*, 7 J. INT'L DISP. SETTLEMENT 161 (2016); Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld & David G. Victor, *Predictability Versus Flexibility: Secrecy in International Investment Arbitration*, 68 WORLD POL. 413, 420 (2016); Samuel Levander, *Resolving “Dynamic Interpretation”: An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT'L L. 506 (2014); Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117 (2016); Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes?*, 71 INT'L ORG. 559 (2017); Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147 (2014); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty*

ing efforts to reform the ITA system, including commitments to improving to transparency.<sup>30</sup>

Part I of this Article provides an overview of existing initiatives to improve ITA transparency and explains how the ITA system generates tensions between public interests and private rights. Part II of this Article describes the data, methodology, and findings of our work. There, we illustrate the transparency gap and estimate the aggregate dimensions of ITA activity. We then explore the implications of investment law's transparency gap. A brief conclusion follows.

## I. Transparency in the ITA System

Investment law exists at the contentious intersection of private rights and sovereign powers.<sup>31</sup> The public-private tensions of international investment law produced controversy even before the inception of the ITA system.<sup>32</sup> Early on, discord was largely a matter of competing interests among capital-exporting countries (the Global North) and capital-importing countries (the Global South).<sup>33</sup> These tensions reflect fundamental tradeoffs at the core of the investment law system.<sup>34</sup> Once the system took shape, producing hundreds of claims against sovereign states, criticisms of ITA amplified and deepened.<sup>35</sup> Today, backlash against ITA is widespread, involving states across the spectrum of economic development.<sup>36</sup> Deficient transparency is a central point of contention.<sup>37</sup> This Part begins with an overview of the ITA system, which describes the workings of investor-state arbitration and the basics of international investment law. This Part then

---

*Arbitration: Empirically Evaluating the State-of-The-Art*, 46 GEO. J. INT'L L. 363 (2015); Daniel Behn, Malcolm Langford & Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. WORLD INV. & TRADE 188 (2020); Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L L. 13 (2014); Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1 (2020).

30. See *infra* Part I.C.2 (outlining multilateral efforts to enhance transparency).

31. See, e.g., GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 148 (Oxford Univ. Press 2007); Julian Arato, *Corporations as Lawmakers*, 56 HARV. J. INT'L L. 229, 288 (2015) (proposing greater scrutiny of treaty-based investor protections); Lise Johnson, Lisa Sachs & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. TRANSNAT'L L. 58, 101 (2019) (observing the public-private balance and noting that investment treaties are often more protective of private property than domestic legal systems).

32. Some capital-importing countries, particularly in Latin America, were suspicious of the investment law system from the outset. See Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256, 257 (1971) (describing opposition that led to "El No de Tokyo").

33. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 78-79 (2005).

34. *Id.* at 77 (2005) (addressing the sovereignty trade-offs for states that sign investment treaties).

35. See Salacuse, *supra* note 20, at 446-47.

36. See, e.g., *supra* notes 21-22 and accompanying text.

37. UNCTAD, *Transparency: A Sequel* at 15.

discusses recent initiatives to enhance transparency in the ITA system, including the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules and the Mauritius Convention on Transparency.

#### A. Investment Law and Investor-State Disputes

The full universe of ISDS cases includes two categories of arbitration: (i) treaty-based arbitration, or ITA, and (ii) contract-based or commercial arbitration.<sup>38</sup> Although sovereign states are parties to the disputes in both categories, the sources of law and the nature of the claims differ.<sup>39</sup> ITA involves a one-way flow of rights whereas contract-based investor-state arbitration is more bilateral in nature.<sup>40</sup> In ITA, the governing law is the international treaty in question.<sup>41</sup> Since ITA is more likely than commercial arbitration to directly target sovereign acts and regulations, ITA tends to generate more controversy around ISDS.<sup>42</sup> Commercial arbitration, on the other hand, is a creature of contract, whether or not a sovereign state is a party.<sup>43</sup> Yet, despite these distinctions, ISDS is often used interchangeably with ITA.<sup>44</sup> We acknowledge and appreciate the distinctions between these two categories of ISDS. At the same time, we recognize the difficulty of a simple and absolute bifurcation as both categories of ISDS have overlapping consequences for public resources and investor-state relations.<sup>45</sup> However, in this Article, we distinguish between the two categories and focus our analysis on ITA.<sup>46</sup>

##### 1. *The Mechanics of ITA*

Tabaré Vázquez, an oncologist, became the President of Uruguay in 2005.<sup>47</sup> Vázquez continued to practice medicine during his term, seeing

---

38. See SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION*, 3 n.11 (2019).

39. *Id.* at 108–09 (contrasting ISDS and ITA).

40. *Id.*

41. Stefan Riegler, Dalibor Valinčič & Borna Dejanovič, *Applicable Law in Investment Treaty Arbitration*, *GLOB. ARB. REV.* (Jan. 14, 2022), <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/applicable-law-in-investment-treaty-arbitration> [https://perma.cc/DYJ7-2ZCP].

42. See Gus Van Harten, *Is It Time to Redesign or Terminate Investor-State Arbitration?*, *CTR. INT'L GOVERNANCE INNOVATION* (Apr. 11, 2017), <https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration/> [https://perma.cc/5VU8-RZ26].

43. See, e.g., *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008).

44. FRANCK, *supra* note 38, at 108–09.

45. See Mary Zhao, *Transparency in International Commercial Arbitration: Adopting a Balanced Approach*, 59 *VA. J. INT'L L.* 176, 188–89 (2019) (underscoring public interests that surface in international commercial arbitration).

46. See *infra* Part II.A (outlining the scope of our dataset).

47. Simon Romero & Mauricio Rabuffetti, *Tabaré Vázquez Reclaims Presidency in Uruguay Election*, *N.Y. TIMES* (Nov. 30, 2014), <https://www.nytimes.com/2014/12/01/world/americas/leftist-tabar-vzquez-reclaims-presidency-in-uruguay-election.html> [https://perma.cc/A6CB-3CDK].

cancer patients one morning a week at a clinic in Montevideo.<sup>48</sup> His administration prioritized public health through initiatives, such as, those aimed at reducing tobacco consumption.<sup>49</sup> Soon, Uruguay had some of the most stringent tobacco packaging regulations in the world.<sup>50</sup> In 2010, Philip Morris challenged those regulations in a \$25.7 million investment arbitration claim.<sup>51</sup> Morris argued that the restrictive tobacco regulations violated an investment treaty between Switzerland and Uruguay.<sup>52</sup> To critics, the case against Uruguay epitomized the overreach of economic globalization.<sup>53</sup> In essence, the Swiss affiliates of a large American tobacco company leveraged an international investment treaty to challenge Uruguay's anti-smoking initiative in a semi-private arbitration.<sup>54</sup>

This case, *Philip Morris v. Uruguay*, illustrates the basic workings of ITA: a foreign investor, affected by a state's laws or regulations, seeks compensation via treaty-based arbitration.<sup>55</sup> As the name suggests, ITA is treaty-based and rooted in various international trade and investment agreements.<sup>56</sup> Investment claims typically involve a foreign investor's assertion that the host state violated its treaty obligations by harming an investment.<sup>57</sup> Like litigation, ITA is adversarial in nature; however, ITA

48. Larry Rohter, *In Uruguay, The President Also Reads Mammograms*, N.Y. TIMES, (Aug. 31, 2006), <https://www.nytimes.com/2006/08/31/world/americas/31uruguay.html> [https://perma.cc/AAP8-QNTV].

49. *Id.*

50. The claim targeted two regulations in particular: (i) the 80/80 requirement, which mandated that graphic health warnings cover eighty percent of the front and the back of the cigarette package and (ii) the single presentation requirement, which allowed only one cigarette variant (e.g., menthol, light, or ultra-light) per brand family. Philip Morris Brands SARL (Switz.), Philip Morris Products S.A. (Switz.), & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 13, 144-45 (July 8, 2016), <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf> [https://perma.cc/NL3L-YFBE] (explaining the policy aims of the requirements and illustrating their effects on the Philip Morris brand family in Uruguay) [hereinafter *Philip Morris v. Uruguay*].

51. Eric Crosbie, Patricia Sosa & Stanton A. Glantz, *Defending strong tobacco packaging and labelling regulations in Uruguay: transnational tobacco control network versus Philip Morris International*, 27 TOBACCO CONTROL 185, 188 (2018).

52. *Philip Morris v. Uruguay*, *supra* note 50, at ¶ 12.

53. See, e.g., Rory Carroll, *Uruguay bows to pressure over anti-smoking law amendments*, GUARDIAN (July 27, 2010), <https://www.theguardian.com/world/2010/jul/27/uruguay-tobacco-smoking-philip-morris> [https://perma.cc/3UHA-EAQP].

54. Several actions were also brought against Australia, where similarly stringent regulation was implemented, as a legal war against tobacco regulations took shape. Actions were brought on numerous fronts—the European Court of Justice, the Andean Court of Justice (*Tribunal de Justicia de la Comunidad Andina*), investor-state arbitration, GATT and WTO mechanisms, and others. See Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 395 (2016) (illustrating tobacco-related disputes by venue).

55. *Philip Morris v. Uruguay*, *supra* note 50, at ¶ 12.

56. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 9-10* (OECD Working Papers on Int'l Inv., 2012/02, 2012), [https://www.oecd.org/daf/inv/investment-policy/WP-2012\\_2.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf) [https://perma.cc/H3RG-NSFW] (finding that approximately 96 percent of treaties in a sample of 1,660 international investment agreements contain ITA provisions).

57. See *id.* at 14.



procedures are streamlined and mechanisms for appeal are limited.<sup>58</sup> In a typical proceeding, a panel of three arbitrators issues an award with monetary damages.<sup>59</sup> Numerous forums and rules are available for investment arbitration.<sup>60</sup> A single investment treaty may even offer a menu of available forums and rules for arbitration.<sup>61</sup> Arbitration under the ICSID and UNCITRAL rules are the most commonly chosen, together covering a vast majority of ITA tribunals.<sup>62</sup>

Like most international investment agreements (IIAs), the treaty invoked in *Philip Morris v. Uruguay* provides foreign investors with substantive and procedural rights.<sup>63</sup> Substantive rights in IIAs typically include investment protections, such as, the guarantee of fair and equitable treatment which is frequently the subject of disputes.<sup>64</sup> Procedural rights in IIAs—particularly the right to sue in arbitration—fortify substantive rights by providing foreign investors with an enforcement mechanism outside of the sovereign's domestic court system.<sup>65</sup> IIAs may either be free-standing, or instead, form part of a broader trade agreement, such as, the investment chapter of the North American Free Trade Agreement (NAFTA) which was replaced by the United States-Mexico-Canada Agreement (USMCA).<sup>66</sup> The most common IIAs are bilateral, like the Switzerland-

---

58. Available in ICSID proceedings, annulment offers limited review compared to appellate mechanisms. See U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: A Sequel*, 150–56, U.N. Doc. UNCTAD/DIAE/IA/2013/2 (2014) (discussing the annulment mechanism, which was not intended to function like an appellate system) [hereinafter UNCTAD, *ISDS: A Sequel*]; see also Behn, Langford & Létourneau-Tremblay, *supra* note 29, at 231 (observing that ICSID awards have “very low chances” of being annulled).

59. See Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 63 (1995) (describing the appointment process).

60. UNCTAD, *ISDS: A Sequel*, *supra* note 58, at 62–64 (illustrating available forums and rules for a variety of treaties with investment provisions).

61. *Id.* For instance, the ASEAN Comprehensive Investment Agreement offers multiple forums and rules for arbitration.

62. See Behn, Langford & Létourneau-Tremblay, *supra* note 29, at 195.

63. See Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, Switz.-Uru., Oct. 7, 1988, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3121/download> [<https://perma.cc/KC9V-DJFE>].

64. The fair and equitable treatment standard is the most invoked and arbitrated standard in ITA. See Andrew Kerner & Krzysztof J. Pelc, *Do Investor-State Disputes (Still) Harm FDI?*, 52 BRIT. J. POL. SCI. 781, 784 (2022) (analyzing the proliferation of FET claims in ITA and assessing their impact on investment flows); see also Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. J. INT'L L. 47, 85 (2019) (referring to the fair and equitable treatment as the “most important investment treaty standard”) [hereinafter Chen, *Precedent & Dialogue*].

65. Christian Tietje et al., Study, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, at ¶ 27, MINISTRY OF FOREIGN AFFS., MINISTRY FOR FOREIGN TRADE AND DEV. COOP. (Neth.).

66. In the USMCA, Chapter 14 deals with investments. See Agreement between the United States of America, the United Mexican States, and Canada ch. 14, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/L89Z-ZDFR>] [hereinafter USMCA].

Uruguay bilateral investment treaty in *Philip Morris v. Uruguay*.<sup>67</sup> But there are multilateral investment treaties, like the Energy Charter, and a variety of regional and mega-regional trade agreements with investment sections as well.<sup>68</sup>

*Philip Morris v. Uruguay* also embodies many notable trends, characteristics, and controversies of ITA. First, the case was widely viewed as an aggressive challenge to legitimate public health regulations.<sup>69</sup> On a broader level, the intrusion of ITA into domestic regulatory realms such as health, the environment, and financial management has produced a legitimacy crisis for investment law.<sup>70</sup> Second, the case was expensive for both parties, which underscores the fact that ITA costs are non-trivial (particularly for states with smaller economies).<sup>71</sup> Third, the case evoked the imagery of David and Goliath, pitting a small country against a large multinational corporation.<sup>72</sup> Other controversial issues in ITA, such as, treaty shopping<sup>73</sup> and participatory transparency,<sup>74</sup> surfaced in Philip Morris' global tobacco litigation-arbitration strategy as well. However, there was an aspect of *Philip Morris v. Uruguay* that was atypical: the role of outside financing as a non-profit endeavor.<sup>75</sup>

---

67. TRAIDCRAFT, INTERNATIONAL INVESTMENT AGREEMENTS UNDER SCRUTINY 7 (2015).

68. See The Energy Charter Treaty, *opened for signature* Dec. 17, 1994, [https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994\\_ECT.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf) [<https://perma.cc/B7ZV-TU9U>].

69. See Puig, *supra* note 54, at 425-26.

70. See generally, Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003).

71. See Behn, Langford & Létourneau-Tremblay, *supra* note 29, 197-99 (reviewing studies on legal costs and tribunal fees); Samples, *Winning and Losing*, *supra* note 28, at 151-53 (discussing the impact of legal costs and tribunal fees).

72. See Sergio Puig & Anton Strezhnev, *The David Effect and ISDS*, 28 EUR. J. INT'L L. 731, 732-33 (2017) (drawing the David versus Goliath analogy in the ISDS context); see also Katia Fach Gomez, *Latin America and ICSID: David versus Goliath*, 17 L. & BUS. REV. AM. 195 (2011).

73. See, e.g., Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225, 230-31 (2015) (explaining the rise of treaty shopping in investor-state arbitration).

74. Patricia Ranald, *When Even Winning is Losing: The Surprising Cost of Defeating Philip Morris Over Plain Packaging*, THE CONVERSATION (Mar. 26, 2019, 1:57 PM), <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279> [<https://perma.cc/JW9Q-DYAG>] (reporting on issues of cost and transparency).

75. Michael Bloomberg's foundation supported Uruguay's defense. As a non-profit endeavor, this instance of arbitration financing was atypical. More common is third-party ISDS financing and "claims trading," which resemble litigation finance. See Kathleen Claussen, *The International Claims Trade*, 41 CARDOZO L. REV. 1743, 1745, 1758-61 (2020) (defining claims trading and contrasting the practice with third-party funding of investment claims).

## 2. *The Rise of International Investment Law*

In many ways, the ITA system has tracked the arc of economic globalization. Although treaties with investment protections existed earlier in history, the twentieth century saw systematic and widespread growth of international investment law.<sup>76</sup> As is the case with much of the architecture framing the contemporary global economic order, the investment law system was established after World War II.<sup>77</sup> An institutional framework for ITA was established in 1965 with the creation of ICSID, one of the five organizations that constitute the World Bank Group.<sup>78</sup> In parallel, some states launched investment treaty programs to protect the foreign investments of their respective domestic constituencies.<sup>79</sup> Early programs were initiated by capital-exporting European powers, which had domestic constituencies interested in protecting investments abroad.<sup>80</sup> Accordingly, most early bilateral investment treaties (BITs) were formed between developed and developing countries.<sup>81</sup> Curiously, the United States did not establish a BIT program until 1981.<sup>82</sup>

The investment law system was founded in response to the post-colonial international landscape.<sup>83</sup> Prior to World War I, approximately 70 percent of the world's population was subject to foreign rule.<sup>84</sup> Decolonization gave rise to dozens of new sovereign states, radically alter-

---

76. Treaties with investment provisions date back to 1778, at least. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 17-24 (1st ed. 2008) (outlining the emergence and evolution of investment treaty law).

77. See Jürgen Kurtz, Jorge E. Viñuales & Michael Waibel, *Principles Governing the Global Economy*, in *THE UN FRIENDLY RELATIONS DECLARATION AT 50: AN ASSESSMENT OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW* 331, 334-35 (Jorge E. Viñuales ed., 2020).

78. Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

79. Scott J. Shackelford, et al., *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. 1, 25 (2015) (discussing the dynamics that set the stage for BIT programs); Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 156 (2007) (referring to concerns facing foreign investors in the post-colonial era) [hereinafter Salacuse, *Treatification*].

80. Germany led the modern era of investment treaty activity in 1959, negotiating BITs with Pakistan and the Dominican Republic. See Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 103 (1985).

81. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 641-42 (1997).

82. See generally Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985). Among U.S. BIT program's primary goals included the protection of U.S. investments abroad and the promotion of economic liberalization and market-oriented policies in foreign states. See, e.g., Salacuse, *Treatification*, *supra* note 79, at 160.

83. Though less examined in the literature, immediately preceding the contemporary era, there was a "pre-history" in international investment law between World War One and 1959. Andrea Leiter-Bockley, Thesis, *Making the World Safe for Investment: The Protection of Foreign Property 1922-1959*, University of Melbourne & University of Vienna (2019).

84. Marion Mushkat, *The Process of Decolonization International Legal Aspects*, 2 U. BALT. L. REV. 16, 16-18 (1972).

ing the international landscape in the process.<sup>85</sup> Over eighty former colonies have gained independence since the creation of the United Nations in 1945.<sup>86</sup> As newly independent states replaced colonial structures, some tested their sovereign power vis-à-vis foreign investors. International capital faced new challenges and risks as socialist and anti-colonial movements in former colonies disrupted foreign investments.<sup>87</sup> Some states conducted direct expropriations to assert control over domestic industries and natural resources.<sup>88</sup> Others opted for gradual measures, such as renegotiating agreements with multinational companies.<sup>89</sup>

After a period of subdued activity during the Cold War, investment law boomed with the dominance of neoliberalism in the 1990s.<sup>90</sup> Following the collapse of the Soviet Union and during a peak of economic globalization and the reign of the Washington Consensus, investment law expanded rapidly through international treaties.<sup>91</sup> Typically, an IIA is a treaty between countries that provides protections for investments made in the other signatory state or states.<sup>92</sup> IIA obligations are reciprocal; that is, they apply to foreign investments from the other signatory state or states.<sup>93</sup> IIAs contain substantive investment protections and procedural rights of

---

85. *Id.*

86. *The United Nations and Decolonization*, U.N., <http://www.un.org/en/decolonization/history.shtml> [<https://perma.cc/CV4P-6VGD>], (last visited July 1, 2021).

87. See Leiter-Bockley, *supra* note 83, at 5 (asserting that socialist and anti-colonial movements disrupted the foreign investment status in the nineteenth century); see also Samples, *Winning and Losing*, *supra* note 28, at 128-32 (drawing connections between decolonization, resource nationalism, and the rise of international investment law).

88. Mexico's 1938 nationalization of the oil industry was a prequel to a broader reallocation in the balance of power between newly independent oil producing nations and multinational oil companies from wealthy countries. See Tim R Samples, *A New Era for Energy in Mexico? The 2013-14 Energy Reform*, 50 *TEX. INT'L L.J.* 603, 621-22 (2016) (weighing the historical significance of Mexico's nationalization); Farshad Ghodoosi, *Combating Economic Sanctions: Investment Disputes in Times of Political Hostility, A Case Study of Iran*, 37 *FORDHAM INT'L L.J.* 1731, 1735-39 (2014) (discussing Iran's 1951 expropriation of the Anglo-Iranian Oil Company); Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 *TEX. INT'L L.J.* 13, 26-34 (1989) (tracing the rise of oil nationalism in former colonies to the formation of OPEC).

89. See Smith & Dzienkowski, *supra* note 88, at 30-31 ("Although a few countries ultimately followed Mexico's lead in using expropriation to regain control over their domestic reserves, their actions generally did not take place until thirty or more years after the Mexican expropriation. Most countries turned to less drastic means of altering the existing agreements.").

90. See Muthucumaraswamy Sornarajah, *Disintegration and Change in the International Law on Foreign Investment*, 23 *J. INT'L ECON. L.* 413, 414-19 (2010) (describing the rise of the investment law system).

91. FDI volumes quadrupled in the 1990s alone. See *infra* notes 114-15 (quantifying the globalization of investment capital during this period).

92. See *Primer on International Investment Treaties and Investor-State Dispute Settlement*, COLUM. CTR. ON SUSTAINABLE INV. (JAN. 2022) <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> [<https://perma.cc/8BYR-MLEB>].

93. U.N. Conference on Trade and Development, *International Investment Agreements: Key Issues Volume 1*, U.N. Doc. UNCTAD/ITE/IIT2004/10 (Vol. 1) (2004) [https://unctad.org/system/files/official-document/iteit200410\\_en.pdf](https://unctad.org/system/files/official-document/iteit200410_en.pdf) [<https://perma.cc/8VUN-XS6T>].

enforcement.<sup>94</sup> Substantive protections usually include a guarantee of fair and equitable treatment of foreign investment.<sup>95</sup> IIAs provide foreign investors with procedural rights to ITA as a means of enforcing substantive obligations.<sup>96</sup>

Most investment treaties are standalone agreements; however, investment chapters may also be included in trade agreements and other treaties.<sup>97</sup> Between 1900 and 1990, fewer than 500 IIAs were signed.<sup>98</sup> But from 1990 and 2010, over 3,300 were signed.<sup>99</sup> That period of explosive growth made investment law one of the fastest growing areas of international law in recent times.<sup>100</sup> By the end of 2019, 2,654 IIAs entered into force.<sup>101</sup> In a matter of decades, these developments shifted investment law's center of gravity from customary international law to treaties.<sup>102</sup>

After its rapid expansion, the growth of investment law plateaued and, more recently, has been showing signs of decline.<sup>103</sup> Once case volumes increased, illustrating the strength and reach of the ITA system, ISDS—the acronym most frequently used to refer to the ITA system—made frequent appearances in criticisms of the global economic order.<sup>104</sup> Several countries have revisited their investment treaty practices after facing ITA liabili-

---

94. See Samples, *Winning and Losing*, *supra* note 28, at 125–26 (describing substantive and procedural obligations in IIAs).

95. See Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 554 (2017).

96. *Id.*

97. See OECD, OECD BUSINESS AND FINANCE OUTLOOK 2016 224, (2016).

98. UNCTAD maintains a comprehensive database of IIAs and model investment agreements. See *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> [<https://perma.cc/DTK6-HQWZ>] (last visited July 1, 2021) [hereinafter UNCTAD, *IIA Navigator*].

99. *Id.*

100. See Lise Johnson & Jesse Coleman, *International Investment Law and the Extractive Industries Sector*, COLUM. CTR. ON SUSTAINABLE DEV. (2016), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1036&context=sustainable\\_investment\\_staffpubs](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1036&context=sustainable_investment_staffpubs) [<https://perma.cc/PS4U-RYYX>].

101. *IIA Issues Note, The Changing IIA Landscape: New Treaties and Recent Policy Developments*, UNCTAD (July 2020), <https://unctad.org/system/files/official-document/diaepcbinf2020d4.pdf> [<https://perma.cc/K95K-TJHE>] [hereinafter UNCTAD, *IIA Landscape 2020*].

102. Salacuse, *Treatification*, *supra* note 79, at 157 (observing that treaties replaced customary international law as the “fundamental source” of international investment law).

103. UNCTAD, *IIA Landscape 2020*, *supra* note 101, at 1 (illustrating the number of investment treaties signed between 1980 and 2019).

104. Anti-ISDS sentiments dogged efforts to negotiate and ratify “mega-regional” trade deals, the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership. See Chris Hamby, *Senators Call for Global Super Court to be Renegotiated*, BUZZFEED (Sept. 29, 2015, 5:56 PM), <https://www.buzzfeednews.com/article/chrisshamby/senators-call-for-global-super-court-to-be-removed-from-tpp> [<https://perma.cc/7QWF-HDT7>] (reporting that a number of Senators cited ISDS as their “[f]irst and foremost” concern in TPP). ISDS was called a “toxic acronym” by a leading European Union trade official. See Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015), <https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/> [<https://perma.cc/34A7-NR7F>].

ties as respondents.<sup>105</sup> Other countries have been proactive, seeking to limit liabilities before facing major claims or adverse awards.<sup>106</sup> A few Latin American states opted for one of the most radical measures: withdrawing from ICSID altogether.<sup>107</sup> However, most approaches have been more incremental, such as selectively withdrawing from IIAs or undertaking comprehensive treaty reform.<sup>108</sup>

At the global level, IIA treaty-making trended negatively in 2019–34 terminations versus 22 new investment treaties—as the cumulative number of IIA terminations reached 349.<sup>109</sup> Together, these trends confirm the waning enthusiasm for the Washington Consensus variety of economic globalization.<sup>110</sup> Less clear, however, is whether deglobalization in investment law is the beginning of a new structural trend or rather more of a cyclical adjustment.<sup>111</sup>

### 3. Investment Disputes Since 1990

ITA activity—arbitration claims brought against states by foreign investors—increased dramatically after the 1990s.<sup>112</sup> Virtually non-existent before 1990, only forty-four cases were initiated before 2000.<sup>113</sup> In contrast, since 2000, nearly one thousand cases have been initiated.<sup>114</sup> In particular, two developments in economic globalization facilitated this boom in ITA activity. First, the rapid proliferation of IIAs provided foreign investors with *substantive* investment protections and *procedural* rights to take claims against sovereigns to ITA. Second, in parallel, the sharp increase in

105. Langford & Behn, *supra* note 9, at 557 (citing examples of states that have terminated or renegotiated treaties after facing investment arbitrations).

106. See, e.g., Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements*, 64 INT'L STUD. Q. 919, 922 (2020) (“Mexico and Chile have also narrowed down the definition of investment in their IIAs to avoid giving protection to portfolio investors”).

107. See, e.g., William B. McElhiney, III, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention*, 49 TEX. INT'L L.J. 601, 602 (2014) (observing denunciations by Bolivia, Ecuador, and Venezuela).

108. UNCTAD, *IIA Landscape 2020*, *supra* note 101, at 6–8 (reviewing the incorporation of ITA reforms in new investment treaties).

109. *Id.* at 2.

110. See Andrew Kohut & Richard Wike, *Assessing Globalization*, PEW RSCH. CTR., <https://www.pewresearch.org/global/2008/06/24/assessing-globalization/> [https://perma.cc/5J4R-G8Q3] (last visited Apr. 2, 2022).

111. See generally Constantinescu et al., *The Global Trade Slowdown: Cyclical or Structural?*, IMF (Jan. 2015), <https://www.imf.org/external/pubs/ft/wp/2015/wp1506.pdf> [https://perma.cc/L6CY-KHMC].

112. LORENZO COTULA, FOREIGN INSUPRAVESTMENT, LAW AND SUSTAINABLE DEVELOPMENT: A HANDBOOK ON AGRICULTURE AND EXTRACTIVE ACTIVITIES 33 (2016).

113. Daniel Behn, *Performance of Investment Treaty Arbitration*, in THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 77, 97 (Theresa Squatrito et al. eds., 2018).

114. From 2000 through the end of 2020, approximately 1,060 cases were initiated in ITA. See *Investment Dispute Settlement Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/investment-dispute-settlement> [https://perma.cc/L289-A3NB] (last visited July 1, 2021) [hereinafter UNCTAD, *IDS Navigator*]. For a detailed review of prevailing trends and characteristics of ITA activity, see *infra* Part II and Annex 1.

cross-border capital flows formed new interactions between foreign investors and sovereign states.<sup>115</sup> Foreign direct investment (FDI) volumes quadrupled during the 1990s alone.<sup>116</sup> For instance, inward FDI stocks in the United States jumped from USD \$0.539 trillion at the beginning of the decade to USD \$2.798 trillion in 1999.<sup>117</sup> In sum, economic globalization set the stage for a steep increase in ITA activity by providing both the legal framework (treaties with investment protections) and the conditions (cross-border capital flows) for investment disputes.

Amid the post-globalization ITA boom, procedural and substantive developments created even more avenues for claims against sovereigns. For example, one procedural development has been the use of mass claims in ITA to adjudicate sovereign debt claims.<sup>118</sup> The *Abaclat* progeny<sup>119</sup> of investment cases introduced both procedural (mass-claim mechanisms) and substantive (sovereign debt securities as protected investments) novelties.<sup>120</sup> Substantive matters have expanded in some areas, too. At a broad level, “classic” cases of direct expropriation are now rare, as they have been replaced by claims aimed at regulatory measures.<sup>121</sup> A majority of ITA activity now consists of indirect expropriation claims as opposed to direct takings or confiscations.<sup>122</sup> Fair and equitable clauses, in some cases, have been interpreted to protect the “legitimate expectations” of investors from subsequent state policies.<sup>123</sup> As a consequence, rather than simply protecting investors from direct expropriation scenarios, investment law has transformed into a deep and complex playbook for investors seeking ways

---

115. On the elements determining the variation of international capital flows, see Jeswald W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 HARV. INT'L L.J. 127, 137-39 (2017).

116. See DOLZER & SCHREUER, *supra* note 76 at 1.

117. *World Investment Report: Annex Tables*, UNCTAD, <https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx> [<https://perma.cc/M6U2-S6QK>] (last visited Sept. 9, 2022) (providing data on cumulative stock of inward FDI).

118. See generally Stephen Park & Tim R Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 VAND. J. TRANSNAT'L L. 1033 (2017).

119. A number of notable cases stemming from this arbitration strategy were brought against Argentina after a debt crisis in 2001. See *id.* at 1048-52.

120. See *id.* at 1049-50 (discussing the new substantive and procedural ground broken by the *Abaclat* tribunal); see also Caroline Simson, *Mass Arbitrations Are Here, But Jury's Out on Practicality*, LAW360 (Feb. 13, 2020, 9:55 PM), <https://www.law360.com/articles/1243997/mass-arbitrations-are-here-but-jury-s-out-on-practicality> [<https://perma.cc/TF9A-4TQ6>] (reporting on the use of mass arbitrations in ITA).

121. *Expropriation Regime under the Energy Charter Treaty*, ENERGY CHARTER SECRETARIAT 7, [https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation\\_2012\\_en.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation_2012_en.pdf) [<https://perma.cc/BWZ6-ZNQD>] (last visited Apr. 2, 2022).

122. See Pelc, *supra* note 29, at 560 (“To put it in stark terms, the greatest portion of legal challenges in the investment regime today seeks monetary compensation for regulatory measures implemented by democracies.”).

123. See, e.g., Sornarajah, *supra* note 90, at 417 (referring to the “legitimate expectations” development as the “most important” expansive interpretation in ITA jurisprudence).

to challenge the regulatory authority of sovereign states.<sup>124</sup>

## B. Structural Factors in Transparency

Transparency deficiencies in ITA run deep both procedurally and substantively.<sup>125</sup> The legacy of commercial arbitration legacy was inimical to procedural transparency from the beginning of the system.<sup>126</sup> As a substantive matter, the concept of transparency in investment law was understood as a sovereign obligation to maintain an accessible and transparency investment environment, rather than as a public right to access ITA proceedings.<sup>127</sup> Below we explain how the foundations and structural factors have inhibited transparency across the various sources of international investment law. As context for that discussion, it is worth noting the most prominent sources of transparency obligations in ITA: (i) investment treaties themselves, such as bilateral treaties and trade agreements with investment provisions; (ii) arbitration rules, such as the ICSID and UNCITRAL rules; (iii) multilateral initiatives to strengthen transparency obligations, such as the Mauritius Convention; and (iv) arbitral tribunals that interpret and apply the aforementioned rules and laws on transparency.<sup>128</sup>

### 1. *The Legacy of Confidentiality*

The procedural model for investor-state arbitration was adapted from international commercial arbitration.<sup>129</sup> That legacy stunted transparency in ITA from the beginning.<sup>130</sup> In commercial arbitration, where confidentiality and privacy are core features, transparency is minimal.<sup>131</sup> A general presumption of confidentiality reinforces privacy in international commer-

124. See Samples, *Winning & Losing*, *supra* note 28, at 137-38; see also Pelc, *supra* note 29, at 560 (showing that most investment arbitration claims challenge unfavorable regulations as opposed to direct expropriations).

125. See Cornel Marian, *Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations*, 10 PEPP. DISP. RESOL. L.J. 275, 275 (2010).

126. See Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1312 (2006).

127. See Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in *TRANSPARENCY IN INTERNATIONAL LAW*, 152, 159-60 (Andrea Bianchi, & Anne Peters eds., 2013).

128. NAFTA and Chapter 11 tribunals offered some early contributions to transparency in ITA. See *infra* Part I.C.1 (outlining prominent Chapter 11 awards on questions of transparency). Similarly, the Central America Free Trade Agreement (CAFTA) followed the path of NAFTA with relatively proactive transparency obligations. See United States-Dominican Republic-Central America Free Trade Agreement, art. 10.21, Dom. Rep.-U.S., Aug. 5, 2004, [https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file328\\_4718.pdf](https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf) [<https://perma.cc/YM34-D49V>].

129. UNCTAD, *Transparency: A Sequel*, *supra* note 25, at 37 (“The traditional model for dispute resolution in investor-State arbitration has long followed that of international commercial arbitration . . .”).

130. See U.N. Comm’n on Int’l Trade Law, Rep. of Working Group II on Its Fifty-Third Session, U.N. Doc. A/CN.9/WG.II/WP.160, at 4 ¶ 5 (2010) [hereinafter UNCITRAL, 2010 Working Group].

