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Does ownership matter? Claimant characteristics and case outcomes in investor-state arbitration

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ABSTRACT
The power of foreign investors has become a key component in debates on sovereignty and globalisation. Here the mechanism of investor-state dispute settlement (ISDS), which allows firms legal recourse against host governments, has come to the forefront of debates over corporate rights in the contemporary era. While proponents laud ISDS as a neutral and efficient means of dispute resolution, critics claim that it shields transnational corporations from the oversight of national legal systems while enhancing their ability to interfere in host state policy matters. Despite the rich literature on ISDS, we know relatively little about the identity of corporate actors who use these mechanisms. Who are these foreign firms that take governments to court? Do different companies use these mechanisms to different effect? This article examines the impact of corporate ownership on ISDS outcomes in 241 cases from 1996 to 2014. Our results suggest that ownership matters. While public and private companies demonstrate similar propensities to settle, respondent states are less likely to win cases that are brought by a publicly traded company. For host-governments, this finding is particularly significant given that public companies demand more – and are likely to win more – in damages than private companies.

KEYWORDS
ISDS; shareholder value; patient capital; financialization; shareholder claims

Introduction

Investor-state dispute settlement (ISDS) holds a firm place in the toolkit of twenty-first century investment attraction strategies. First appearing under a bilateral trade agreement between the Netherlands and Indonesia signed in 1968, ISDS provisions are now a common feature of investment treaties, free trade agreements and investment contracts. To date, 120 countries are known to have been respondents in one or more ISDS case, with the total number of cases surpassing the 1000 threshold. While for some countries being sued by foreign investors is a rare event, for others, like Argentina, Spain and Czechia the repercussions of being taken to court are all too familiar. Regardless of their varied experiences, many governments now face growing demands for the reform of international investment law and dispute settlement mechanisms. ISDS, critics argue, shields foreign investors from domestic law while enabling them to interfere in the domestic policymaking processes of host-countries. After all, even the threat of a costly and protracted legal battle may be enough to convince governments to forgo regulatory changes.

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Luckily for host-countries, governments have won more cases than they have lost. Of the 674 ISDS proceedings concluded by the end of 2019, 37 per cent were decided in favour of the state and 29 per cent in favour of the investor (UNCTAD 2020). Studies have scoured host country characteristics and the ISDS system for clues about what makes a government more likely to win a case. Much less is known however about the plaintiffs themselves: does it matter who brings the claim? Critics argue that given high administrative and legal fees, the system privileges wealthier investors over smaller and less affluent counterparts. Others find that foreign investors active in natural resource sectors win more often than foreign investors that are active in other sectors of the economy. Here, however, case outcomes have more to do with the political sensitivity of natural resource industries than the investors themselves. What then of the claimants? How might corporate characteristics, such as ownership and decision-making structures shape case outcomes?

Our article seeks to address these questions by investigating the relationship between corporate ownership and ISDS outcomes. Namely, we ask whether publicly traded companies are more likely to settle, win or lose the cases they bring than their privately held counterparts.[1] Investor claimants face multiple courses of action when confronted with a dispute in addition to ISDS. Here, we are specifically interested in what happens after the choice to sue has been made. We start from the premise that foreign investors, like governments, face arbitration costs and reputational costs in ISDS proceedings. These costs and the potential benefits of ISDS claims factor into the legal strategies of claimants and inform decisions around the award sought, when to settle and ultimately impacts on investors' likelihood to win a case. Yet, different kinds of investors experience these costs differently. Building on this premise, we examine variation in the likelihood that cases brought by publicly listed companies and privately-owned entities will end up in an investor-win, -loss or settlement. We offer two sets of hypotheses. The first concerns the likelihood of settlement. Here we suspect that publicly traded companies, facing temporary pressure on share price, are less patient and therefore more eager to settle. The second pertains to the likelihood of a state-win. We expect states to win relatively fewer of the cases brought by publicly traded companies, because these companies bring 'stronger' cases for fear of reputational costs and have greater resources to pursue litigation. To test these hypotheses, we use a Heckman probit model examining 241 discrete ISDS cases from 1996 to 2014. We analyse, first, the likelihood that a case is settled and, second, the conditional likelihood that the respondent state wins the case. In so doing, we find (all else being equal) that there are no clear differences in the propensity to settle. However, host states are significantly less likely to win a case when the claimant company is publicly traded. The odds of states wining cases brought by publicly listed firms are almost 1/3 lower than for cases filed by private plaintiffs.

Our research joins and contributes to three bodies of literature that seldom enter into dialogue. First, the (predominantly) law and political science scholarship on international investment law and the drivers of ISDS outcomes. The literature on how the economic and political profile of host states and institutional biases impact on ISDS outcomes is well developed (e.g. Davis and Bermeo 2009, Donaubauer *et al.* 2018). Yet, to our knowledge, no study has examined the impact of investor characteristics beyond the industry sector. Our work suggests that corporate ownership matters to arbitral outcomes and that there is an important difference in the way public and private companies use the ISDS system. Second, our article speaks to the literature on market structure and shareholder capitalism, which argues that publicly-listed companies' have become increasingly oriented towards the short-term aim of share price maximisation rather than on the long-term development of companies' productive facilities (e.g. Lazonick and O'Sullivan 2000, Fligstein and Shin 2007, Knafo and Dutta 2020). In this view, the ability of shareholders quickly to exit their ownership position (or the perceived threat thereof) and the concomitant pressure on the company share price may push company management to take different ISDS decisions than private companies. Our findings suggest that, all else being equal, publicly-owned companies are more successful in pursuing ISDS litigation, which supports the view that investment treaties serve the needs of the shareholder model of capitalism especially well. Third, our research taps into legal scholarship on shareholder claims (e.g. Schreuer 2005, Gaukrodger 2014, Korzun 2018) which has analysed not only publicly listed companies legal standing in ISDS procedures and the use of respective loss in shareholder claims, but also provides important insight into the legal approach of host governments. Legal scholarship on 'piercing the corporate veil' has so far focused on arbitration proceedings and the question of permissible plaintiffs (e.g. Kryvoi 2010). Our article contributes to this literature by foregrounding corporate identity in the study of ISDS arbitration *outcomes*.

