# Kluwer Arbitration Blog

## The Social Cost of Secrecy in International Investment Arbitration

Sergio Puig (University of Arizona, James E. Rogers College of Law ) · Wednesday, November 18th, 2015 · Institute for Transnational Arbitration (ITA), Academic Council

The issue of transparency is hardly a new topic in legal scholarship addressing international arbitration. Last year, in an important contribution to this blog, Loukas A. Mistelis broke with the conventional wisdom that investor-state dispute settlement, or ISDS, is in need of court-like transparency, arguing that extending court-like transparency to arbitration "would not benefit the arbitration process or the disputing parties." Arguments for court-like reforms have led to important efforts, including the 2014 UN Transparency Convention. But what if Professor Mistelis is right and the transparency reforms do little to improve the oft-controversial system of ISDS?

In an upcoming article, together with Emilie Hafner-Burton and David G. Victor, two preeminent political scientists based at the University of California San Diego, we explore the role of transparency reforms in ISDS. We suggest, based on empirical evidence, that the reforms adopted at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) with the goal of fostering transparency have not been followed by a general decline in secrecy. In fact, the largest effort to produce greater transparency in the field—a set of procedural reforms adopted by ICSID in 2006—preceded a noticeable rise in the probability of secret arbitration. We suggest that the general lack of an observable impact on transparency may be rooted in the fact that reforms have never been designed to have much impact on settlements. Reformers have focused on procedural issues rather than the underlying incentives motivating the preference for secrecy, and parties have preserved many ways of keeping inconvenient information away from the public eye—using settlement foremost among other mechanisms.

Our paper is not a plea against transparency reforms. Instead, we argue that transparency reforms should look also at the rich history of debate regarding settlements within national legal systems. In fact, using statistical models we demonstrate that it is possible to identify historical patterns to explain why information is concealed in certain types of disputes. This suggests that the theoretical literature about the incentives for settlement within national legal systems is a reasonable starting point for a wave of new empirical scholarship on the question of secrecy internationally.

Unlike Mistelis we believe that the high level of secrecy in ISDS is problematic, largely because it has created a spiral in which parties face ever-stronger incentives to keep outcomes secret. This spiral is bad news for the legitimacy of international investment law, as its expanding scope and depth are creating stronger public needs for disclosing the issues addressed in such disputes as well as how governments conclude such disputes. Settlement occupies a pivotal role in this crisis

because it is the mechanism of choice for litigants who want secret outcomes—exactly what Owen Fiss argued in the now iconic *Against Settlement* and the rich literature that resulted from his provocation against private settlements. Re-wiring the incentives and procedures could help fix the problem, but halting settlements is neither feasible nor wise since full transparency can impede some efficient outcomes. Hence, we argue for policy reforms that lead to disciplined settlements or, in plain English, against secret settlement.

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