131. Zhao, *supra* note 45, at 180 (“Confidentiality has traditionally been a central feature of international arbitration.”).



cial arbitration.<sup>132</sup> Likewise, public access is limited and awards are rarely published.<sup>133</sup> In commercial arbitration, these confidentiality features—combined with flexibility and streamlined procedures—are often viewed as advantageous.<sup>134</sup> Though confidentiality has sometimes been contested in commercial arbitration, the presumption in favor of privacy and confidentiality are generally quite strong.<sup>135</sup> Even in the purely commercial context, high confidentiality has drawbacks and criticisms.<sup>136</sup> However, public interests are not at stake to the extent that they are in ITA, where the respondents are always sovereign states.<sup>137</sup>

Another factor that entrenched confidentiality in ITA was, put simply, timing. Many investment treaties were signed during the high tide of the Washington Consensus—a majority<sup>138</sup> of the time period between 1990 and 2000—before procedural transparency was a matter of urgent concern in investment law.<sup>139</sup> Transparency obligations in previous eras of international economic law existed in trade frameworks, such as the General Agreement on Trade and Tariffs (GATT) of 1947.<sup>140</sup> Transparency also underpins predictability and stability, as understood by the World Trade Organization (WTO), which built upon GATT.<sup>141</sup> But when investment

132. See, e.g., Levander, *supra* note 29, at 515 n. 35.

133. *Id.*

134. See, e.g., Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 213 (2001) (referencing statements about the importance of confidentiality in international commercial arbitration).

135. Challenges to the presumption of confidentiality in arbitration have been raised in courts. For instance, distinguishing between the concepts of confidentiality and privacy, in *Esso Australia Resources v. Plowman*, a landmark decision at the High Court of Australia, challenged the view that confidentiality is not necessarily inherent of arbitration. See Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 975-85 (2001) (reviewing prominent cases, including *Esso*, on questions of confidentiality in commercial arbitration).

136. See, e.g., Zhao, *supra* note 45, at 181-83; see also Levander, *supra* note 29, at 510, 513.

137. But see Inga Martinkute & Anastasiya Ugale, *Right to Regulate in the Public Interest: Treaty Practice*, JUS MUNDI (Oct. 15, 2021), <https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest> [<https://perma.cc/29CM-UTAU>] (“In the investment arbitration context, the right to regulate in the public interest is understood as a State’s power and right to regulate certain activities affecting the public interest, which may originate in a duty to regulate such activities.”).

138. See UNCTAD, *IIA Navigator*, *supra* note 98 (illustrating that approximately 1,875 IIAs were signed between 1990 and 2000).

139. See UNCITRAL, *2010 Working Group*, *supra* note 130, at 4 ¶ 5 (observing that the issue of procedural transparency was not a prominent topic during the 1990s).

140. Article X of the GATT contained proactive transparency obligations for signatory states. See Padideh Ala’i, *Transparency and the Expansion of the WTO Mandate*, 26 AM. U. INT'L L. REV. 1009, 1016 (2011) (describing Article X of the GATT as the “oldest transparency provision” in the WTO).

141. Without transparency, monitoring and enforcing obligations on tariff and non-tariff barriers to trade is practically impossible. Accordingly, transparency is a core principle of the WTO. See *Implementation and Monitoring*, WTO [https://www.wto.org/english/tratop\\_e/monitor\\_e/monitor\\_e.htm](https://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm) [<https://perma.cc/BTS7-3GER>] (last visited July 1, 2021) (“A large and essential part of members’ work in the WTO is to monitor how the agreements that they have negotiated are being implemented. Transparency is key.”).

law peaked, during the rapid globalization of capital in the 1990s, the emphasis on transparency in ITA was limited at best.<sup>142</sup> Early generation investment treaties did little to promote transparency through disclosure obligations.<sup>143</sup> These treaties and arbitral rules were also silent on the question of civil society participation.<sup>144</sup>

## 2. Asymmetrical Transparency

Furthermore, when transparency did surface during the early stages of ITA, it was frequently conceived as a unilateral obligation of the state to disclose information about laws and regulations to investors.<sup>145</sup> That unilateral tendency fits within the overall contours of the international investment law system, which is deeply asymmetrical both in theory and in practice.<sup>146</sup> Owing to its origin and purpose: to shield foreign investments from political risks, the system is driven predominantly by a one-way flow of rights—from sovereigns to foreign investors.<sup>147</sup> Put differently, sovereigns incur substantive and procedural obligations while foreign investors obtain substantive and procedural rights.<sup>148</sup> As a result, investors can bring claims against states in ITA but states do not receive reciprocal rights. Only more recently have investment treaties tended to contain obligations for investors.<sup>149</sup>

Early on, the concept of transparency in ITA was similarly unilateral. Essentially, transparency meant “regulatory transparency,” which is an obligation of the state to disclose information about laws, regulations, and policy-making processes.<sup>150</sup> For instance, in 2000, regulatory transparency was identified as a component of the “fair and equitable treatment” obligation to foreign investors in *Metalclad Corp. v. United Mexican*

---

142. See James D. Fry & Odysseas G. Repousis, *Towards a New World for Investor-State Arbitration Through Transparency*, 48 INT'L L. & POL. 795, 811 (2016) (“The move towards transparency in investor-state arbitration emerged at a time when both arbitration rules and the majority of investment treaties were silent concerning transparency.”).

143. *Id.*

144. See Simões, *Amicus*, *supra* note 7, at 162.

145. In some ways, the “regulatory transparency” version of transparency resembles how the concept functions in trade law—an obligation of the state to transmit clear information about the legal and regulatory environment for a particular business activity. Fry & Repousis, *supra* note 142, at 800 (alluding to conceptual connections between transparency in international investment law and international trade law).

146. See Arcuri & Montanaro, *supra* note 14, at 2793 (describing asymmetric structure as the “central flaw” in investment law).

147. *Id.*

148. *Id.*

149. For instance, Canada’s most recent model BIT revisions contain an article on responsible business content, which reflects OECD positions on business responsibilities in investment treaties. For a broader review of the emergence of business responsibility in investment treaties, see Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 1 NORDIC J. COMM. L. 91, 111–17 (2017).

150. See, e.g., UNCTAD, *Transparency: A Sequel*, *supra* note 25, at 5–6 (“Transparency obligations in IIAs have traditionally centered on the provision of adequate information to foreign investors . . .”); Fry & Repousis, *supra* note 142, at 800–01 (discussing the emergence of transparency in investment law as a disclosure requirement for states).

States.<sup>151</sup> In 2003, the *Tecmed v. Mexico* tribunal articulated the “leading statement”<sup>152</sup> on fair and equitable treatment, which included the state’s obligation to maintain a transparent investment environment.<sup>153</sup> In this context, fair and equitable treatment meant providing foreign investors with timely and transparent information about laws and regulations.<sup>154</sup> Defined this way, transparency aims to reduce information costs and institutional risks in foreign investment by imposing disclosure obligations on states.<sup>155</sup> Following *Tecmed*, this concept of transparency was consolidated through dozens of ITA awards.<sup>156</sup>

State-to-investor transparency obligations certainly play an important role in investment law. Reliable information about laws and regulations is critical for an investment environment, and transparency is a key component in the rule of law.<sup>157</sup> That regulatory transparency would exist as a substantive obligation of investment law is sensible and logical. However, regulatory transparency, as the sole concept of investment law transparency, is extremely narrow. For a system that adjudicates private rights in matters of public interest—primarily reviewing acts of democratically-elected governments—such a narrow conception of transparency is even more unreasonable.<sup>158</sup> It comes as little surprise that, once ITA case volumes increased, the importance of increasing transparency and public access in ITA quickly moved to the foreground.<sup>159</sup> In particular, cases involving sensitive public interests fueled transparency concerns and sparked public outcry.<sup>160</sup> That early backlash elevated the expansion and

151. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award), ¶ 13 (Aug. 30, 2000).

152. Chen, *Precedent & Dialogue supra* note 64, at 86 (characterizing the *Tecmed* award as the “leading statement” of the fair and equitable treatment obligation).

153. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award), ¶ 101 (May 29, 2003) [hereinafter *Metalclad Award*].

154. *Id.*

155. See Fry & Repousis, *supra* note 142, at 800.

156. Esmé Shirlow, *Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures*, 8 GOETTINGEN J. INT’L L. 73, 81–83 (2017) (finding forty-six tribunal awards between 2000 and 2016 holding that transparency is required as part of a state’s obligations to provide fair and equitable treatment or the minimum standard of treatment) [hereinafter Shirlow, *Manifestations of Transparency*].

157. Accordingly, the quality of the legal and regulatory environment is a top factor in FDI decisions. See *Global Investment Competitiveness Report 2017/2018*, WORLD BANK GRP., <http://documents.worldbank.org/curated/en/169531510741671962/pdf/121404PUBPUBLIC-PUBDATE-10-25-2017.pdf> [https://perma.cc/AW2J-YZFA] (last visited Sept. 9, 2022).

158. See Pelc, *supra* note 29, at 560; see also *supra* note 120 and accompanying text.

159. Treaties and cross-border capital flows set the foundation for ITA case volumes, but there was a lag in case volumes, which began a steep climb towards the end of the 1990s. See Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 415.

160. See *supra* note 7 and accompanying text (discussing outrage about the *Agua del Tunari* case); see also Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in *TRANSPARENCY IN INTERNATIONAL LAW* 142, 152 (Andrea Bianchi & Anne Peters eds., 2013) (“Thanks to the civil society outcry engendered by a few notorious early [NAFTA] claims, the United States and Canada moved to introduce greater openness into several aspects of the investment law regime.”).

enhancement of transparency as a priority goal in ITA reform.<sup>161</sup>

### C. Progress Towards Transparency

A precise definition of transparency is elusive.<sup>162</sup> Even in a context as specific as ITA, identifying a singular definition is difficult.<sup>163</sup> For our analysis in this Article, transparency is essentially the availability and accessibility of information about outcomes in ITA, namely the amounts of claims, awards, and settlements.<sup>164</sup> Conceptually, there are grounds to distinguish *procedural* transparency from *participatory* transparency. For instance, in the ITA system, procedural transparency often pertains to the publication of documents and to the openness of hearings.<sup>165</sup> As for participatory transparency, mechanisms for civil society to observe and participate in ITA proceedings is also sometimes considered an element of transparency.<sup>166</sup>

Efforts to reform transparency in ITA have revolved around three primary areas: (i) opening arbitral proceedings to public observation, (ii) publishing arbitral awards and other documents, and (iii) fostering the participation of civil society through third party submissions.<sup>167</sup> Our analysis focuses primarily on procedural transparency, exemplified in elements (i) and (ii) above. We focus on procedural transparency because it is most relevant to the availability of information about the outcomes of ITA.<sup>168</sup>

---

161. See *infra* Part I.C.2 (discussing ITA reform initiatives).

162. See Maupin, *supra* note 160, at 142-43.

163. Shirlow, *Manifestations of Transparency*, *supra* note 156, at 74 (“Transparency is a difficult term to define.”).

164. We adopt our working definition of transparency from Esmé Shirlow. See *id.* (using a definition of transparency as the “availability and accessibility of information about norms and institutions”).

165. Essential documents related to arbitral proceedings include submissions by the parties, transcripts from hearings, orders and rulings of the tribunals, and settlements. See Maupin, *supra* note 160, at 149 (providing a thorough definition of transparency in ITA).

166. Some scholars conceptualize ITA transparency in four categories, distinguishing between third-party participation and *amicus curiae* submissions. In our analysis, we consider these two forms of participation under the umbrella of *participatory* transparency. See Fry & Repousis, *supra* note 142, at 811 (articulating four principles of transparency in ITA).

167. We draw a distinction between mechanisms for civil society’s participation in ITA and mechanisms for transparency. We also acknowledge the interdependence of these concepts and their importance for enhancing the legitimacy and governance of the ITA system. See Maupin, *supra* note 160, at 152 (distinguishing between transparency and public participation). Although participation by third parties in ITA has often been referred to with the term *amicus curiae*, we refer to such involvement as third-party participation and submissions. See UNCITRAL, *2012 Working Group*, *supra* note 28, at 15-16 ¶¶ 71-74 (reviewing debates on terminology for third party participation in ITA).

168. However, in our analysis of implications, we do not ignore the role of civil society participation as an ingredient in legitimacy and a part of the transparency movement in ITA. See *infra* Part III.

### 1. The Impact of NAFTA

There were also some early—if isolated—advancements for transparency in ITA. The investment chapter (Chapter 11) of the North American Free Trade Agreement (NAFTA) provides some notable developments for transparency in ITA.<sup>169</sup> While rejecting the idea that a general principle of confidentiality applies to investor-state arbitration under NAFTA,<sup>170</sup> Chapter 11 tribunals established grounds for public access and the publication of awards, for instance.<sup>171</sup> In parallel, the NAFTA Free Trade Commission reaffirmed in 2001 that nothing in the trade agreement precludes public access to documents in a Chapter 11 investor-state dispute.<sup>172</sup> The Commission issued additional guidance in 2003, refining the criteria for public access and amicus filings.<sup>173</sup> The guidance on public access marked a significant departure from the traditional practice of standard confidentiality (unless expressly provided to the contrary) in international commercial arbitration.<sup>174</sup>

In *Metalclad*, an early Chapter 11 case, the Tribunal rejected the Mexican government's motion to keep the proceedings confidential.<sup>175</sup> Mexico's motion aimed to preclude Metalclad from discussing the details of the case with investors and analysts during teleconferences.<sup>176</sup> In doing so, the *Metalclad* Tribunal found that nothing in the relevant arbitral rules—NAFTA, ICSID, or UNCITRAL—creates an express restriction on the publication of information related to an arbitration.<sup>177</sup> The *Metalclad* award explicitly reiterates that, absent an agreement of confidentiality, the parties are free to speak publicly about the arbitration.<sup>178</sup> But the impacts of *Metalclad* on transparency were limited.<sup>179</sup> For instance, the hearings were restricted to necessary personnel, on the other hand, amicus parties from civil society were not involved.<sup>180</sup> Nor was the concept of transparency in

---

169. Though limited to just three member states, as a major trade framework that entered into force in 1994, NAFTA made visible contributions to transparency in ITA. See Arcuri & Montanaro, *supra* note 14, at 2800; see also Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration*, 25 ICSID REV.: FOREIGN INV. L.J. 225, 259 (2010) (observing that contributions to transparency are “[p]erhaps the most notable legacy of Chapter 11”).

170. See Fracassi, *supra* note 134, at 217-18.

171. See Zhao, *supra* note 45, at 203.

172. *Notes of Interpretation of Certain Chapter 11 Provisions*, OAS FOREIGN TRADE INFO. SYS., [http://www.sice.oas.org/tpd/nafta/commission/ch11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp) [<https://perma.cc/8LL9-KSJK>].

173. FREE TRADE COMMISSION, STATEMENT OF THE FREE TRADE COMMISSION ON NON-DISPUTING PARTY PARTICIPATION (2003), [https://ustr.gov/archive/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file660\\_6893.pdf](https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf) [<https://perma.cc/R7C4-AAJB>].

174. See Arcuri & Montanaro, *supra* note 14, at 2800.

175. *Metalclad Award*, *supra* note 153, at ¶ 13.

176. See *id.*; Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1368 (2006).

177. *Metalclad* was the first investor-state arbitration under the ICSID Additional Facility Rules. See Coe Jr., *supra* note 176, at 1369 n. 178.

178. *Metalclad Award*, *supra* note 153, at ¶ 13.

179. See Coe Jr., *supra* note 176, at 1368-70.

180. *Id.*

*Metalclad* understood as an essential element of legitimacy and a vital connection to public interests at stake.<sup>181</sup> Those notions developed later, as the concept of transparency matured in ITA.

Known as the first tribunal to actively address transparency in ITA, *Methanex Corp. v. United States of America*, another Chapter 11 arbitration, was an early landmark case.<sup>182</sup> The *Methanex* claim revolved around a California executive order to phase out a gasoline additive, methyl tertiary butyl ether (MTBE), which posed health and environmental risks.<sup>183</sup> Methanex Corporation, a Canadian company and the world's largest producer of methanol—a key ingredient in MBTE—at that time, brought an investment claim under Chapter 11 against the United States.<sup>184</sup> In accepting briefs from amici curiae and opening the proceedings to remote public observation, the *Methanex* Tribunal established a role for civil society's participation and observation in ITA proceedings.<sup>185</sup> Although the tribunal denied some requests by civil society groups (such as requests to attend oral hearings), *Methanex* was a significant advancement for access and participation.<sup>186</sup>

Although *Methanex* was brought under NAFTA and the UNCITRAL Arbitration Rules of 1976—neither of which contained proactive provisions for transparency—the Tribunal took meaningful steps to enable public participation and open information.<sup>187</sup> Crucially, the *Methanex* Tribunal explicitly recognized the nexus between legitimacy and transparency—a prescient acknowledgement in retrospect.<sup>188</sup> Following guidance from the NAFTA Free Trade Commission,<sup>189</sup> civic participation became further established in Chapter 11 tribunals, such as in *Glamis Gold v. United*

181. In *Metalclad*, the notion of transparency primarily revolved around the sovereign obligation to maintain transparent and predictable investment environment. See *Metalclad Award*, *supra* note 153, at ¶ 110. For a broader discussion of transparency as a sovereign obligation to maintain transparent laws and regulations, see *supra* Part I.B.2.