The remainder of this article proceeds as follows. In the next section, we present a review of the literature on ISDS outcomes and the costs of ISDS arbitration. Building on this literature, we develop two central hypotheses regarding public and private companies experience in and use of the ISDS system. Next, we present descriptive statistics, our model specifications and data. The subsequent section discusses the empirical results. The final section concludes with a reflection on future research avenues.

Explaining ISDS outcomes

Explanations on ISDS outcomes focus broadly on three sets of characteristics related to: (1) the respondent state, (2) the arbitration system, and (3) the suing firm. First, there is a substantial and varied body of evidence that the economic and political profile of host states matters for arbitration outcomes. In line with broader anti-development bias/democratic advantage theory (e.g. Bernhard and Leblang 2006, Davis and Bermeo 2009), there is evidence that both the political regime (Franck 2014, Franck and Wylie 2015, Pelc 2017) and the development status of sued states (Schneiderman 2008) matter for arbitration outcomes. Secondly, a related body of literature has found evidence of arbitrator bias (Nunnenkamp 2017, Donaubauer *et al.* 2018). Tucker (2018, p. 151) argues that arbitrator bias is not systematically favouring home states: 'arbitrators retain substantial autonomy from states, benefiting from imprecise treaties, multiple competing overseers, and a network of treaties'.

A third body of literature has investigated the impact of corporate profiles on ISDS cases. The bulk of work focuses on claimant industry or sector. Foreign investors active in extractive industries, infrastructure and utilities sectors are more likely to bring legal claims, especially when the investment project was recently privatised (Moosa 2002, Bauerle Danzman 2016). Projects in these sectors tend to be politically contentious and, as a result, are more susceptible to government interference and/or breach of contract. A related argument concerns so-called immobile industries, that is industries with location specific assets where (the threat of) exit in response to unfavourable government action is less feasible (e.g. Behn *et al.* 2018, Jones 2018).

What about other firm characteristics? Could the ownership and decision-making structure of claimants matter in arbitral proceedings? As scholars recognise, investors stand much to gain from bringing an ISDS claim. On the one hand, a favourable arbitral ruling may enable foreign investors to recoup not only their sunk investments, but also the profit they had expected to make throughout the life of their investment contract. On the other, the threat of an ISDS claim alone can be enough motivation for governments to offer a desired policy concession. However, investors, like governments also face various costs in arbitral proceedings. While many studies examine how different costs inform state behaviour, few have examined what they mean for investor claimants. In the next section, we extrapolate different costs borne by investor claimants from this literature.

The costs of arbitration

Governments are keen to avoid investor-state litigation, and for good reason. Losing an ISDS case can blow a sizeable hole in the budget of host states. According to one estimation, the average award for successful claimants amounts to about USD 76 million (Hodgson 2014). Yet host states are almost certain to face financial costs irrespective of the case outcome, and legal and administrative fees associated with ISDS are on the rise. UNCTAD (2014) estimates that on average, ISDS costs exceed USD 8 million per party per case, the bulk of which (on average 82 per cent) go towards legal fees. Sued governments may not necessarily be able to recover these costs – even when winning the case (Franck 2010). This is not to suggest that arbitration is always cheap for claimants. In the sovereign debt case of Abaclat v. Republic of Argentina, a landmark case involving initially 180,000 claimants, the tribunal compared the claimants' case costs of some USD 27 million to date to Argentina's USD 12 million (Gaukrodger and Gordon 2012, p. 18). In several cases, proceedings were ordered discontinued by arbitral tribunals after foreign investors were unable to pay their share of administrative fees.

Arbitration costs are only one category of costs associated with ISDS. Scholars have identified three additional categories of costs for host-states related to their sovereignty, international reputation and diplomatic relations. The sovereignty costs of ISDS chimes with criticisms that the system favours (multinational) private corporations at the expense of state sovereignty and democratic policymaking (Alvarez and Topalian 2012). A loss of sovereignty is furthermore likely in the shadow of ISDS litigation, where governments refuse to introduce policies as a means of pre-emptively avoiding investor claims (Pelc 2017, p. 569). Secondly, ISDS cases can erode countries' reputations for rule-governed behaviour. The ISDS system is frequently championed on the grounds of attracting foreign direct investment (FDI). This is why states tend to accept more binding BIT conditions during worse economic conditions (Simmons, 2014). ISDS can provide a quick and efficient means of signalling the government's 'credible commitment' to maintaining investor-friendly regulation (Poulsen 2020, see also Bonnitcha *et al.* 2017). On the flip side of this argument, agreeing to ISDS raises expectations amongst investors and home government for certain kinds of behaviour that are reputationally costly to violate (Simmons 2000, p. 819). States facing ISDS litigation are thought to suffer from a decline in investor confidence. There is evidence that governments lose FDI as a result of ISDS arbitration regardless of the outcome (Allee and Peinhardt 2011, Wellhausen 2015, although see Wellhausen 2019 on *reinvestment*). Thirdly, while ISDS is often pitched by proponents as a peaceful means of resolving investment disputes, it does not entirely negate diplomatic tensions. Often, foreign investors lobby their home-governments on the side of ISDS proceedings in the hopes that diplomatic interventions will pressure host-governments to offer the desired policy concessions (Wellhausen 2015, Gertz *et al.* 2018, Yazbek 2010, p. 114).

The choice to proceed to arbitration is not clear cut for investor claimants as certain categories of cost also apply to them. The 'burnt bridges' argument of FDI flows in the shadow of ISDS also applies to investors whose legal action is likely to sour relations with sued governments. Whereas a decline in FDI as a result of litigation is usually portrayed as a loss to eager host states, it may arguably also represent a loss in investment opportunities for foreign capital. Moreover, while some investors use ISDS claims to gain greater bargaining power in the renegotiation of contracts and licenses (Calvert 2018a), there is no guarantee that a government will offer the desired concession. Resorting to ISDS is therefore a risky strategy that may make poor financial sense. Investors bear significant administrative and legal fees in bringing a claim, often while their capacity to recoup profit from their sunk investment is significantly curtailed. Given the lengthy nature of ISDS proceedings, investments may be tied up for years while governments maintain the policies or treatment that the investor seeks to correct.