182. See Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 378–80 (2010) (analyzing the role of *Methanex* in the development of third-party participation in ITA proceedings).

183. Governor of California, Exec. Order D-5-99, Mar. 25, 1999.

184. *Methanex Corp. v. U.S.*, Statement of Claim, NAFTA Chap. 11 Ad Hoc Tribunal (UNCITRAL) (Dec. 3, 1999).

185. Sanford E. Gaines, *Methanex Corp. v. United States*, 100 AM. J. INT'L L. 683, 689 n. 33 (2006) (“Most notably, the Methanex tribunal accepted briefs amicus curiae and opened tribunal proceedings to public observation.”).

186. See Puig & Kinnear, *supra* note 169, at 259–61 (2010) (identifying *Methanex* as a landmark case for civil society participation in ITA); see also Ishikawa, *supra* note 182, at 378–80 (providing other details about third-party participation in *Methanex*). A third-party brief was even cited in the *Methanex* award. See *id.*, at 686 n. 29 (noting the tribunal's citation to a brief filed by the International Institute for Sustainable Development).

187. See Fry & Repousis, *supra* note 142, at 811–12.

188. See *Methanex Corp. v. U.S.*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, NAFTA Chap. 11 Ad Hoc Tribunal (UNCITRAL), ¶ 49 (Jan. 15, 2001) (“[The] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”)

189. See *supra* notes 172–173 (referencing NAFTA Free Trade Commission positions on issues of transparency and third-party participation).

*States*, which applied the criteria laid out by the Commission.<sup>190</sup> Likewise, in *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, a more recent Chapter 11 tribunal, proceedings were open to the public and amicus submissions were accepted from third parties.<sup>191</sup> With proactive tribunals and transparency-strengthening positions taken by the NAFTA Free Trade Commission, NAFTA proved influential for transparency in the early stages of ITA.<sup>192</sup>

## 2. *Multilateral Efforts*

Momentum around transparency in ITA remained fairly dormant through the 1990s and well into the 2000s.<sup>193</sup> Eventually, transparency elevated to a priority issue at the global level through a combination of unilateral and multilateral initiatives. UNCITRAL, for instance, identified transparency in ITA as a “matter of priority” in 2008.<sup>194</sup> A working group was formed two years later.<sup>195</sup> Multilateral efforts to improve transparency produced amendments to general rules of investor-state arbitration<sup>196</sup> as well as transparency-specific rules, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the UNCITRAL Transparency Rules).<sup>197</sup> As a reinforcement to the UNCITRAL Transparency rules, the Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the Mauritius Convention on Transparency, was implemented.<sup>198</sup>

Arbitral rules are a critical component of transparency norms. Procedural rules often govern the central questions of transparency, particularly

---

190. See *Glamis Gold, Ltd. v. U.S.*, Decision on Application and Submission by Quechan Indian Nation, NAFTA Chap. 11 Ad Hoc Tribunal (UNCITRAL), ¶ 10 (Sept. 16, 2005).

191. *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 73 (Oct. 17, 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0883.pdf> [<https://perma.cc/6MUE-HHRH>].

192. See *supra* note 169 and accompanying text.

193. See *Transparency and the UNCITRAL Arbitration Rules*, INT'L INST. SUSTAINABLE DEV., <https://www.iisd.org/projects/transparency-and-uncitral-arbitration-rules> [<https://perma.cc/N85W-SCDW>] (last visited Aug. 8, 2022) (outlining transparency initiatives in ITA that began in 2006).

194. See UNCITRAL, *2010 Working Group*, *supra* note 130, at 3 ¶ 1.

195. *Id.* at 3 ¶ 2.

196. The two most important sets of arbitration rules for ITA were amended to foster greater transparency. See generally ICSID R.P. ARB. PROC. See also UNCITRAL Arbitration Rules, U.N. Doc. A/RES/65/22, art. 1(4) (Jan. 10, 2011) (“[F]or investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration”).

197. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, U.N. Doc. A/RES/68/109 (Apr. 1, 2014), [hereinafter UNCITRAL Transparency Rules].

198. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Dec. 10, 2014, Reg. No. 54749 (entered into force Oct. 18, 2017) [hereinafter Mauritius Convention on Transparency]. For an editorialized perspective, see generally Stephan W. Schill, *Editorial: The Mauritius Convention on Transparency*, 16 J. WORLD INV. & TRADE 201 (2014).

when treaties are largely silent on the subject.<sup>199</sup> A vast majority of investor-state arbitration is conducted under two bodies of procedural rules: the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules. Cases at ICSID account for a majority—approximately two-thirds—of investment arbitration caseloads.<sup>200</sup> Ad hoc tribunals under UNCITRAL make up most of the remainder.<sup>201</sup> Though far less common, investor-state arbitrations may also be organized through the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the Permanent Court of Arbitration (PCA), or the London Court of International Arbitration (LCIA).<sup>202</sup>

Though not a standing investment court, ICSID does offer uniform procedural rules for arbitration and the appointment of tribunals.<sup>203</sup> As one of five organizations within the World Bank, ICSID also provides an institutional presence in ITA.<sup>204</sup> ICSID is exclusively devoted to investment disputes, as opposed to international commercial arbitration.<sup>205</sup> Accordingly, ICSID has been more progressive on the topic of transparency, for instance, with a longstanding practice of making its caseload public.<sup>206</sup> Generally, more information exists about investment disputes at ICSID than, for instance, ad hoc tribunals formed under the UNCITRAL Arbitration Rules.<sup>207</sup> However, more detailed information about cases—such as the amounts of claims and awards, which are critically important—is frequently unavailable.<sup>208</sup>

The ICSID Arbitration Rules were reformed in 2006 to enhance transparency.<sup>209</sup> The reforms included amendments to facilitate more open proceedings, the submission of amicus briefs from third parties, and the publication of awards.<sup>210</sup> Currently, the ICSID Arbitration Rules are

---

199. See Fernando Dias Simões, *Clandestine Awards, Information Asymmetries, and Equality of Arms in Investment Arbitration*, 2021 J. DISP. RES. 317, 319 (2021) (“Most investment treaties contain no explicit legal obligation to make arbitral awards public.”) [hereinafter Simões, *Clandestine*].

200. In one comprehensive data set covering ISDS activity from 1990 to the end of 2014, approximately sixty-eight percent of all ISDS cases were filed at ICSID. Wellhausen, *supra* note 29, at 121. For a similar illustration that relies on a different dataset, see Behn, Langford & Létourneau-Tremblay, *supra* note 29, at 195.

201. UNCTAD, *ISDS: A Sequel*, *supra* note 58, at 65 (illustrating that UNCITRAL arbitrations make up approximately a quarter of ISDS cases while ICSID cases account for almost two-thirds).

202. See U.N. Conference on Trade and Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, 5, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005) (illustrating disputes by arbitral rules); see also Pohl, Mashigo & Nohen, *supra* note 56, at 21 (showing disputes by rules and forum).

203. See ICSID, *supra* note 195.

204. *About ICSID*, ICSID, <https://icsid.worldbank.org/About/ICSID> [<https://perma.cc/RP6G-ARRD>] (last visited Sept. 10, 2022).

205. See Wellhausen, *supra* note 29, at 119.

206. *Id.* at 120.

207. See Levander, *supra* note 29, at 516–18.

208. See Wellhausen, *supra* note 29, at 120.

209. See Levander, *supra* note 29, at 517.

210. *Id.*



undergoing another round of revisions.<sup>211</sup>

For years, UNCITRAL lagged behind NAFTA and ICSID in matters of transparency.<sup>212</sup> Until the UNCITRAL Arbitration Rules were reformed, they resembled a procedural framework styled for international commercial arbitration.<sup>213</sup> However, since their revision, they now contain relatively robust transparency provisions.<sup>214</sup> Years of coordinated effort and multilateral negotiations through UNCITRAL also produced the Mauritius Convention.<sup>215</sup> The Mauritius Convention on Transparency is one of three UNCITRAL instruments for transparency in ITA. The other two are the UNCITRAL Transparency Rules<sup>216</sup> and the Transparency Registry.<sup>217</sup> As a set of procedural rules for investor-state arbitration, the UNCITRAL Transparency Rules acknowledge the public interests at stake in ITA by providing a disclosure regime that promotes public access to documents, open hearings, and civil society participation for qualified third-parties.<sup>218</sup> The Transparency Registry is a repository for information and documents related to ITA.<sup>219</sup> The information in the Registry is sorted by respondent states, treaties, and economic sectors.<sup>220</sup> As of this writing, the Registry remains lightly populated with data.<sup>221</sup>

New or renegotiated treaties offer opportunities to remedy transparency deficiencies in ITA. At the national level, some sovereigns have taken proactive stances on transparency through updates to treaty prac-

211. *Proposals for the Amendment of the ICSID Rules*, (ICSID, Working Paper No. 5, 2021), <https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf> [<https://perma.cc/27ST-D48D>].

212. See Levander, *supra* note 29, at 521.

213. See *id.*

214. See Sonia Anwar-Ahmed Martinez, *Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation*, KLUWER ARB. BLOG (Apr. 8, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/> [<https://perma.cc/8T5L-226S>].

215. See Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID REV.: FOREIGN INV. L.J. 622, 627-29 (2016) (commenting on the negotiation process at UNCITRAL working groups).

216. UNCITRAL Transparency Rules, *supra* note 197. For a comparison of the two sets of rules, see Martinez, *supra* note 214.

217. See *Transparency Registry*, UNCITRAL, <http://www.uncitral.org/transparency-registry/registry/index.jsp> [<https://perma.cc/9VAD-NFW8>] (last visited Aug. 8, 2022).

218. See Levander, *supra* note 29, at 522-27 (providing background and a summary of recent reforms to the UNCITRAL Rules on Transparency).

219. *Transparency Registry - Introduction*, UNCITRAL, <http://www.uncitral.org/transparency-registry/en/introduction.html> [<https://perma.cc/KLR4-JX5A>] (last visited Aug. 8, 2022). See *2012 Working Group*, *supra* note 28, at 26-27 ¶ 131-33, for a background on the proposals that led to the registry.

220. UNCITRAL, *supra* note 219.

221. As of August 8, 2022, the Registry contains a total of 195 documents spanning 11 disputes and provides links to document locations for an additional 13 disputes. See *id.* However, other ITA resources maintained by United Nations agencies—namely, UNCTAD—are extensively populated with data.

tices.<sup>222</sup> After political fallout triggered by notorious Chapter 11 cases, Canada and the United States embraced greater transparency with high-profile treaty modifications.<sup>223</sup> As early as 2004, both states had modified their model BITs to implement public access and disclosure standards.<sup>224</sup> These modifications consolidated the early progress of Chapter 11 tribunals, essentially codifying some of the best practices into harder treaty law.<sup>225</sup>

Similar practices soon expanded well beyond the NAFTA region. For instance, the Common Market for Eastern and Southern Africa (COMESA) provides for open hearings, publication of documents, and amicus participation.<sup>226</sup> Another approach—a 2009 agreement between Australia and Chile—included disclosure and publication obligations.<sup>227</sup> Additionally, India’s 2016 BIT model contained robust transparency provisions.<sup>228</sup>

The United States-Mexico-Canada Agreement (USMCA), a renegotiated version of NAFTA,<sup>229</sup> consolidated advancements in transparency.<sup>230</sup> Yet, at the same time, the USMCA drastically scaled back the scope of ITA provisions.<sup>231</sup> ITA was essentially discontinued between Canada and the United States and reduced between Mexico and the United States.<sup>232</sup> This curtailment of ITA—a major departure from NAFTA—was arguably the most significant development for trade agreement policy in the USMCA renegotiations.<sup>233</sup> From an even broader perspective, that departure is

222. UNCITRAL, *2010 Working Group*, *supra* note 130, at 6-11 ¶ 12-22 (reviewing examples of public access provisions in investment treaties).

223. See, e.g., *supra* note 160 (noting the impact of notorious ITA cases); see also Fry & Repousis, *supra* note 142, at 798 (stating that the “main core of transparency in [ITA] emerged in the context of [NAFTA]”).

224. See Zhao, *supra* note 45, at 204-05.

225. See, e.g., Fry & Repousis, *supra* note 143, at 819-22 (reviewing the impact of the NAFTA *acquis* on treaty practices of Canada and the United States).

226. Investment Agreement for the COMESA Common Investment Area, art. 28 5-7, adopted on May 23, 2007. For a broader perspective of investment law reforms and innovations emerging in Africa, see generally Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RES. J. INT’L L. 7 (2021).

227. Australia-Chile Free Trade Agreement, art. 10.22.

228. See, e.g., Sonia E. Rolland & David M. Trubek, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 U. PA. J. INT’L L. 355, 429-30 (2017).

229. Oddly, the agreement goes by multiple names—USMCA, CUSMA, or T-MEC—depending on the government party one asks. See, e.g., Jerry L. Lai, *A Tale of Two Treaties: A Study of NAFTA and the USMCA’s Investor-State Dispute Settlement Mechanisms*, 35 EMORY INT’L L. REV. 259, 259 n. 1 (2021).

230. Building on the developments in Chapter 11 tribunals, the USMCA directly codifies open proceedings and obligations to publish arbitral documents. See USMCA, *supra* note 66, at 14.D.8 (providing for transparency in ITA proceedings under Chapter 14); see also Alex Reed, *NAFTA 2.0 and LGBTQ Employment Discrimination*, 57 AM. BUS. L.J. 5, 7-13 (2020) (tracing the chronology of the renegotiation of NAFTA into USCMA).

231. See Lai, *supra* note 229, at 281-84 (comparing the scope and substance of ITA in NAFTA versus the USMCA).

232. *Id.*

233. A roll-back of ITA was arguably the most significant trade policy shift in the renegotiation of NAFTA as the USMCA. CHRISTOPHER A. CASEY & M. ANGELES VILLARREAL, CONG. RSCH. SERV., IF11167, USMCA: INVESTMENT PROVISIONS 2 (2019), <https://fas.org/sgp/crs/row/IF11167.pdf> [<https://perma.cc/Z8XF-BTQK>] (describing the “cur-

emblematic of the controversial nature of ITA, even in certain capital-exporting countries. As part of broader rollback of established frameworks for international economic law, these trends may represent a sign of the times for the global economic order.<sup>234</sup>

## II. The Transparency Gap

The transparency gap in ITA is non-trivial and persistent. Through the end of 2020, approximately 339 (thirty-one percent) cases are missing claim information, and 139 (thirty-nine percent) concluded cases are missing award information. These gaps are the “known unknowns” of ITA activity: known cases for which information about claims or awards is unavailable publicly. As with other systems of dispute resolution, data on settlements are even murkier.<sup>235</sup> In the ITA system, the results of settlements are undisclosed in eighty-one percent of cases: 120 out of 148 settled cases have no information on award amounts.<sup>236</sup> Furthermore, the extent of secrecy in settlements is likely underestimated because some settlements occur prior to the filing of an ITA claim.<sup>237</sup>

### A. Data

The data were obtained from UNCTAD’s *Investment Dispute Settlement Navigator (IDS Navigator)*, an online tool hosted on the *Investment Policy Hub* website and maintained by UNCTAD’s Work Programme on International Investment Agreements.<sup>238</sup> It is updated biannually using publicly available primary (e.g., official case documents provided by the administering institutions) and secondary (e.g., specialized ITA news outlets) sources of information.<sup>239</sup> The *IDS Navigator* contains information about known international arbitration cases pursuant to IIAs such as bilateral investment treaties or investment chapters of free trade agreements that have registered a notice of or request for arbitration through an administering

---

tailment of ISDS” as the “biggest change” in NAFTA/USMCA revisions and recent U.S. trade agreement policy).

234. See *supra* notes 21, 22.

235. See Hafner-Burton, Puig & Victor, *supra* note 12, at 283–84 (stating that settlements account “for three-quarters of all the cases whose substantive outcomes are not transparent”); Samples, *Winning and Losing*, *supra* note 28, at 150–51 (referring to settlements as “one of the least transparent areas of the ISDS system”); Lise Johnson & Brooke S. Guven, *The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest*, INT’L INST. SUSTAINABLE DEV. (Mar. 13, 2017), <https://www.iisd.org/itn/en/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/> [<https://perma.cc/FTY2-PWBP>].

236. See UNCTAD, *IDS Navigator*, *supra* note 114.

237. See, e.g., Johnson & Guven, *supra* note 235.

238. See UNCTAD, *IDS Navigator*, *supra* note 114.

239. See *IDS Navigator: About and Methodology*, UNCTAD, <https://investmentpolicy.unctad.org/pages/1057/isds-navigator-about-and-methodology> [<https://perma.cc/UC74-N594>] (last visited Jul. 1, 2021) [hereinafter UNCTAD, *IDS Navigator: About and Methodology*].

institution (e.g., ICSID, PCA, etc.).<sup>240</sup> This does not include disputes based solely on private contracts or domestic investment law.<sup>241</sup> Although the *IDS Navigator* neither claims to be exhaustive nor without error or approximation, it is the most easily accessible most up-to-date publicly available source of ITA cases.<sup>242</sup>

The final dataset is comprised of 1,104 ITA cases.<sup>243</sup> The dataset includes the following information at the case level: case name, investor and respondent states involved, year of initiation, applicable IIA, arbitral rules, administering institution, details of the investment and dispute, relevant economic sector, status/outcome of proceedings, amounts claimed/awarded, IIA breaches alleged and found, composition of the tribunal, the existence of any follow-on proceedings, and links to source documents.<sup>244</sup> We obtained the universe of cases on the *IDS Navigator* on July 15, 2021 using a web-scraping algorithm, which automatically navigates to each ITA case's individual webpage and records all present information into a spreadsheet.<sup>245</sup> The model has little scope for error since it directly pulls all listed text on each page on the *IDS Navigator*; however, it must be updated if the *IDS Navigator*'s structure is fundamentally revised.<sup>246</sup> Although UNCTAD releases a dataset of ITA in a spreadsheet format,<sup>247</sup> that dataset is not updated as frequently as the website.<sup>248</sup> Accordingly, we employ a web-scraping algorithm to capture the most recent version of the data.

To estimate the transparency gap, we first use a statistical model to estimate the missing claims and awards. This model is employed at the case level and uses information from cases with non-missing information to estimate claims and awards for those with missing information. The first dependent variable that is used by the model is *Claim* as defined by the *IDS Navigator*: "the amount of monetary compensation claimed by the investor, not including interest, legal costs or costs of arbitration."<sup>249</sup> This variable is usually acquired from the original request for arbitration submitted by the claimant; however, where the primary source document remains confidential, this variable may instead be taken from secondary sources such as company reports, news media, or press releases.

Our second dependent variable is *Award* as defined by the *IDS Naviga-*

---

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Our approach to the web-scraping of UNCTAD's *IDS Navigator* was adapted from Krzysztof Pelc. See Pelc, *supra* note 29. For our version of the Python code used to scrape data from the *IDS Navigator*, see *Python script*, DROPBOX.COM, <https://www.dropbox.com/s/si2luwanc6udoh8/UNCTAD%20Srape%20v5.py?dl=0> [https://perma.cc/3U5C-JBWS] (last updated Dec. 31, 2019).

246. This was the case in 2019 when the *IDS Navigator*'s was updated and the corresponding HTML code was changed. See UNCTAD, *IDS Navigator*, *supra* note 114.

247. See UNCTAD, *IDS Navigator: About and Methodology*, *supra* note 239.

248. *Id.*

249. *Id.*

tor.<sup>250</sup> if the case is decided in favor of the investor, “the amount of monetary compensation awarded by the arbitral tribunal to the investor, not including interest, legal costs or costs of arbitration,” or, if the proceedings end in a settlement, “the amount of compensation that the [respondent state] agreed to pay to the claimant under the terms of the settlement.”<sup>251</sup> Similar to claims, secondary sources are only used to measure a case’s award if the primary document is unavailable. The arbitral tribunal decides in favor of the investor if it concludes that the respondent state committed one or more breaches in the relevant IIA.<sup>252</sup> For an expropriation, many investment treaties specify that compensation should be based on the fair market value of the investment.<sup>253</sup> However, for breaches other than expropriation, treaties are almost always silent on what constitutes appropriate compensation.<sup>254</sup> As a consequence of these ambiguities and the general fragmentation of the ITA system, approaches to calculating compensation vary widely from tribunal to tribunal.<sup>255</sup> Alternatively, the case is settled if both parties consent to discontinue the case and resolve the claim through a private negotiation.<sup>256</sup>

## B. Methodology

To estimate the transparency gap, we first estimate missing claims and awards, then we sum these estimates to quantify missing amounts.<sup>257</sup> We define a case as “missing” if the case’s claim and/or award is unavailable on the *IDS Navigator*. There are several reasons why this might occur. Under ICSID rules, with the consent of one or both parties, the final award of the tribunal or the settlement amount may not be officially released through the administering institution or other public channels.<sup>258</sup> The majority of settlements are not publicly available and, therefore, are not included in our data set.<sup>259</sup> As a product of informal negotiations, settlements tend to be even more opaque than other areas of ITA activity.<sup>260</sup> There are a few cases in which the outcome of the case itself is unavailable

---

250. *Id.*

251. *Id.*

252. *Id.*

253. See, e.g., Jonathan Bonnitche & Sarah Brewin, *Compensation Under Investment Treaties*, IISD BEST PRACTICES SERIES (2020), <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf> [<https://perma.cc/DAY6-5EQ6>].

254. *Id.*

255. See, e.g., Steven R. Ratner, *Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction*, 111 AM. J. INT’L L. 7, 15–18 (2017) (observing “a significant range” of methods and identifying four distinct approaches in expropriation cases).

256. See UNCTAD, *IDS Navigator: About and Methodology*, *supra* note 239; see also Hafner-Burton, Puig & Victor, *supra* note 12, at 306.

257. Annex 5 contains a detailed description of our empirical methodology. In order to confirm the accuracy of our estimates, we run tests to verify the high fit of our model, as explained in Annex 5 and as illustrated in Annexes 3–4.

258. See Hafner-Burton, Puig & Victor, *supra* note 12, at 305–06.

259. See *id.* at 284 (observing that settlements account for a large portion of secret cases).

260. *Id.*

(i.e., decided in favor of the state or the investor), but we do not make any award estimations for such cases.

As with other dispute contexts, the parties to a case in ITA may want proceedings, documents, and outcomes to remain confidential.<sup>261</sup> A variety of reasons why parties prefer secrecy have been explored in social science and legal scholarship, such as, flexibility, the ability to negotiate in the shadow of domestic law, avoiding scrutiny, etc.<sup>262</sup> Those dynamics—and their associations with confidentiality—are not exclusive to ITA.<sup>263</sup> In Part III of this Article, we observe parallel dynamics and implications of low transparency in other systems.<sup>264</sup> However, in designing the statistical model for the transparency gap in ITA, we are agnostic as to *why* information about a case might be missing. We simply aim to estimate the missing amount(s).

### C. Findings

Through the end of 2020, there were 1,104 ITA cases made publicly available by UNCTAD, the majority of which (425) are between a claimant located in a high-income country and an upper-middle income respondent country.<sup>265</sup> The second and third most likely claimant-respondent income combinations are high-income vs. high-income (310) and high-income vs. lower-middle income (173).<sup>266</sup> Only thirty-three cases are between high-income claimants and low-income respondents.<sup>267</sup> There are no known ITA cases where the claimant is in a low-income state.<sup>268</sup> In the aggregate, eighty-five percent of claimants are from high-income states and forty-five percent of respondents are from upper-middle income states.<sup>269</sup>

The mean claim is USD \$556 million while the median is USD \$463 million.<sup>270</sup> The mean award is USD \$169 million while the median is USD \$53 million.<sup>271</sup> The distribution of *Claim* is far to the right of the distribution of *Award*; this is likely because claimants want to maximize their

---

261. *Id.* at 297–300.

262. *Id.* at 297.

263. See Hafner-Burton, Puig & Victor, *supra* note 12.

264. See *infra* Part III.

265. Argentina is the most frequent respondent (62), followed by Venezuela (54) and Spain (53). The United States is the most frequent home state of investors (184), followed by the Netherlands (100) and the United Kingdom (81). See UNCTAD, *IDS Navigator*, *supra* note 114; see also *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, UNCTAD (2021), [https://unctad.org/system/files/official-document/diaepcbinf2021d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf) [https://perma.cc/J9MK-ZHET].

266. See *infra* Annex 1. See also UNCTAD, *IDS Navigator*, *supra* note 114.

267. *Id.*

268. See UNCTAD, *IDS Navigator*, *supra* note 114.

269. Income classifications are assigned in 2019 using World Bank definitions. See *World Bank Country and Lending Groups*, WORLD BANK GRP., <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> [https://perma.cc/WP9D-EE2J] (last visited Sept. 10, 2022).

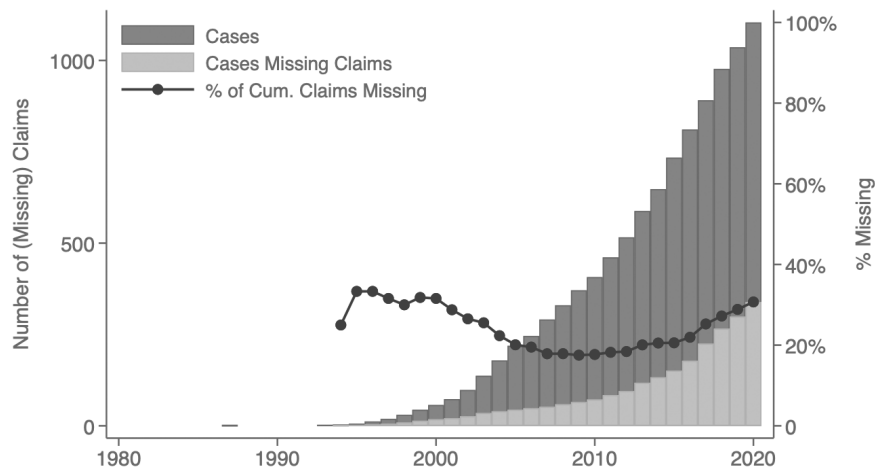
270. See *infra* Annex 2; see also UNCTAD, *IDS Navigator*, *supra* note 114.

271. *Id.*

expected award which is almost always a fraction of the original claim.<sup>272</sup> Therefore, investors are incentivized to maximize the amount of monetary compensation demanded. We find that forty-nine percent of claimants allege breaches of fair and equitable treatment and forty-one percent of them allege indirect expropriation.<sup>273</sup> Only twelve percent of claimants allege direct expropriation.<sup>274</sup>

Figures 1 and 2 show that through the end of 2020, 339 (thirty-one percent) cases are missing claim information, and 139 (thirty-nine percent) concluded cases are missing award information.<sup>275</sup> It is apparent that missingness is a persistent phenomenon; the number of cases with information missing increases each year and the percent of cases with missing information about claims and awards has been relatively constant since the 2000s.<sup>276</sup>

Figure 1: Cumulative Number of (Missing) Claims Over Time



Notes: This figure shows the number of cumulative number of ITA cases over time and the cumulative number of cases that are missing information on claims over time on the left axis, as well as the percent of cumulative cases that are missing claims on the right axis. This figure does not include cases that are missing the year in which the case was initiated.

272. Two cases are exceptions to the tendency that the award is a fraction of the original claim: *Oschadbank v. Russian Federation* and *Electricité de France (EDF) International S.A. v. Republic of Hungary*.

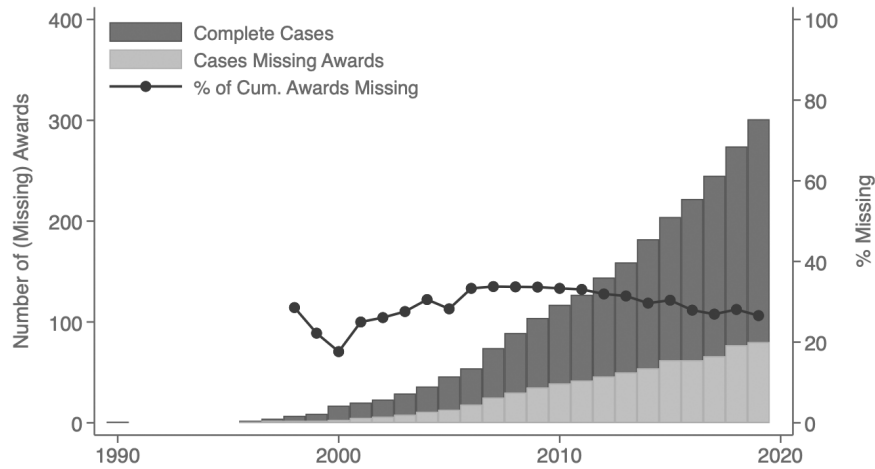
273. For discussions about the role of fair and equitable treatment in transparency obligations and in ITA more generally, see *supra* text accompanying notes 64, 150-156.

274. See *supra* text accompanying note 120 (observing that ITA revolves primarily around claims of indirect expropriation aimed at regulatory measures).

275. See Figures 1 and 2; see also UNCTAD, *IDS Navigator*, *supra* note 114.

276. See Figure 2; see also UNCTAD, *IDS Navigator*, *supra* note 114.

Figure 2: Cumulative Number of (Missing) Awards Over Time



Notes: This figure shows the number of cumulative number of resolved ITA cases over time and the cumulative number of resolved cases that are missing information on awards over time on the left axis, as well as the percent of cumulative resolved cases that are missing awards on the right-axis. This figure does not include cases that are missing the year in which the case was concluded.

Annex 1 details some descriptive statistics of cases missing award information compared to all ITA cases.<sup>277</sup> Missing cases look similar to the universe of cases on the *IDS Navigator* in terms of economic sector, the income group of home and respondent state, and the region of the home and respondent state.<sup>278</sup> This gives more validity to our research design and the accuracy of our estimates because cases missing information are similar to cases with complete information on observable characteristics, and thus, potentially unobservable characteristics as well.<sup>279</sup> Put differently, cases that *are not* missing information are good predictors for those that *are* missing information.

Missingness is not confined to a certain set of investor states or respondents.<sup>280</sup> Eighty-eight percent of the variation in missingness is within investor state-respondent pairs.<sup>281</sup> Similarly, sixty-two percent of the variation in awards for concluded cases is within investor state-respondent pairs.<sup>282</sup> A majority of the variation in missingness and award amounts is within investor state-respondent pairs as opposed to across investor state-respondent pairs, meaning that missingness is neither isolated to a few claimant-respondent pairs nor that investor state-respondent pairs alone can predict award amounts accurately.<sup>283</sup> This heterogeneity

277. See Annex 1; see also UNCTAD, *IDS Navigator*, *supra* note 114.

278. See UNCTAD, *IDS Navigator*, *supra* note 114.

279. *Id.*

280. See Annex 1; see also UNCTAD, *IDS Navigator*, *supra* note 114.

281. See Annex 1.

282. *Id.*

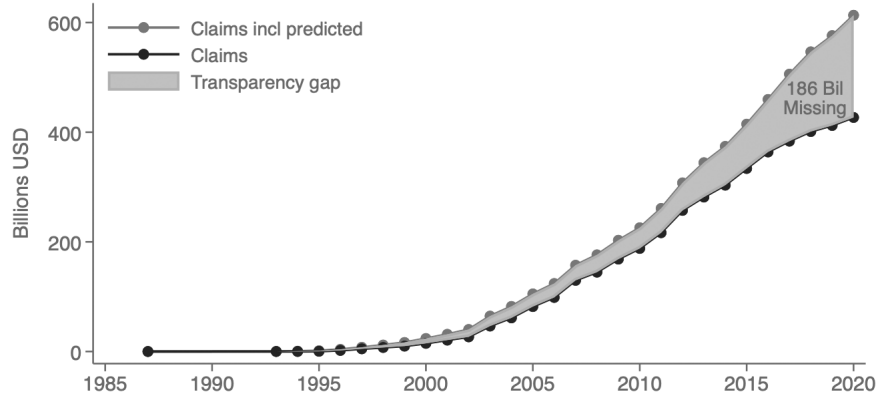
283. See Annexes 1 and 3; see also UNCTAD, *IDS Navigator*, *supra* note 114.



highlights the difficulty in predicting case information.<sup>284</sup>

Figures 3 and 4 visually represent the transparency gap over time as the difference in the yearly cumulative sum of claims or awards, respectively, with and without the added estimates. For example, in 2020, the cumulative sum of all known ITA claims was USD \$427 billion while the cumulative sum of all known ITA claims plus our estimates of missing claims was USD \$613 billion, implying an estimated transparency gap of USD \$186 billion.<sup>285</sup> The transparency gap in awards is calculated to be USD \$15 billion using a similar approach.<sup>286</sup> This visual representation allows us to see the growth of the transparency gap in claims and awards which have both gotten larger over time. The transparency gap composes about forty-three percent of known claims and forty-two percent of all known awards.<sup>287</sup>

Figure 3: Transparency Gap in Claims



Notes: This figure shows the transparency gap in ITA claims over time, which arrive at a cumulative total of approximately \$186 billion at the end of 2020.

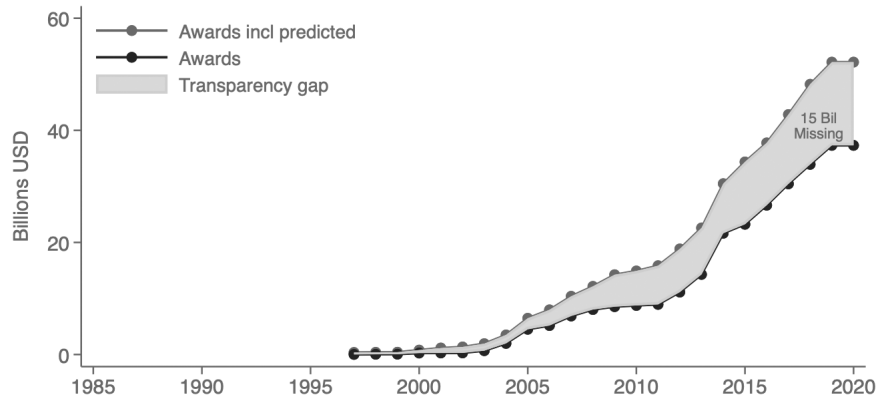
284. See Annex 3; see also UNCTAD, *IDS Navigator*, *supra* note 114.