Given the potential for financial loss, the decision to bring an ISDS case may signal to shareholders and business partners irresponsible investment decisions or an inability to effectively manage relations with host communities. Aisbett *et al.* (2018) find that BITs serve primarily as deterrents for adverse regulation. Even bringing potentially successful cases may thus be interpreted as evidence that host countries are willing to breach investment treaties and that the relation between investors and host countries has soured. Reputational damage may be particularly severe in highly publicised cases. In several countries, investor claims served as lightning rods of social protest and led to mass demonstrations that helped inform decisions on the expropriation of investor assets. For instance, in Ecuador, Occidental Petroleum's ISDS win in a highly publicised battled over tax credits prompted widespread social protest and demands for the company's ousting (Calvert 2018b). The reputational and financial damage of Philip Morris' ISDS case in Australia is another prominent example (Knaus 2017). Some governments and arbitral bodies have incorporated transparency requirements into their procedural rules and open ISDS proceedings to third-party participation. Such reforms increase opportunities for public scrutiny of claimant demands with potential repercussions for investors' brand image and identity in host-markets.

Investor claimants, like governments face financial and reputational costs in ISDS proceedings. Our starting premise is that these costs are different for publicly traded corporations than they are for private companies. We posit that the potential financial and reputational costs of ISDS are filtered through the ownership structures of investor claimants. Corporate structures affect the agency of corporate managers with important impacts on corporate behaviour. According to agency theory, publicly listed companies are more likely to face principal-agent conflicts – that is, a conflict between the interests and goals of owners (principals) versus managers (agents) – than private firms where ownership and management are often concentrated in the same hands. Principal-agent conflicts place different formal and informal constraints on the strategic choices of corporate managers, which drives variation in corporate behaviour (Lu *et al.* 2009). We highlight in particular the impact of the 'shareholder primacy' (or 'shareholder value') thesis, which privileges external stock market valuation (Jensen and Meckling 1976, Jensen 1993). Shareholder value maximisation is thought to rest on three legs: providing comprehensive economic incentives (e.g. salary and bonuses, including stock options which would increase the sensitivity to share prices), monitoring managerial performance, and promoting an active market for corporate control such as hostile takeovers (Fourcade and Khurana 2017, p. 355). We apply this logic of shareholder primacy to ISDS. Specifically, we argue that ownership structures place upon corporate managers different short- and long-term pressures that influence their legal strategies. We therefore expect to see variation in ISDS outcome depending on whether states are sued by private versus publicly listed companies.

Share prices matter not only for firms' (un)willingness to provide patient capital and pursue legal action against host governments, they also play a key epistemic role in litigation itself. Share prices 'should be treated as barometers for managerial performance' (Knafo and Dutta 2020, p. 492). In line with this logic, they often appear in ISDS litigation as an indicator of firm damage. For instance, in Bear Creek v. Peru, an independent consultant report submitted weighed the impact on share prices of Peru's decision to terminate the company's operating permit by decree. The report found that the company's stock value declined 39.5 per cent just after the decree's issuance while its market capitalisation fell by 46.8 per cent.[2] In Pacific Rim v. El Salvador, a witness statement by the company's Chief Financial Officer claimed that the company's share price declined from USD$1.22 to under $0.30 a share immediately after the government announced it would stop issuing mining permits (ICSID 2010). In these cases, an effect on share price supported claims about the size of damages accrued by investors.

We post two hypotheses to explore this relationship between the corporate governance of suing firms and arbitration outcomes further:

> Hypothesis 1: All other things being equal, the settlement odds are higher for public firms because they are exposed to greater short-term costs (mediated through pressure on share prices).

As noted above, we expect that the management of a publicly listed company faces different pressures than the management of private firms, which may reduce the willingness of public entities to see through an ISDS case until its conclusion. A likely intermediating factor here is the share price: increased uncertainty about a company's value and downward pressure on its share price, so the argument goes, leaves a company vulnerable to a hostile takeover, pushing management to take decisions that support the stabilisation of the share price (Lazonick and O'Sullivan 2000). Various corporate decisions, such as the selling of non-core business entities, stock buybacks, and company down-sizing have been linked to the efforts of corporate management to boost the share prices of their firms (e.g. Davis and Thompson 1994). Efforts to reduce operational costs, including labour costs, are often positively received by shareholders because they generate an immediate impact, whilst investments in high-risk exploratory projects and basic research are not (Lazonick and O'Sullivan 2000, Cushen and Thompson 2016). We assume that a similar effect influences the litigation strategy of publicly listed firms: the litigation costs can be seen as a highly uncertain investment in future rewards, which shareholders may perceive negatively; their preference may be for immediate settlement and the cutting of any losses.

In some cases, the link between an ISDS dispute and the share price of the company involved is rather direct. Public companies are likely to be beholden to the interests of shareholders even in the absence of takeover threats. According to the shareholder primacy thesis, firms are to prioritise and maximise shareholders' return on investment (Erturk 2019). Yet, ISDS arbitration – especially if unsuccessful – threatens to harm corporations' future returns, which is especially obvious in cases of direct expropriation, causing uncertainty about future revenue streams. Indeed, Baruník *et al.* (2020) find that the share price of publicly-traded companies involved in ISDS litigation show 'abnormal volatility', which indicates increased uncertainty about their value. Moreover, the increased volatility, though subsiding in the case of a company win, persists when the state wins the case (*ibid*.). To reduce this kind of uncertainty (and to stabilise share prices), companies may agree to settle and recuperate or get reimbursed for at least some of the assets in advance of a final adjudication.

In other cases, the link between an ISDS dispute and the claiming company's share price may be related to the reputational implications of the company being embroiled in a dispute. When a dispute unexpectedly enters into the public spotlight or the proceedings take a long time to move forward, confidence in company management may deteriorate leading to downward pressure on share prices. Also, when the legal proceedings develop in ways that appear unfavourable to the claiming company, the management's reputational concerns may push decision making towards settlement. In both these cases, settling a case may be part of a broader corporate strategy to boost the company's reputation. Taken together, our first hypothesis is that (all else being equal) publicly listed companies have less patience to see through a case until the end and will be more likely to settle.[3]

> Hypothesis 2: All other things being equal, states are less likely to win ISDS cases when being sued by a publicly traded firm.

Similar to the rationale in hypothesis 1, we could expect publicly traded companies to behave more cautiously toward ISDS than private companies because they are more exposed to reputational costs. Put another way, corporate managers in public companies are less likely to gamble on arbitral outcomes than managers in private companies who benefit from greater degrees of privacy and less scrutiny over their business decisions.[4] As we argued above, public companies face additional costs of losing a case via upset shareholders. This should make them both more cautious in bringing and proceeding with cases that they consider likely to win. This mechanism of shareholder punishment works both as anticipated and actualised responses to unfavourable ISDS outcomes.