285. See Figure 3; see also UNCTAD, *IDS Navigator*, *supra* note 114.

286. See Figure 4; see also UNCTAD, *IDS Navigator*, *supra* note 114.

287. See Figures 3 and 4; see also UNCTAD, *IDS Navigator*, *supra* note 114.

Figure 4: Transparency Gap in Awards



Notes: This figure shows the transparency gap in ITA awards over time, which arrive at a cumulative total of approximately \$15 billion at the end of 2020.

### III. Transparency Dilemmas

Even in private systems for dispute resolution, low transparency has potentially significant downsides.<sup>288</sup> For an adjudicatory system that weighs private claims against sovereign acts, opacity is especially problematic.<sup>289</sup> In this Part, our discussion turns to ethical and systemic questions.<sup>290</sup> We highlight several dilemmas and implications related to our findings about opacity in the ITA system. We then undertake a comparative analysis, considering parallels between transparency dilemmas in ITA and other legal systems. In doing so, we compare the conceptual and functional roles of transparency across legal systems. Along the way, we also identify potential areas for future research.

#### A. Ethical and Systemic Dilemmas

*The transparency gap is significant and persistent.* At approximately USD \$186 billion in unreported claims and USD \$15 billion in unreported awards, the dimensions of the transparency gap in ITA are non-trivial.<sup>291</sup> These figures represent significant unknowns, particularly for a system that focuses on the adjudication of private rights against public interests.<sup>292</sup> The extent and range of public-private tensions in the ITA system is well documented in the literature.<sup>293</sup> Even the mere threat of ITA claims is believed to have a meaningful impact—the so called “regulatory chill”

288. See generally Hafner-Burton, Puig & Victor, *supra* note 12, at 286.

289. See, e.g., Norris & Metzidakis, *supra* note 3, at 51.

290. Because the tradeoffs of transparency versus confidentiality are covered extensively in existing scholarship, we avoid that debate. For a thorough discussion of those tradeoffs, see Norris & Metzidakis, *supra* note 3, at 49-69.

291. See Figures 3 and 4; see also UNCTAD, *IDS Navigator*, *supra* note 114.

292. See Figures 3 and 4; see also UNCTAD, *IDS Navigator: About and Methodology*, *supra* note 239.

293. See *supra* text accompanying notes 12-16.

created by the threat of claims—on policymaking.<sup>294</sup> Considering these implications, the significance and persistence of the transparency gap underscore the urgency of ongoing efforts to enhance transparency in ITA.<sup>295</sup>

*Low transparency exacerbates systemic problems.* Though difficult to quantify, low transparency has major costs.<sup>296</sup> Transparency deficiencies deprive the ITA system of intangible systemic benefits while exacerbating fundamental problems.<sup>297</sup> First, for a system with profound public implications, transparency is legitimacy, and vice versa.<sup>298</sup> From strengthening norms to fostering accountability, transparency is widely viewed as lending legitimacy to institutions of governance.<sup>299</sup> Low transparency—even the perception of low transparency, if at times exaggerated—undermines the legitimacy of the ITA system.<sup>300</sup> Given the extent of transparency-legitimacy connections, it follows that secrecy is frequently cited in criticisms of the ITA system.<sup>301</sup> Multilateral efforts have helped: though still lagging in key areas, information about ITA is far more available and navigable than before.<sup>302</sup> Still, the reality and the perception of low transparency in the ITA system hinders legitimacy.<sup>303</sup>

Second, low transparency impairs functional outcomes in ITA. By nature, the ITA system is prone to unpredictable and inconsistent results.<sup>304</sup> Low transparency exacerbates those tendencies by reducing the availability of arbitral decisions and awards.<sup>305</sup> Although ITA operates without binding precedent, arbitral awards create persuasive authority.<sup>306</sup> Tribunals routinely cite previous decisions, and discernable lines of jurisprudence develop from the reasoning of influential awards.<sup>307</sup> The development of coherent jurisprudence is hobbled when awards and key arbitral

294. See Pelc, *supra* note 29, at 567–69.

295. See, e.g., Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 433.

296. See generally Norris & Metzidakis, *supra* note 3, at 60–69.

297. *Id.*

298. See Murat Jashari & Islam Pepaj, *The Role of the Principle of Transparency and Accountability in Public Administration*, 10 AUDA, 60, 61 (2018).

299. See, e.g., Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 413; Pamela Bookman, *Arbitral Courts*, 61 VA. J. INT'L L. 161, 212 (2021).

300. *Id.* at 168.

301. See *supra* note 25, at 469, and accompanying text.

302. ITA data has become more transparent thanks to open, searchable databases maintained by UNCTAD, ICSID, and ITALaw. Journalists and scholars have contributed to transparency efforts as well. Still, investment agreements remain far more transparent than awards. See Ritika Bansal, *Need for Implied Transparency in Investment Arbitration*, 54 N.Y.U. J. INT'L L. & POL. 221, 228 (2021).

303. *Id.*

304. See generally Biris B. Ovidiu, *Advantages and Disadvantages of Transparency and Public Participation in Investment Arbitration*, 12 ROM. ARB. J. 16 (2018).

305. *Id.*

306. See W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1908 (2010). (“There is no doctrine of stare decisis in investment or any other kind of arbitration.”); see also Bookman, *supra* note 299, at 176.

307. See *id.*; see also Simões, *Clandestine*, *supra* note 199, at 324.

documents are not published.<sup>308</sup> ITA also lacks a comprehensive appeals mechanism to correct inconsistencies and encourage more coherent awards overall. Precedent should, theoretically, promote key values associated with the rule of law: predictability, accuracy, and legitimacy.<sup>309</sup> Partial transparency mutes those values and muffles the upsides of stable jurisprudence.<sup>310</sup> Cost allocations in ITA could also be more predictable with greater transparency surrounding the methodology of calculations.<sup>311</sup> Functional outcomes that are unpredictable or inconsistent, in turn, damage systemic legitimacy.<sup>312</sup>

Third, low transparency inhibits optimization by reducing the quality and clarity of information.<sup>313</sup> States rely on information about the ITA system in designing reform priorities, treaty policies, and regulatory strategies.<sup>314</sup> Arbitral decisions inform treaty modifications and the evolution of treaty practices.<sup>315</sup> Capacities to monitor and proactively manage new developments in ITA are asymmetrical, which likely aggravates inequities within the investment law system.<sup>316</sup> Meanwhile, investors rely on information in the ITA system to assess risks while undertaking investment decisions.<sup>317</sup> Multilateral institutions and non-governmental organizations rely on information about ITA outcomes to propose and implement reforms to the system.<sup>318</sup> In sum, uneven and incomplete information distorts signals that could otherwise help participants optimize their strate-

308. See Zhao, *supra* note 45, at 210-12 (drawing connections between incomplete precedent and inconsistent decisions in international arbitration); see Shirlow, *supra* note 215, at 637 (suggesting that higher transparency in ITA could generate greater coherence and consistency).

309. See Weidemaier, *supra* note 306, at 1944-47. See also Chen, *Precedent & Dialogue*, *supra* note 64, at 57-62.

310. See also Simões, *Clandestine*, *supra* note 199, at 324.

311. See FRANCK, *supra* note 38, at 337 (2019) (arguing for targeted cost assessment reforms “to promote cost containment, predictability, and sustainable conflict management”).

312. See Arcuri & Montanaro, *supra* note 14, at 2797-98 (highlighting the problem of inconsistency in ITA); Chen, *Precedent & Dialogue*, *supra* note 64, at 49 (connecting the role of precedent to the values of predictability, accuracy, and legitimacy); see also Bookman, *supra* note 299, at 215 (arguing that independence and accountability depend upon transparency).

313. See also Simões, *Clandestine*, *supra* note 199, at 324.

314. See Shirlow, *Manifestations of Transparency*, *supra* note 156, at 94-96 (articulating connections between information and behavior in ITA); see also Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality*, 42 *YALE J. INT'L L.* 1, 4, 54-62 (2017) (finding that states “fine-tune existing treaty commitments in light of legal developments”).

315. Shirlow, *Manifestations of Transparency*, *supra* note 156, at 96 (“The public availability of arbitral decisions also informs the development of new investment treaties.”).

316. See Simões, *Clandestine*, *supra* note 199, at 326-27.

317. See Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 415, 447 (arguing that secrecy weakens signal effects of the ITA system); Jeswald W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 *HARV. INT'L L.J.* 127, 143-44 (2017) (discussing the quality of information in the investment law system as signals to international capital markets).

318. See Shirlow, *supra* note 215, at 650.

gies and investments.<sup>319</sup>

*Settlements are particularly problematic.* For data collection, settled cases are especially murky because they are substantially less transparent than cases which end in an award.<sup>320</sup> Because settlements are usually the product of informal negotiation, they take place in the shadow of the law.<sup>321</sup> Unlike formal proceedings, the settlement process exists outside of the purview of arbitral rules, which makes settlements an especially difficult target for reform and other transparency initiatives.<sup>322</sup> There are even fewer, if any, opportunities for open proceedings and civil society involvement.<sup>323</sup> Because publication is voluntary and not a common practice, settlements contribute little, if anything, to enhancing jurisprudence.<sup>324</sup> Our findings are thus consistent with existing scholarship on the question of settlements and secrecy in ITA.<sup>325</sup>

*Low transparency has major ethical implications.* In the ITA system, transparency is both a means and an end, existing on two distinct but interrelated planes: as a standalone ethical virtue and as a pro-ethical condition.<sup>326</sup> First, as an end, transparency is simultaneously a goal and an ethical principle, vital to systemic legitimacy.<sup>327</sup> Put simply, transparency is part and parcel of legitimacy.<sup>328</sup> Low transparency in a system that routinely adjudicates the sovereign acts of democratically-elected governments is, arguably, inherently undemocratic.<sup>329</sup> Second, as a pro-ethical condition, transparency serves as the means to promote other ethical goals in the ITA system, such as accountability and fairness.<sup>330</sup> As we argue above, inadequate transparency exacerbates systemic problems in ITA.<sup>331</sup> Given the paramount importance of transparency for the legitimacy of investment

---

319. See *id.* at 649.

320. See *supra* notes 235, 258-60 and accompanying text.

321. See Hafner-Burton & Victor, *supra* note 29, at 180.

322. See Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 447 (identifying as a shortcoming that transparency reforms have focused “disproportionately” on formal awards).

323. See Johnson & Guven, *supra* note 235 (highlighting how the investment framework does not include spaces for the participation of non-parties in litigation and proposed settlements).

324. See Joshua Paine, *International Adjudication as a Global Public Good*, 29 EUR. J. INT'L L. 1223, 1238 (2018) (observing that international adjudication can help to clarify international law when judgments are made available to the public).

325. See, e.g., Hafner-Burton, Puig & Victor, *supra* note 12, at 284.

326. See Matteo Turilli & Luciano Floridi, *The Ethics of Information Transparency*, 11 ETHICS INFO. & TECH. 105, 107 (2009) (distinguishing between pro-ethical conditions and ethical principles).

327. See, e.g., *supra* notes 25, 190 and accompanying text.

328. See Ovidiu, *supra* note 304, at 18.

329. See Simões, *supra* note 199, at 317 (highlighting the incongruence of democratic systems with the lack of transparency in investor state arbitration given that it is related to public affairs).

330. See, e.g., Shirlow, *Manifestations of Transparency*, *supra* note 156, at 75 (“Instrumentally, transparency may facilitate stakeholder participation and/or engagement with legal regimes, and support the legitimacy and accountability of actors or norms operating in them”).

331. See *supra* notes 308-17 and accompanying text.

law, we believe that further research could more fully explore the practical and theoretical dimensions of transparency ethics.

*Heterogeneity and idiosyncrasies loom large.* The high degree of heterogeneity in the ITA system deserves mention. Idiosyncratic conditions and outcomes are fairly common.<sup>332</sup> In other words, across cases and among participants, ITA activity varies greatly.<sup>333</sup> The extent of that variance makes generalized prescriptions and conclusions about the ITA system especially difficult.<sup>334</sup> Outcomes may be highly dependent on the particular circumstances of a given dispute or set of disputes.<sup>335</sup> In some instances, investors and states have resolved disputes through a negotiated settlement *following* an award, resulting in partial payouts or similarly alternative outcomes.<sup>336</sup> Transparency is low in this area as well, which makes even the question of award payouts somewhat murky.<sup>337</sup> Furthermore, there is a real possibility that third-party funding contributes additional complexity to the already convoluted soup of partial information available about activities in the ITA system.<sup>338</sup>

## B. Parallel Dilemmas

Our findings have parallels outside of investment law. As an integral element of system design, the role of transparency in ITA presents analogies in a wide range of domestic and international frameworks.<sup>339</sup> A rhyming Russian proverb, translated as “trust, but verify,” epitomized the importance of transparency in nuclear disarmament and non-proliferation efforts at the twilight of the Cold War.<sup>340</sup> A variety of disclosure-oriented regimes rely on transparency to foster informed transactions in the marketplace, from complex investments to everyday food purchases.<sup>341</sup> Recent developments have raised profound transparency dilemmas in the modern

332. See *supra* Part II.C (discussing heterogeneity in ITA data).

333. See FRANCK, *supra* note 38, at 5 (categorizing investment treaty arbitration as “a complicated, multivariate phenomenon with both positive and negative attributes”).

334. See Schultz & Dupont, *supra* note 29, at 1149.

335. See, e.g., Nnaemeka Anozie, *Legal Analysis of the Scope of ‘Like Circumstances’ Concept under NAFTA National Treatment of Investments Obligation* at 8 (2017). (Discussing the almost completely open range of variables that are considered when deciding whether a prior case relates to the one under review), available at SSRN: <https://ssrn.com/abstract=2996863> [<https://perma.cc/YR4F-VDEP>] or <http://dx.doi.org/10.2139/ssrn.2996863> [<https://perma.cc/GKB9-D9RC>].

336. See Christopher P. Moore, Laurie Ahtouk-Spivak & Zeineb Bouuraoui, *The Guide to Challenging and Enforcing Arbitration Awards: ICSID Awards*, GLOBAL ARB. REV. 1, 163 (2021).

337. See José Carlos Bernal Rivera, *Post-award Bargaining Power of States: Examples from Bolivia*, KLUWER ARB. BLOG 1, 2 (2019).

338. For a discussion of third-party funding in ITA, see generally Claussen, *supra* note 75.

339. See Martinez, *supra* note 12, at 359.

340. See, e.g., Abram Chayes, *An inquiry Into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 947 (1972).

341. See, e.g., David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 6 (2019).

workplace<sup>342</sup> and artificial intelligence ethics,<sup>343</sup> to mention just a couple of examples. To cite a closely related example, though lacking the same public components, some of the systemic downsides of secrecy in ITA are also observable in international commercial arbitration.<sup>344</sup>

The rationale for improving transparency in the ITA system—and the downsides of low transparency—apply broadly.<sup>345</sup> For sovereign debt markets, for instance, in which governments borrow on behalf of citizens and future generations, the rationale for transparency overlaps with the ITA system.<sup>346</sup> In both instances, legitimacy and accountability hinge on transparency.<sup>347</sup> There are also parallels in terms of stakeholders.<sup>348</sup> Due to the nature of transactions and disputes involving a sovereign party, the universe of stakeholders extends far beyond the immediate parties in a debt transaction or an investment dispute.<sup>349</sup> Public interests are directly and indirectly at stake. Yet, like the outcomes of ITA, information about sovereign debt is difficult to find and often incoherent.<sup>350</sup>

Transparency has significant practical and theoretical implications across legal systems. Many such implications relate to the functional roles of transparency, while others are deeply rooted in legitimacy.<sup>351</sup> For instance, in trade law, transparency is an indispensable condition for the WTO's goals of promoting market access and implementing non-discrimination.<sup>352</sup> At the same time, transparency is integral to the legitimacy of the WTO system.<sup>353</sup> Like the ITA system, the WTO Appellate Body has grappled with mechanisms for civil society participation in disputes.<sup>354</sup> Trade disputes, like investment disputes, often have strong ties to public

---

342. See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 *STAN. L. REV.* 351, 375 (2011).

343. See, e.g., Hannah Block-Wehba, *Transparency's AI Problem*, KNIGHT FIRST AMEND. INST. (2021), <https://knightcolumbia.org/content/transparencys-ai-problem> [https://perma.cc/G3JF-Q3G2].

344. See Zhao, *supra* note 45, at 210-212 (drawing connections between incomplete precedent and inconsistent decisions in international arbitration).

345. See, e.g., Shirlow, *Manifestations of Transparency*, *supra* note 156, at 74.

346. See, e.g., ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE 1* (2014).

347. See, e.g., Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 *HARV. INT'L L.J.* 151, 167-68, 201 (2016) (underscoring the need for greater transparency in sovereign debt restructurings).

348. *Id.* at 168.