Another reason public companies may be more successful in ISDS cases pertains to resource asymmetries. Here, we define resources not just in terms of profitability and revenue, but also as access to credit and the flexibility firms have in redirecting capital. Private companies may face legal capacity constraints having less experience or fewer resources to dedicate to legal strategy, which would make their case less convincing to arbitrators. Public companies may furthermore have greater resources with which to fund their legal strategies. Legal fees associated with external counsel, the hiring of expert witnesses and investigators can be exorbitant. Such costs provide incentives to settle, but the more resources a company has to devote to their case, the more likely they are to make their case convincing. What is more, public companies are likely to be more confident of their ability (and more willing) to sustain the costs of ISDS proceedings once arbitration has begun. The profit stream of public companies may be less burdened by temporary disruptions to a single investment project caught up in a protracted legal battle. Asker *et al.* (2011), for instance, find that publicly listed companies in the United States tend to have more diverse investment portfolios and invest less of their total assets than privately held companies of similar size and industry. The debate on the profitability of public vs. private corporations dating back to the seminal contribution of Berle and Means (1932) is far from settled and as studies continue to be US-centric, the generalisability of findings is questionable. Overall, the literature points to public ownership allowing for swifter and greater access to credit, and often at lower costs (e.g. Allee and Yohn 2009, Minnis 2011).

Public vs. private companies and investor state disputes

To assess the differences publicly and privately held firms in ISDS arbitration, we collected data on claimant corporation ownership. Building on Wellhausen's data (2016) we used the information on the suing firm's identity and matched this with the ownership data available at Standard & Poor's Capital IQ database. This allowed us to construct two ownership dummies: *Public* taking the value 1 if the company is publicly traded and 0 otherwise and *Private* taking the value 1 if the company is privately held and 0 otherwise.[5] Capital IQ does not provide information on all claimant firms, which reduces the sample from an initial 434–274. We include cases that have resulted in either settlement or a ruling up to 2014. We are thus not considering pending or discontinued cases. We assume that public and private companies face different odds of winning an ISDS case as well as different odds of reaching a settlement. Figure 1 plots the three main outcome categories – investor win, claimant win, settlement – for public and private firms respectively.

Based on these descriptive statistics, there is indeed some reason to believe that the public-private distinction matters for arbitration outcomes. The main difference concerns the settlement and the state-win rate. Publicly traded companies take a higher share of the settled cases (44 per cent vs. 39 per cent) and of the cases won by the investor (32 per cent vs. 28 per cent). If we assume that respondent states win fewer cases brought by publicly traded companies, could it be that this trend is driven by the so-called anti-development bias discussed above? Correlation coefficients reveal however no strong pattern of association between our dummy for public company and home country GDP ($r(268) = -.07$). What is more, at first glance it does not appear that public companies target less developed host states – if anything litigation is more prevalent by private firms (see Figure 2).[6] Whereas 35 per cent of the cases privately held firms brought were filed against low-income and low-middle-income countries, this is the case for only 28 per cent of the cases brought by public companies.

A further interesting difference between these company types is that public companies seem to seek higher awards. This statistic is to be taken with a pinch of salt given that this information is only available for 58 per cent of the cases. Figure 3 plots the mean award sought and award won for the two company groups. The award variable takes the mean award received in millions of US dollars at the exchange rate at the time the arbitration is concluded. This value captures the absolute

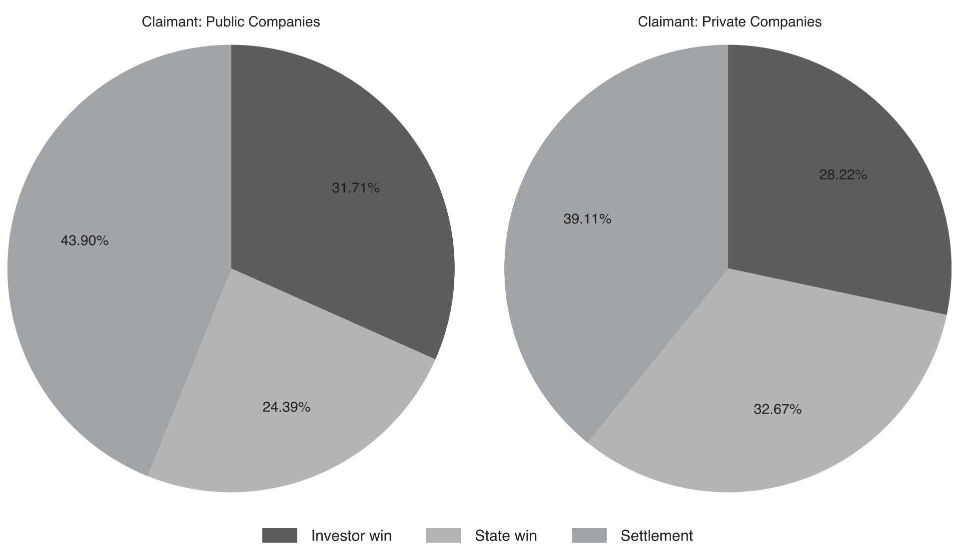

Figure 1. Arbitration Outcome by Private/Public Status of Suing Company. Source: Arbitration outcome data from Wellhausen (2016), public/private from Capital IQ (authors own coding)