349. See Anna Gelpern, *About Government Debt . . . Who Knows?*, 13 *CAP. MKTS. L.J.* 321, 325 (2018).

350. *Id.* at 339 (noting hidden debt problems in several sovereign debt crises); see also Andrea Kropp, W. Mark C. Weidemaier & Mitu Gulati, *Sovereign Bond Contracts: Flaws in the Public Data*, 4 *J. FIN. REG.* 190, 194-98 (2018) (finding high rates of error even in leading databases for sovereign bonds).

351. See Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 413.

352. See *supra* notes 141-42 and accompanying text (discussing the origins and importance of transparency in the GATT/WTO frameworks).

353. See, e.g., Hafner-Burton, Steinert-Threlkeld & Victor, *supra* note 29, at 414.

354. See Brigitte Stern, *Civil Society's Voice in the Settlement of International Economic Disputes*, 22 *ICSID REV.: FOREIGN INV. L.J.* 280, 285-890 (2007) (reviewing the role of civil society in WTO disputes).

interests and social challenges.<sup>355</sup> Both are treaty-based systems of international economic law.<sup>356</sup> Both systems also navigate challenges inherent in the balance between systemic goals, public interests, and sovereign prerogatives.<sup>357</sup> Yet WTO panels have had much higher procedural and participatory transparency than ITA from the beginning.<sup>358</sup>

Corporate prosecution offers a vivid set of contrasts and parallels. Like ITA, corporate prosecution exists at the intersection of public interests and private rights. Additionally, much like ITA, corporate settlement practices pose a variety of transparency and legitimacy dilemmas.<sup>359</sup> In the United States, corporate prosecution is largely conducted through settlements, namely deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).<sup>360</sup> In these pre-trial arrangements, regulators or prosecutors negotiate penalties with companies in exchange for agreements to defer or drop formal prosecution.<sup>361</sup> This practice has escalated dramatically since 2001.<sup>362</sup> Over the last decade, corporate settlements in the United States average almost USD \$6 billion per year.<sup>363</sup> Yet, amid the boom in corporate criminal settlements, the prosecution of individuals has been relatively minimal.<sup>364</sup>

Like in ITA, public interests are routinely in play in corporate prosecution.<sup>365</sup> Corporate settlements arise from environmental damage, financial

355. *Id.* at 280.

356. See *Overview: A Navigational Guide*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) [<https://perma.cc/8UPY-CXW8>] (last visited Apr. 14, 2022).

357. See generally Mitsuo Matsushita, *Transparency, Amicus Curiae Briefs and Third Party Rights*, 5 J. WORLD INV. & TRADE 329 (2004).

358. See David Zaring, *Rulemaking and Adjudication in International Law*, COLUM. J. TRANSNAT'L L. 563, 595 (2008) (“[T]he WTO’s Appellate Body is an example of the relative formality, transparency, and independence of effective international adjudication.”). To be sure, there are important contrasts: the WTO panel system is more centralized institutionally and disputes are state-state, as opposed to investor-state. See, e.g., Maupin, *supra* note 160, at 143–44 (noting the highly decentralized nature of the ITA system).

359. See *infra* notes 370–387 and accompanying text.

360. See Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1484–85 (2017) (listing the various forms of corporate settlement agreements).

361. See Alexander A. Zende, *Note: Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need To?*, 95 TEX. L. REV. 1451, 1453–54 (2017); see also Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 348–49 (2014).

362. See *2021 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements*, GIBSON, DUNN & CRUTCHER LLP 1, 2–3 (July 22, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/07/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf> [<https://perma.cc/7B88-8CME>].

363. *Id.* at 2.

364. See, e.g., David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1411 (2014) (observing a “surprising dearth of individual penalties”); Nick Werle, *Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366, 1367 (2019).

365. See generally Garrett, *supra* note 360.



scandals, and violations of economic sanctions or anti-bribery legislation.<sup>366</sup> Yet, despite the public interests at stake, meaningful external oversight is limited.<sup>367</sup> Again, like in the ITA system, low transparency is problematic for the legitimacy and functional outcomes of the corporate prosecution regime.<sup>368</sup> Although information about how much different DPAs and NPAs paid out is readily available in most cases, there are also serious shortcomings.<sup>369</sup> Similar to arbitration, corporate settlements are largely removed from the judiciary.<sup>370</sup> Courts have largely been sidelined, as judicial review of corporate settlements has been whittled down.<sup>371</sup> Negotiations between executives and regulators are opaque.<sup>372</sup> As a result, transparency shortcomings become a target for criticism and a source of systemic problems.<sup>373</sup>

In both ITA and corporate prosecution alike, low transparency is both problematic for legitimacy and creates suboptimal practical outcomes.<sup>374</sup> Opacity in an area of vital public interests undermines legitimacy.<sup>375</sup> Many sovereign states have rejected the American model of corporate prosecution via settlement agreements because the model does not live up to basic rule of law principles.<sup>376</sup> Indeed, the settlement model has material deficiencies in terms of procedural transparency, civic participation, judicial oversight, and accountability.<sup>377</sup> Corporate prosecution lacks meaningful avenues for public participation.<sup>378</sup> Victims and public interest groups have few, if any, opportunities to shape the terms of settlements

---

366. Although we focus on settlements between governments and companies, settlements may also exist between companies and the general public in mass settlement programs, such as the trust fund established by British Petroleum after the Deepwater Horizon oil spill. See Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 136–37 (2014) (defining the “corporate settlement mill”).

367. See Phineas Baxandall & Michelle Surka, *Settling for a Lack of Accountability?: Which Federal Agencies Allow Companies to Write Out-of-Court Settlements as Tax Deductions, and Which Are Transparent About It*, U.S. PUB. INT. RES. GROUP EDUC. FUND 1, 13 (Dec. 2015), [https://uspirg.org/sites/pirg/files/reports/USPIRG\\_SettlementsReport.pdf](https://uspirg.org/sites/pirg/files/reports/USPIRG_SettlementsReport.pdf) [<https://perma.cc/5N85-XGEP>].

368. A study of DOJ and SEC press releases about settlements from 2012–14 often fail to provide underlying legal texts. See *id.*

369. See Werle, *supra* note 364, at 1366 (observing that “the best publicly accessible database of corporate criminal settlements is operated by the University of Virginia Law Library, not the government”).

370. Garrett, *supra* note 360, at 1484–85.

371. *Id.* at 1489–90.

372. *Id.* at 1485–86.

373. See *id.* at 1485–86; see also Werle, *supra* note 364, at 1366–37.

374. Cf. Jenny De Fine Licht et al., *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27 GOVERNANCE 111, 114–15 (2014) (discussing several theories of how organizational transparency increases perceived legitimacy).

375. Peter Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1124 (2018).

376. *Id.* at 1116.

377. The lack of meaningful oversight also raises separation-of-powers concerns. *Id.*

378. Garrett, *supra* note 360, at 1492.

between regulators and corporations.<sup>379</sup> Furthermore, the role of public interests in judicial review is poorly defined, which weakens the only viable avenue for oversight.<sup>380</sup>

In addition to legitimacy problems, the functional outcomes of corporate prosecution are suboptimal with inadequate transparency. As with ITA, transparency has pro-ethical functions in the corporate settlement regime.<sup>381</sup> Theoretically, adequate transparency should lend greater accountability and enhance the rule of law.<sup>382</sup> However, low procedural transparency results in low oversight and incomplete information, both of which impair functional outcomes.<sup>383</sup> In the absence of participatory transparency, the public interests are not sufficiently involved in determining outcomes.<sup>384</sup> Low transparency also diminishes the rule of law.<sup>385</sup> Uncertainty abounds in the absence of clear standards.<sup>386</sup> Because settlement agreements exist outside of the judicial process, they do not contribute to precedent or even add clarity to the legal environment—much like secret cases in ITA.<sup>387</sup>

## Conclusions

The landscape for transparency in ITA is improving.<sup>388</sup> The next two decades should be much more transparent than the first two decades, thanks to a variety of multilateral initiatives.<sup>389</sup> We applaud those efforts. However, closing the transparency gap has proven difficult; solutions remain partial and retroactive efforts have shortcomings.<sup>390</sup> Because trans-

379. *Id.*

380. *Id.* at 1541-42.

381. See *supra* notes 326-31 and accompanying text (distinguishing between transparency as a standalone ethical principle and as a pro-ethical condition).

382. See *supra* notes 351-52 and accompanying text.

383. See, e.g., Werle, *supra* note 364, at 1366-67 (noting that low transparency in corporate settlement process impairs functional outcomes).

384. Garrett, *supra* note 360, at 1492.

385. See *supra* notes 368-69, 376-77 and accompanying text.

386. *A Mammoth Guilt Trip*, *ECONOMIST* (Aug. 28, 2014), <https://www.economist.com/briefing/2014/08/28/a-mammoth-guilt-trip> [<https://perma.cc/3S6C-2849>] (“[T]he crimes they are accused of are often obscure and the reasoning behind their punishments opaque, and that it is far from obvious that justice is being done and the public interest is being served.”).

387. See Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 *YALE J. INT’L L.* 279, 282-87 (2017); Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld & David G. Victor, *Predictability Versus Flexibility: Secrecy in International Investment Arbitration*, 68 *WORLD POL.* 413, 418 (2016) for further discussion and analysis of secret cases in ITA. As an additional example, mediation has similar systemic downsides. See, e.g., Esmé Shirlow, *The Promises and Pitfalls of Investor-State Mediation*, in *YEARBOOK ON INT’L INV. L. & POL’Y* 2019 (Lisa E. Sachs, Lise J. Johnson & Jesse Coleman eds.) (2021) (noting the risk that mediation will detract from the “accretion of precedent,” exacerbating problems with consistency and predictability).

388. See *supra* Part I.C.

389. *Id.*

390. The UNCITRAL Transparency Rules, for instance, apply to treaties formed after April 1, 2014. Because the vast majority of IIAs came into existence before that date,

parency in ITA was stunted from the beginning, solutions have tended to offer only piecemeal bits of progress.<sup>391</sup> The uneven pace of reform speaks to inherent challenges in international governance. Fragmentation, for instance, limits the scope and pace of reform.<sup>392</sup> Reforming the investment law universe, which exists as thousands of freestanding investment treaties, is an arduous process, particularly in the absence of a strong, centralized institutional structure.<sup>393</sup> Sovereignty also limits the scope of reform where states are less enthusiastic about transparency.<sup>394</sup> At the end of the day, states are both the lords and the subjects of international law.

As we have noted elsewhere, a better ITA system tomorrow calls for enhancing transparency today.<sup>395</sup> In this Article, we present new evidence about the likely proportions of secrecy in investment law. We find that missing information about critical outcomes in the ITA system is both significant and persistent. Our contribution adds a missing element to debates about legitimacy and transparency in the investment law system. Across legal systems, transparency is a key ingredient in accountability, legitimacy, and long-term success outcomes.<sup>396</sup> Our findings suggest that enhancing transparency is indispensable for enhancing legitimacy in the ITA system.

Still, transparency is not a silver bullet for all that ails the ITA sys-

---

unless sovereigns or disputing parties explicitly opt-in to the rules, the scope of automatic application is small. The Mauritius Convention on Transparency attempts to remedy this problem by widening the scope of the UNCITRAL Transparency Rules. See Shirlow, *supra* note 215, at 623–24.

391. Lise Johnson, *The Transparency Rules and Transparency Convention: A Good Start and Model for Broader Reform in Investor-State Arbitration*, COLUM. CTR. ON SUSTAINABLE DEV., 1, 1–2 (2014), [ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf](https://perma.cc/2GFK-P9TT) [https://perma.cc/2GFK-P9TT] (“The problem is not their content but in their application.”).

392. See, e.g., Stephen Kim Park & Tim R. Samples, *Distrust, Disorder, and the New Governance of Sovereign Debt*, 62 HARV. INT’L L. J. 175, 180–81, 212–13 (2021) (discussing challenges posed by fragmentation in sovereign debt governance); Stephen Kim Park & Tim R. Samples, *Towards Sovereign Equity*, 21 STAN. J.L. BUS. & FIN. 240, 249–55 (2016); see also Shirlow, *supra* note 215, at 631–36 (addressing fragmentation challenges in efforts to reform ITA).

393. *Id.*

394. Lise Johnson, *Countries Continue to Pursue Efforts to Increase Transparency in Investor-State Dispute Settlement*, INT’L INST. FOR SUSTAINABLE DEV. (Feb. 17, 2012), <https://www.iisd.org/articles/countries-continue-pursue-efforts-increase-transparency-investor-state-dispute-settlement> [https://perma.cc/6UPH-BWNM]. Unfortunately, however, only a handful of states have ratified the Mauritius Convention: Australia, Benin, Bolivia, Cameroon, Canada, Gambia, Iraq, Mauritius, and Switzerland. *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, U.N. COMM’N ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> [https://perma.cc/Q7RX-6MGE] (last visited July 1, 2021).

395. Sebastian Puerta & Tim R. Samples, *Assessing Outcomes in ISDS*, 11 INV. TREATY NEWS 19, 21 (Oct. 2020), <https://www.iisd.org/itn/en/2020/10/05/assessing-outcomes-in-isds-sebastian-puerta-tim-samples/> [https://perma.cc/KA9T-DSB9].

396. See Martinez, *supra* note 12, at 345.

tem.<sup>397</sup> Informational transparency alone cannot cure structural imbalances and systemic flaws.<sup>398</sup> Yet we believe that transparency, as a pro-ethical condition, is essential to progress and optimization.<sup>399</sup> In ITA, as with other legal systems, low transparency impairs functional outcomes, exacerbating flaws.<sup>400</sup> Transparency sets norms and settles expectations, which foster accountability and predictability.<sup>401</sup> Many of these aims are intertwined with legitimacy.<sup>402</sup> After all, in a system that exists to adjudicate private rights against public interests, transparency is legitimacy, and vice versa.

---

397. See generally Hess, *supra* note 341 (underscoring the limitations of transparency-disclosure regimes).

398. *Id.*

399. See Bookman, *supra* note 299, at 215.

400. See *supra* note 383 and accompanying text.

401. See *supra* note 150 and accompanying text.

402. *Id.*

**Annex 1: Descriptive Statistics by Award Missingness**

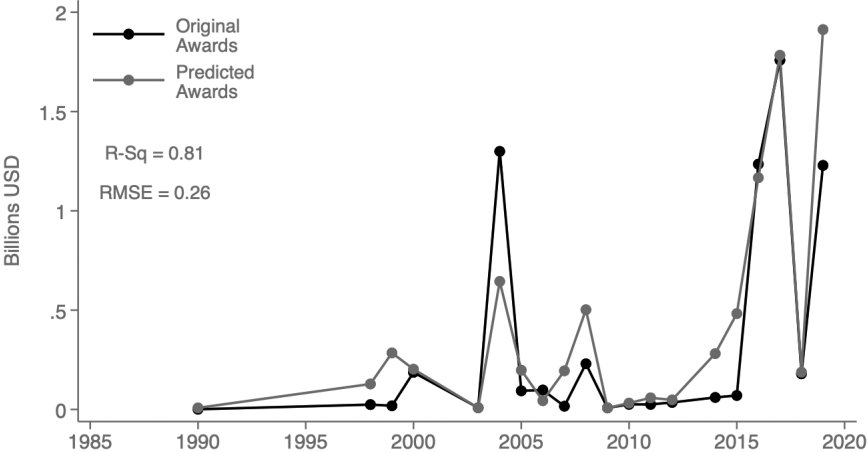
	All Cases	Settled or Decided in Favor of Investor	Missing Awards
<i>Economic Sector (% of cases):</i>			
N/A	0.02	0.01	0.01
Agriculture	0.03	0.04	0.04
Mining	0.16	0.19	0.14
Manufacturing	0.13	0.14	0.12
Energy	0.18	0.22	0.27
Water	0.03	0.05	0.04
Construction	0.11	0.09	0.12
Wholesale/Retail Trade	0.02	0.02	0.01
Transportation & Storage	0.05	0.03	0.03
Accommodation & Food	0.01	0.00	0.00
Information/Communication	0.07	0.08	0.12
Financial Services	0.10	0.06	0.06
Real Estate	0.04	0.03	0.01
Professional Services	0.02	0.02	0.02
Administrative Services	0.01	0.02	0.00
Public Admin.	0.00	0.00	0.00
Health and Social Services	0.00	0.00	0.00
Arts, Entertainment, & Recreation	0.01	0.01	0.01
Other Services	0.00	0.00	0.00
<i>Home State Income (% of cases):</i>			
High-Income Home State	0.85	0.87	0.85
Lower Middle-Income Home State	0.03	0.03	0.01
Upper Middle-Income Home State	0.12	0.10	0.14
<i>Respondent State Income (% of cases):</i>			
High-Income Respondent State	0.32	0.23	0.22
Low-Income Respondent State	0.03	0.04	0.04
Lower Middle-Income Respondent State	0.20	0.26	0.36
Upper Middle-Income Respondent State	0.45	0.47	0.37