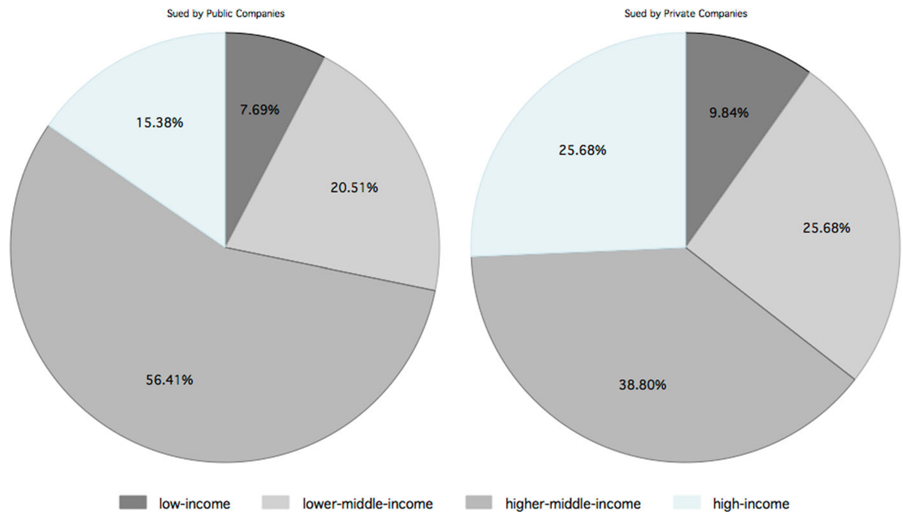

Figure 2. Income group of host country by private/public status of suing company. Source: Income categorisation based on World Bank's four categories, the threshold between categories varies by year, public/private from capital IQ (authors own coding).

minimum, base award the investor won in arbitration. From Figure 3 we can see that, on average public companies demanded more in compensation and received more when winning a case. This difference is not necessarily due to the corporate ownership profile, but could also be a result of the higher-value of the underlying investment. Being sued by a (winning) public company is more expensive for host states.

One reason for this award cost variation may be found in the different representation of sectors across the public-private divide. In line with the sunk costs argument on extractive industries, if more firms operating in this sector were publicly traded, the damages sought and the dollars awarded might also rise. Figure 4 visually explores this assumption by plotting the sectoral distribution by public and private status. In our sample, a larger share of firms situated in extractive industries is

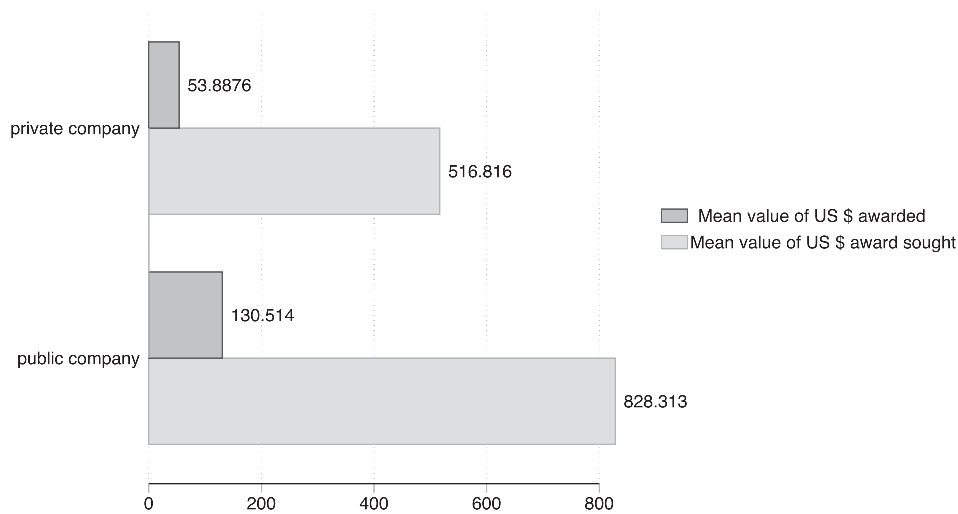

Figure 3. Amount of Compensation Sought and Awarded. Source: $ awarded and sought data from Wellhausen (2016), $ in millions of US dollars, public/private from Capital IQ (authors own coding)

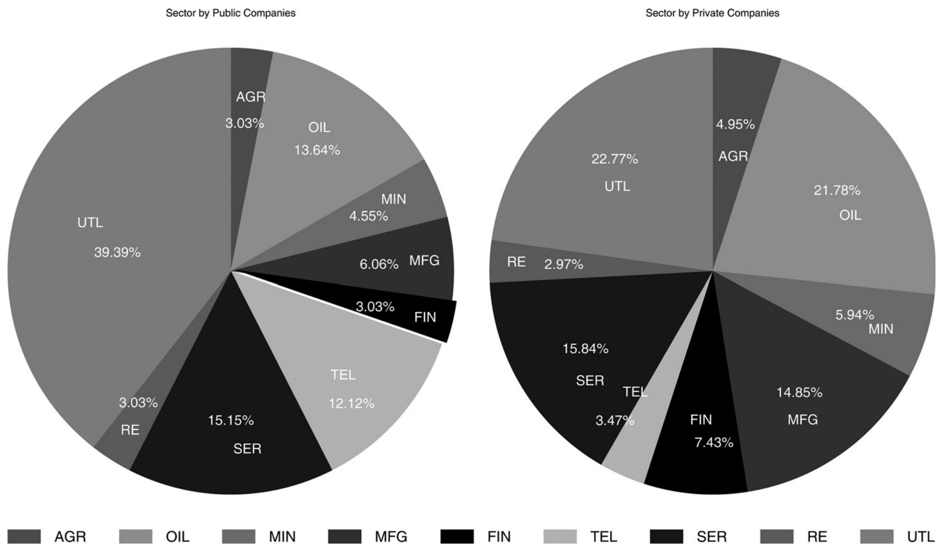

Figure 4. Firm sector by private/public status of suing company. Source: Sector data from Wellhausen (2016), public/private from capital IQ (authors own coding).

privately held (for oil and mining companies this is close to 28 per cent vs. 19 per cent respectively). Especially pronounced is the difference between utility firms that are publicly vs. privately owned (39 per cent vs. 23 per cent). The lion share of ISDS cases stems from foreign investors in utilities industries (see Wellhausen 2016). Foreign investment in utilities, such as water, electricity, gas and telecommunications, is frequently contentious (Moosa 2002). These areas also tend to be capital intensive, however the significance here in economic sector may be in the expropriation rate. Public companies may demand (and win) more in compensation because they invest in sectors with higher rates of direct expropriation than sectors that more frequently give rise to disputes over indirect expropriation. A second explanation for award cost variation pertains to the ownership of underlying investments. As larger firms with more liquid assets, public companies may be more likely to own a larger stake in the underlying investment than private companies. The public-private variation across sectors is sufficiently important to explicitly account for sectoral differences in the quantitative analyses that follow.

Measuring ISDS outcomes

The quantitative literature on ISDS arbitration outcomes has focused on investor vs. firm wins (e.g. Behn *et al.* 2018, Donaubauer *et al.* 2018). Here models usually adopt a binary approach where both outcomes are measured as a dummy variable (taking 1 for a firm/state win and 0 for a loss). This article considers three kinds of ISDS outcomes: state win, investor win and settlement. The descriptive statistics visually presented in Figure 1 show that public companies have a (slightly) higher settlement rate. Settlements occur if the arbitration parties jointly decide to exit the panel deliberations in favour of a mutually acceptable agreement – it thus antecedes any ISDS panel ruling. This informs our second, sequential motivation: settlements are not independent from secondary outcomes but are part of a suing firms and respondent states strategy/characteristics and should therefore be taken into consideration. Parties to the arbitration do not randomly agree on a settlement. This means that observed arbitration outcomes at the ruling stage are not a random sample of the entire population of cases filed. In our case the private vs. public identity of the plaintiff will affect the pool of cases that make it to the ruling stage of arbitration. We are treating settlement as a distinct category here. This means that we are agnostic as to whether a settlement is in the interest of the

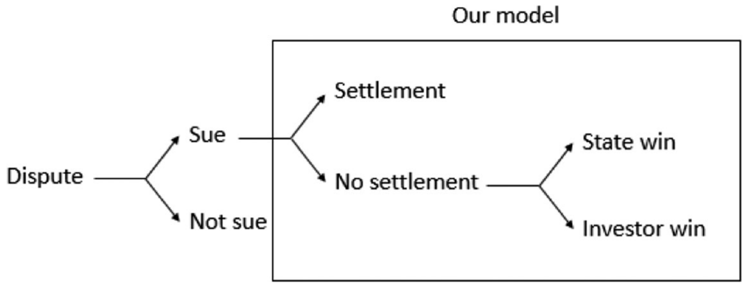

Figure 5. Two-step model of ISDS outcome.

respondent state, the claimant firm, or both. As a former lawyer for the Canadian government put it: 'We don't know what settlement means, or how many cases a government settles, or what they did in the settlement, simply because of the risk. Not because of the merits of the claim but the risk of a greater judgement. One should not assume that a settlement is an admission that the claim had merit' (quoted in Williams 2016, p. 39).

Our empirical approach follows Pelc (2017) and employs a Heckman two-stage probit model with sample selection to estimate the likelihood that (1) an ISDS case is settled and then (2) the conditional likelihood that case results in a win for the respondent state (see Heckman 1976).[7] We visualise our model in Figure 5. Estimating the two stages of arbitration outcomes separately could lead to selection bias and incorrect standard errors because the errors would be correlated between the estimation equations of each stage. The Heckman approach allows us to control for non-random selection of arbitration outcomes in the second stage. To properly identify the model, we need an independent identification variable that affects the odds reaching the ruling stage or agreeing on a settlement yet has no independent impact on the second-stage outcome, that is whether the investor or the state wins the case. We use Pelc's identification strategy (2017) and use a privacy dummy (*Private*) which takes the value 0 if the amount of compensation requested by the foreign investor is publicised and 1 otherwise. The choice of this variable is supported by a number of studies demonstrating that privacy increases the odds of settlement while not impacting the direction of a subsequent ruling (e.g. Bown 2005, Kucik and Pelc 2016). We find no statistically significant correlation ($r(298) = .03$) between the secrecy variable and the outcome variable of the second stage (state win). What is more, there is no correlation between our private and secret dummy (−.003). For public companies 43 per cent of demands are secret, for private ones this number is 44 per cent. Freedman and Sekhon (2010) caution that the use of Heckman two-step method in probit models may create biases in the estimated coefficients. In line with the recommendation of Brandt and Schneider (2007), we also estimate separate probit models for both 'Settlement' and 'State-win' to ensure the robustness of the result. Results hold, both with and without the inclusion of the 'privacy' dummy. What is more, we obtain equivalent results when using a logit and maximum likelihood bivariate probit approach.[8]

Control variables

To estimate the effect that the ownership profile of foreign investors has on ISDS outcomes we include several controls. These variables in both stages are identical, with the exception of the controls *NAFTA* and *Contract*, as well as the inclusion of *Private* in the first stage as discussed above. Specifically, we control for a host of political and economic factors that might affect both the odds of reaching the award stage and the direction of the award. First, we control for respondent country characteristics. The variable *Wealth* takes the log of GDP per capita obtained from the World Development Indicators accounts for any wealth effects in litigation outcomes along the lines of bias against the 'have-nots'. As a robustness test, we also controlled for the log GDP per capita of a claimant firm's home country. To control for any pro-democracy bias in arbitration outcomes we include the V-Dem-Liberal Democracy Index (*Democracy_Index*) from the V-Dem codebook (Coppedge *et al.* 2017). The variable *Learning* counts for the number of ISDS cases a country has faced and aims at capturing state learning that has been identified by the literature (e.g. Davis and Bermeo 2009). Similar to Behn *et al.* (2018), we cap this variable at 10 assuming that the marginal effect of learning is likely to diminish over time. We include the variable *Cluster* recording the total amount of cases brought against a country in a given year (ranging from 1 to 10) to account for the potentially adverse effects on respondent states of encountering a large number of ISDS cases at once. Prominent examples of such clustering include the Argentine economic crisis at the start of the century, the 2011 uprisings in Egypt and Libya, the Russian annexation of Crimea in 2014, and a wave of Venezuelan nationalisations in 2011/2012.

We further control for the effects of specific investment agreements underlying the disputes with two dummies. First, we include the dummy *NAFTA* which takes the value 1 if the case is based on the North American Free Trade Agreement and 0 otherwise. Secondly, we include the dummy *Contract* to account for variation in the substantive rights given to investors under treaties versus investment contracts. *Contract* takes the value 1 if the arbitration is brought under a bilateral contract between a host state and an international investor as well as domestic law, and 0 otherwise. We furthermore count the length of the dispute with the variable *Duration* adding up the years that the case has been ongoing. There is reason to assume that the odds of settlement are higher the 'younger' a case is because governments who can – and want to – settle will settle as soon as they can to avoid lengthy disruptions. Furthermore, the duration of litigation may have an impact on outcomes at the award stage and this impact may be different for private and public investors. For instance, public investors could employ more resources to fight lengthy arbitration battles through to the very end with resulting higher win chances. To account for the distinctiveness of extractive industries, we include a dummy measuring whether the investment underlying claim relates to the *extractive industries* or not. We cluster the robust standard errors on the claimant sector given the differences noted in Figure 4. Finally, we account for time effects, namely the decreasing odds of legal success that claimant firms encounter over time. To do so we include cubic Schoenberg splines at three knots (Schoenberg 1969).