	All Cases	Settled or Decided in Favor of Investor	Missing Awards
<b>Home State Region (% of cases):</b>			
East Asia & Pacific	0.04	0.03	0.04
Europe & Central Asia	0.63	0.68	0.70
Latin America & Caribbean	0.04	0.02	0.01
Middle East & North Africa	0.06	0.04	0.05
North America	0.22	0.22	0.19
South Asia	0.01	0.01	0.01
Sub-Saharan Africa	0.01	0.01	0.01
<b>Respondent Region (% of cases):</b>			
East Asia & Pacific	0.05	0.03	0.04
Europe & Central Asia	0.43	0.39	0.34
Latin America & Caribbean	0.27	0.33	0.26
Middle East & North Africa	0.12	0.11	0.16
North America	0.05	0.04	0.05
South Asia	0.04	0.06	0.10
Sub-Saharan Africa	0.05	0.05	0.06
Observations	1104	360	139

### Annex 2: Claims and Awards by Award Missingness

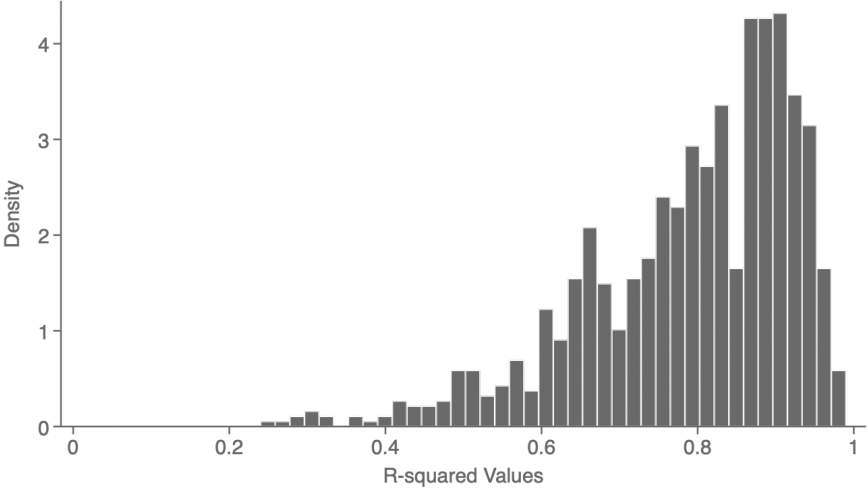
	All Cases				Settled or Decided in Favor of Investor				Missing Awards			
	Mean	Median	SD	N	Mean	Median	SD	N	Mean	Median	SD	N
Claim Amount	558	165	906	765	621	206	949	283	647	270	974	82
Award Amount					169	31.9	313	221				139

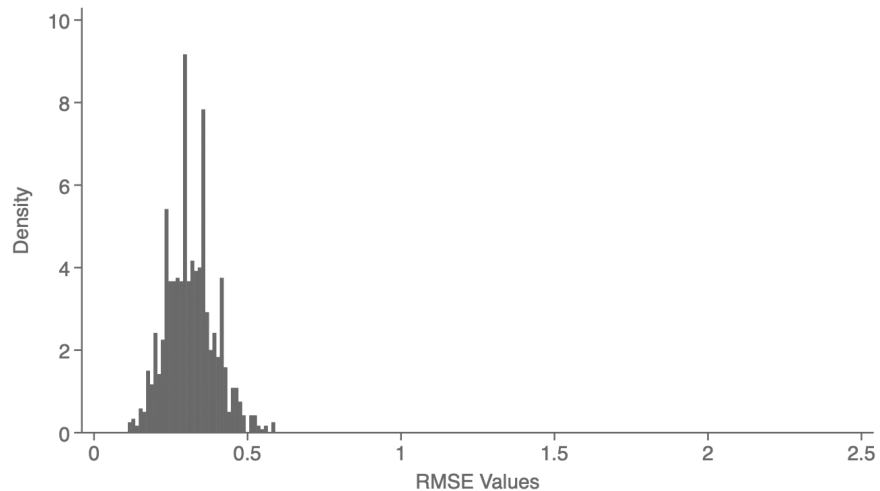
Annex 3: Out-of-Sample Model Fit



Notes: This figure shows the out-of-sample fit of our predictive model. The model was trained on a random 75 percent subset of the aggregate data (training set) and tested on the remaining 25 percent (testing set). The R-Sq is the out-of-sample R-Squared Statistic - the fraction of the variance in the dependent variable (awards) that is explained by the predictors in the testing set. The RMSE is the root mean squared error - the square root of the mean squared error (difference between actual and predicted value) in the testing set.

Annex 4: Distribution of Out-of-Sample Fits





Notes: This figure shows the results of an out-of-sample simulation, verifying the fit of the predictive model. The model was trained on a random 75 percent subset of the aggregate data (training set) and tested on the remaining 25 percent (testing set). The fit of the model on the training data, in the form of the R-Squared and the RMSE, was recorded, then this training, testing, and fitting process was repeated 1000 times. Panel A contains the distribution of R-Squared values, and Panel B contains the distributions of RMSE values.

## Annex 5: Data and Methodology

### *Data: Collection, Adjustments, and Variables*

Claims and awards are originally recorded by UNCTAD in the currency used by the claimant/tribunal but are converted to U.S. dollars using the OANDA Historical Currency Converter.<sup>403</sup> The date of conversion is the date the source document was listed by the administering institution. This amount is then converted to 2020 dollars using the Consumer Price Index (CPI).<sup>404</sup> The amount claimed or awarded is rounded to the nearest hundred thousand U.S. dollars. An approximate amount claimed or awarded is sometimes recorded by UNCTAD.<sup>405</sup> Claims and awards are winsorized, meaning values above the 95th percentile are replaced with the 95th percentile.<sup>406</sup> Winsorization greatly increases the accuracy and statis-

403. See OANDA, *Historical Exchange Rates*, <https://www.oanda.com/fx-for-business/historical-rates> [<https://perma.cc/6TYQ-YUQB>] (last visited July 1, 2021). Unless otherwise indicated, all figures cited in this article are in U.S. dollars.

404. The United States Federal Reserve maintains a record of inflation based on CPI since 1913. See Federal Reserve Bank of Minneapolis, *Consumer Price Index, 1913-*, <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913-> [<https://perma.cc/UD5Y-FZKH>] (last visited July 1, 2021).

405. See *Investment Dispute Settlement Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/investment-dispute-settlement> [<https://perma.cc/E845-SKQT>] (last visited Mar. 24, 2023).

406. In 2020 U.S. dollars, the pre-winsorized 95th percentile value of claims is \$3.62 billion, and the 95th percentile of awards is \$1.19 billion.



tical fit of our model.<sup>407</sup> This is due to the addition of large outlier cases like *Yukos v. Russia*,<sup>408</sup> which culminated in an award of almost two billion dollars—about 63 times larger than the median award.<sup>409</sup> This case, along with other outliers, result in the model predicting other extremely large awards when such outcomes are in fact unlikely.

Although the data constitute the largest and most up-to-date source of ITA cases, there are several limitations which may affect our analysis. First, we must assume that the cases on the *IDS Navigator* are not a selected subsample of the universe of ITA cases (e.g., cases on *IDS Navigator* are not more likely to have larger claim amounts, an untestable assumption). Second, our dataset and methodology only allow us to estimate previously unknown case outcomes and not the number of confidential cases, an inherently unfeasible task.<sup>410</sup> Third, our data suffer from measurement error due to rounding: UNCTAD rounds claims and awards to the nearest hundred thousand U.S. dollars and sometimes approximates claim and award amounts if an exact figure is not available.<sup>411</sup> This measurement error will tend to slightly underestimate the size of claims and awards and is dependent on the variance of the errors in relation to the variance of the outcome of interest.<sup>412</sup> Since rounding is done to the nearest hundred thousand U.S. dollars and claim and/or award amounts are usually much larger, the bias arising from measurement error is likely to be minimal. Lastly, since *IDS Navigator* is constructed through manual coding, claim and award amounts may not match source documents simply due to human error. Although *IDS Navigator* coders work in teams of two to ensure accuracy by cross-checking entries, the database is not completely shielded from error.<sup>413</sup> Despite these limitations, the *IDS Navigator* is more accessible and open than other public sources of ITA cases, underscoring the need for more transparency in IDS.

---

407. The out-of-sample R-squared, or how much of the variation in awards or claims is explained by the predictors, of the model is increased when outcomes are winsorized. Otherwise, the predictions are abnormally large. See e.g., Lien and Balakrishnan, *On Regression Analysis with Data Cleaning via Trimming, Winsorization, and Dichotomization*, COMM. IN STATISTICS - SIMULATION & COMPUTATION (2005), <https://doi.org/10.1080/03610910500307695> [<https://perma.cc/P4UV-HHJE>].

408. See Samples, *Winning and Losing*, *supra* note 28, at 163–64 (illustrating the distortionary effect of *Yukos* in ITA data).

409. In 2020 U.S. dollars, the pre-winsorized median award is \$32 million.

410. *ISDS Navigator update: 1,229 known investment treaty cases by 31 July 2022*, UNCTAD (Dec. 20, 2022), <https://investmentpolicy.unctad.org/news/hub/1709/20221220-isds-navigator-update-1-229-known-investment-treaty-cases-by-31-july-2022> [<https://perma.cc/R2YS-NJZP>]; If cases are confidential and not reported, it is not possible to know how many as they are then not documented.

411. *IDS Navigator: About and Methodology*, UNCTAD, <https://investmentpolicy.unctad.org/pages/1057/isds-navigator-about-and-methodology> [<https://perma.cc/XLN5-PNVA>] (last visited July 1, 2021).

412. See, e.g., Steve Pischke, *Lecture Notes on Measurement Error*, LONDON SCHOOL ECON. (2007), [https://econ.lse.ac.uk/staff/spischke/ec524/Merr\\_new.pdf](https://econ.lse.ac.uk/staff/spischke/ec524/Merr_new.pdf) [<https://perma.cc/K8AQ-YMCG>].

413. UNCTAD, *supra* note 412.

When there are multiple home states of the investor listed on the *IDS Navigator*, we assign the home state listed first as the respondent state. The year of initiation is usually the year in which the claimant submitted the Request for Arbitration, however for cases brought under ICSID or ICSID Additional Facilities Rules, the year in which the claim was registered by ICSID is used. The applicable IIA is the treaty by which the claimant initiated the proceedings, usually a bilateral investment treaty between the home state of the investor and the respondent state or the investment chapter of a free trade agreement.<sup>414</sup>

The arbitral rules govern how the proceedings are conducted.<sup>415</sup> Cases not subject to any existing set of arbitral rules are assigned as “None (ad hoc).” The administering institution provides the procedural structure for the arbitration, though cases may also be conducted without an administering institution on an ad hoc basis.<sup>416</sup> The category of the investment and dispute broadly identify the investment at stake and the conduct allegedly in breach of the relevant IIA. The economic sector is classified by UNCTAD following the International Standard Industrial Classification of All Economic Activities, Rev.4. The status/outcome of the proceedings can take multiple values:

- 1) decided in favor of state: the tribunal found that the respondent state had not committed any breach of the relevant IIA or dismissed the case for lack of jurisdiction;
- 2) decided in favor of investor: the tribunal found that the respondent state committed one or more breaches of the relevant IIA;
- 3) decided in favor of neither party: the tribunal found that the respondent state committed one or more breaches of the relevant IIA but did not award monetary compensation to the claimant;
- 4) settled: the claimant and the respondent settled the case;
- 5) discontinued: the case was discontinued for any reason other than a settlement; or
- 6) pending: the case is still pending decision.

When estimating claims, we focus on cases of all possible statuses/outcomes. When estimating awards, we focus on cases that have been decided in favor of investors or have been settled. The definitions of claims and awards of described above. The IIA breaches alleged are derived from the claimant’s request for arbitration, and the IIA breaches found are derived from the arbitral decisions. The composition of the tribunal includes the names of the individuals serving as members of the tribunal. Follow-on proceedings include the following possible values:

- 1) ICSID annulment proceedings;
- 2) judicial review by national courts; or

---

414. *International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> [https://perma.cc/3ZS4-P688] (last visited Mar. 24, 2023).

415. See *supra* Part I.C.2 (discussing reforms that enhanced transparency provisions in prominent arbitral rules for ITA).

416. See *supra* notes 20, 68.

## 3) ICSID resubmission proceedings.

We use the ultimate outcome of any concluded follow-on proceedings if the proceedings change the previous outcome of the case.<sup>417</sup> In addition to data from the *IDS Navigator*, we include country-year level data on income level, geography, and economic development obtained from the World Bank.<sup>418</sup>

*Methodology: Calculating the Transparency Gap*

To estimate the transparency gap in ITA, we follow a two-step process. We first create a statistical model that estimates previously missing claim or award amounts. We then sum these estimated claims or awards to calculate the transparency gap. We create a linear regression model to estimate missing claim and award amounts. The following specification is estimated using ordinary least squares (OLS) at the individual case level on the subsample of data for which claims and/or awards are available

*Claim (Award)*

$$\begin{aligned} &= \beta_1 \text{Respondent State} + \beta_2 \text{Investor Home State} \\ &+ \beta_3 \text{Year Filed} + \beta_4 \text{Year Ended} (+\beta_5 \text{Claim Amount}) \\ &+ \text{error}, \end{aligned}$$

Ordinary least squares is a method for estimating unknown parameters in a linear regression model by choosing the parameters ( $\hat{a}$ 's) that minimize the sum of the squared errors - the difference between the actual and predictive outcome (claim or award) value.<sup>419</sup> The resulting OLS estimated  $\hat{a}$ 's are used to estimate award amounts for cases missing award information by inserting the known values of the predictors for a specific case with an unknown claim and/or award into the estimated equation and calculating the predicted outcome.

We have selected the combination of predictor variables which maximize the out-of-sample fit of the model. We solely wish to accurately estimate the outcome. Therefore, our priority is to maximize out-of-sample fit, or how well the model tracks data different from that which it was estimated with. This allows us to continue with less structure and rigorous proving of the satisfaction of traditional OLS assumptions that are often used for inference.<sup>420</sup>

417. See UNCTAD, *Transparency: A Sequel*, *supra* note 25, at 150-56 (describing primary avenues for follow-on proceedings in ITA).

418. See *World Bank Open Data*, WORLD BANK GRP., <https://data.worldbank.org/> [https://perma.cc/ZHB7-WS4H]. (last visited July 1, 2021).

419. Formally, the estimated vector of parameters  $\beta$ 's are equal to the  $\arg \min \sum_{i=1}^n (y_i - \sum_{j=1}^m X_{ij} \beta_j)^2 = (X^T X)^{-1} X^T Y$  where  $y$  is the vector of outcomes (claims or awards) with length  $n$ ,  $X$  is the matrix of predictors with dimensions  $n \times m$ , and  $\beta$  is the vector of parameters with length  $m$ .

420. *Key Assumptions of OLS: Econometrics Review*, ALBERT, <https://www.albert.io/blog/key-assumptions-of-ols-econometrics-review/> [https://perma.cc/CEX7-DVNP] (last visited Apr. 17, 2023).

Additionally, we have estimated models using lasso, a method similar to OLS which performs variable selection and regularization to find which variables out of those available are the most predictive of the outcome, in an effort to decrease prediction variance.<sup>421</sup> Out-of-sample fit for the lasso predictions were lower than using standard OLS, however, likely because the number of variables relative to observations is not large enough.

To confirm the accuracy of our estimates, we show the out-of-sample fit of the model in Annex 3, which illustrates the ability of the model to estimate missing information.<sup>422</sup> Annex 3 plots the sum of predicted awards by year from a model estimated using a random 75 percent sub-sample of cases against the remaining 25 percent of the cases. A high R-squared of 0.81 and a low RMSE of 0.26 verifies that models fit.<sup>423</sup>

The high fit of our model illustrated in Annex 3, however, could have occurred to simple random chance and may differ had we selected a different random 75 percent sub-sample of cases. To address this, we have repeated the above exercise, training the model on a random 75 percent sub-sample, and testing it on the remaining 25 percent, 1000 times and plotted the distribution of root mean squared error (RMSE) and R-squared values. The distribution of R-squared values is situated close to one, (an R-squared of one indicating perfect predictive ability), with a mean of 0.791 and a median of 0.830. The distribution of RMSE values is close to zero, (a RMSE of zero indicating no error between the model estimates and the actual data), with a mean of 0.314 and a median 0.310. These results, illustrated in Annex 4, underscore the ability of our model to estimate the transparency gap.

A potential concern for our methodology is that our sample of concluded cases have larger claim or award amounts on average than cases with missing claims or awards. So, we may be over-estimating claims or awards for missing cases and thus are over-estimating the transparency gap for claims and awards. However, this concern is assuaged in Annex 2 since the average (median) claim amount for cases missing awards, \$647 million (\$207 million) is similar to the average claim amount for all concluded cases, \$621 million (\$270 million). Nevertheless, when predicting awards differences in claim amounts between all cases and cases with missing information are not as important as potential differences in the *relationship between* claim and award amounts since the most important predictor of award amounts is the claim amount. Although it is not possible to quantitatively test whether the relationship differs, it is reasonable to assume that it does not. If the relationship between claim and award amounts did indeed differ between all cases and cases that were missing awards, it may imply that arbitrators have a different award calculation for cases with awards that are not publicly available compared to fully transparent cases, a question reserved for future research.

---

421. See TREVOR HASTIE, ROBERT TIBSHIRANI, & JEROME FRIEDMAN, *THE ELEMENTS OF STATISTICAL LEARNING* 68-73 (2nd ed., 2009) (explaining the lasso method).

422. See Annex 3.

423. *Id.*