The determinants of ISDS outcomes – ownership matters

We begin by examining the drivers of ISDS outcomes for the full sample available without our coded private-public ownership variable. This provides us with a baseline model from which to interpret any effects that the public-private distinction might have on arbitration outcomes. Since data availability prevented us from coding this ownership dummy for the full universe of cases initially recorded by Wellhausen (2016), this first set of estimations suggests that the truncated model (2004–14) does not introduce substantial bias. These results are shown in Table 1, column 1 and cover data from the years between 1996 and 2014. In line with similar preceding studies, we present evidence that richer host countries have higher rates of winning investment disputes. The duration of cases reduces the odds of a state win. Turning to the first stage of our estimations, we find that the clustering of cases has a negative impact on reaching the tribunal stage, whereas the same odds increase the longer litigation is on-going. Across our models we detect no evidence that the level of democracy matters for arbitration outcomes (see Behn *et al.* 2018, p. 347). In line with Pelc (2017), we find that when the amount of compensation sought by the claimant is kept private, the odds of a case reaching the ruling stage decrease significantly. The Wald tests of the correlation coefficients (that is, the probability that rho = 0) are significant at the 0.01 per cent level, which supports our choice of a two-stage model.

Turning to our main model in column 2 we can see that the findings are broadly in line with the baseline mode. Turning to our main variable of interest, *Public*, we find no evidence that the settlement odds are affected by whether the plaintiff is a private company. However, the identity of the

Table 1. Outcomes of investor-state dispute cases.

State win	(1)	(2)
GDP/CAP (LOG)	0.31***	0.38***
	(0.09)	(0.13)
Cluster	−0.11	−0.10
	(0.08)	(0.08)
Learning	−0.01	−0.03
	(0.02)	(0.02)
Duration	−0.17**	−0.21***
	(0.08)	(0.05)
Democracy_Index	−0.07	−0.23
	(0.31)	(0.56)
Contract	−0.11	−0.80*
	(0.34)	(0.47)
NAFTA	0.28	0.39
	(0.25)	(0.32)
Extractive	−0.01	0.07
	(0.10)	(0.13)
Public		**−0.55*** **
		(0.20)
Constant	−5.04	−57.40**
	(9.01)	(25.98)
Goes to Ruling		
Secret	−0.76***	−0.73***
	(0.20)	(0.19)
Democracy_Index	0.44	0.30
	(0.35)	(0.45)
GDP/CAP (LOG)	−0.04	0.14
	(0.09)	(0.14)
Cluster	−0.07*	−0.10***
	(0.04)	(0.04)
Learning	−0.04	−0.02
	(0.03)	(0.04)
Duration	0.21***	0.26***
	(0.07)	(0.07)
Public		**−0.33**
		(0.32)
Constant	−1.27	−3.17
	(9.20)	(20.06)
N	434	241
Uncensored Observations	296	146
Time splines	yes	yes

Notes: Timespan for model (1): 1996–2014, timespan for model (2): 2004–14. Heckman probit (maximum-likelihood probit with sample selection). Robust standard errors clustered on the claimant's sector. *$p < .10$; **$p < .05$; ***$p < .01$. Cubic time splines included but not shown to conserve space.

suing firms matters for whether or not a state wins case that is not settled outside court. When a case is brought by a public company, the odds of the respondent state winning drop by 31 per cent, keeping all other variables at their mean values. This suggests that ISDS arbitration is an instrument that works especially well for publicly-owned companies, either because competition over shareholder value leads public companies to invest more resources in litigation procedures and/or because fear for reputational damage leads them to be more selective in deciding when to pursue a case or not. For host-governments, this finding should be particularly significant given differences in monetary awards. Public firms, if successful, are awarded more than twice as much in compensation than private companies (see Figure 3).

Again, all things being equal, public and private companies demonstrate similar propensities to settle. There are various possible reasons as to why this may be the case. First, short-term considerations related to share price may not be a strong determinant of a company's legal strategy. Shareholders may be relatively more patient than we expect and hence exert little pressure on complainant companies. Legal cases involving host-governments may be an area of corporate management that is considered beyond the realm of shareholder concern given its indirect relationship to corporate (pure) strategy. It is also possible that corporate management may be more resistant to market pressure than it is often assumed (Knafo and Dutta 2020). Private companies may also face short-term pressures that encourage a similar settlement rate. Private companies may have fewer financial resources needed to sustain ISDS claims and therefore feel short-term financial costs more acutely than a public company. Assuming short-term concerns over share price matter to public companies, the fact that financial costs are more acute in private firms results in a similar settlement rate.

Legal scholarship provides us with another reason as to why we would see similar settlement rate, even if publicly listed firms had additional incentives to settle. Specifically, governments be less willing to settle when encountering shareholder claims. Such claims reduce governments' incentive to settle because 'a settlement agreement concluded by the company would not extinguish shareholder claims' (Korzun 2018, p. 196). Foreign shareholders can sue both for expropriation, that is the loss of investment, and for 'reflective loss'. Shareholders are thus able to bring claims against host states for treaty breach that harms them directly (e.g. seizure of investment or total expropriation) or indirectly (e.g. share respective loss or loss of dividends). Being taken to court by a public firm increases the number of potential claimants in relation to any particular investment dispute substantially. From a host countries' perspective, an investment dispute with a publicly listed company risks exposure to multiple claims by different shareholder groups. This feature might furthermore force sued states 'to pay overlapping damages claims where it loses successively (double recovery)' (Arato *et al.* 2019, p. 4). The potential proliferation of litigation from publicly listed companies would furthermore amplify treaty or forum shopping strategies (e.g. Pauwelyn and Salles 2009). It seems plausible that the disperse ownership and shareholder structure of public companies would be particularly amenable to selecting into more favourable investment protection (Graukodger 2015, p. 232). As Lee (2015, p. 369) argues 'many multinational corporations involved in Treaty Shopping have complex and opaque shareholding structures. Thus, it can be problematic for a respondent to prove who is the effective controller at a shareholder level, given the unequal access to information regarding the company's structure'. These features point to reasons why although they are less likely to win cases brought by public firms, host states may be less willing to settle. This may help explain why settlement rates are similar across public and private companies even if managers in public companies were to face greater settlement incentives.

Conclusion

This article has examined the impact of corporate ownership on ISDS. We find that while public and private companies demonstrate similar propensities to settle, host governments are less likely to win cases that are brought by public firms. This finding is particularly significant given that public companies demand more – and are likely to win more – in damages. By studying how corporate identity affects ISDS outcomes, this article opens a conversation at the intersection of the literature on international trade disputes, shareholder primacy and shareholder claims. On the one hand, we argue that shareholder value theory and the legal standing of shareholder claims can contribute to a better understanding of arbitration outcomes. On the other hand, we posit that international investment regimes belong to the study of patient capital and shareholder value debates.

Going forward the arguments developed in the article point to numerous avenues for future research. Especially in light of a possible uptick in COVID related ISDS litigation (UNCTAD 2020, p. 6) a better understanding of the determinants of ISDS remains high on the agenda not just for scholarship interested in questions of state capacity in international legal trade regime. First, it is possible that any effect pertaining to the relative patience of different investor types is offset by a differential propensity to initiate cases in the first (unobserved) stage of the decision-making process, namely whether to sue at all. What is more, we lack data to ascertain the merit of a case filed (assuming that the first and second stage outcomes are insufficient indicators thereof). Both point to clear limitations of quantitative research and we would welcome particularly qualitative research to shed light onto some of these unanswered questions (cf. Moehlecke 2020).

Secondly, research on investment disputes has started to pay attention to the financialization of the ISDS system. Key contributions here are Dafe and Williams (2020) and Kalyanpur and Newman (2020) on third-party funding (TPF) of investment claims where a financial actor exchanges costs associated with a legal case in exchange for a share of the award. The rise of TPF in the past decade furthermore needs to be appreciated within the increasingly negative public standing of the ISDS system as well as the return of 'noisy politics' more broadly (Morgan and Ibsen 2021) which may well affect legal strategies as well as arbitration outcomes. This article contributes to research interested in how finance and the growing dominance of financial logics shape not just investment decisions but also investment disputes. Future research may want to expand our understanding of how the financialized logic of shareholder value plays out across the ISDS process. Public companies ask for more money when suing and are rewarded more when winning. We assume that the use of the share price in public companies' litigation might explain some of this variation. Another question arising is whether the rise of TPF affects public and private companies differently eroding or exacerbating the 'deeper pockets' advantage that we attribute to public plaintiffs.

Thirdly, our binary distinction between public and private companies can only be a starting point for an assessment of ownership structure in ISDS litigation. A more nuanced examination of plaintiff identity and ownership structures is needed to disassemble suing firms. Important questions here include whether or not a firm has a highly fragmented ownership structure, which would make the corporation more beholden to a hit on short-term stock prices and more vulnerable to hostile takeovers. Relatedly, we know very little about the effect of parent companies' identity on firms' arbitration strategies as well as arbitration outcomes. According to UNCTAD (2016) one third of ISDS claims filed since 2010 were filed by claimant entities that were ultimately owned by a parent. The role of parent companies in ISDS arbitration merits further investigation. For reasons of limited data availability, our analysis of aggregated data did not permit detailed firm-level analysis beyond the public-private dichotomy; future comparative analysis of case studies could provide a more nuanced picture of how shareholder ownership matters. Such an analysis could also help to untangle whether share prices act as a barometer of investment dispute management; that is, whether shareholders' confidence in how corporate managers resolve a dispute with their hosts impacts share price and the effects of shareholder pressure on corporate decision making. It could also help to clarify the role that share price plays in gauging the severity of the alleged infringement of investor rights. Research of this kind, moreover, could also examine whether and how corporate ownership matters by looking more closely into cases brought by individual corporate entities versus joint ventures, or cases where the corporate entity is (partially) owned by the state. Shareholder primacy is influenced by the identity of investors. This means that opening the black box of the plaintiff firm can yield important insights into the conditions of patient capital and its effect on ISDS.

Notes

1. We treat companies here as a unitary actor as a simplified analytical assumptions despite the fact that there may well be rivalling approaches to ISDS arbitration within a single firm.
2. The consultant's assessment of damages was based on a discounted cash flow method in the first instance. Share price valuation served primarily as a robustness check. See Rosen and Milburn (2015).
3. Apart from criticising the normative underpinnings of shareholder primacy (Lazonick and O'Sullivan 2000), some scholars have also raised doubts about the legal footing and the empirical accuracy of the thesis. The stakeholder theory of the firm, for instance, argues that corporations are legally beholden to the interests of a wider array of actors beyond shareholders (e.g. Ireland 1999, Asher et al. 2005). Corporate management may seek external stakeholder involvement to counterbalance shareholders' attempts to discipline firm behaviour, for instance by mobilising public opinion or by seeking regulatory recourse (Knafo and Dutta 2020, pp. 477–8). The stakeholder conception of the firm may be especially salient when its investors are of the patient

type. Whether and how shareholder pressure filters through in corporate decision making is determined not just by the corporate structure but also by investor-type.
4. Virtually all claimants, public and private, are represented by highly skilled counsel that can assess the strength of the legal case. However, as scholars note (Franck 2005, Yazbek 2010, p. 106, Spears 2010, p. 1040), ambiguity in the wording and scope of investment rules mean that arbitral outcomes are not entirely predictable. Counsel can therefore provide only a reasonable assessment of the potential outcome and the degree of risk in proceeding with a claim. Our argument is that managers of public and private companies react to this information differently.
5. Initially we coded more complex ownership structures distinguishing between publicly traded companies with no identified shareholders with more than 25 per cent of total shares outstanding; companies with at least one shareholder owning more than 25 per cent of total shares outstanding but less than 50 per cent; companies with an identified shareholder owning more than 50 per cent of total shares outstanding, and companies who are public funds or government owned. We were however left with too few observations per arbitration outcome (as low as 1) to meaningfully investigate the impact of these variables.
6. As per World Bank approach, economies are split into four categories: (1) low-income; (2) lower-middle-income; (3) higher-middle-income; and (4) high-income. The thresholds between each category vary by year see http://data.worldbank.org/news/new-country-classifications-2015.
7. The routine 'heckprobit' is employed in STATA 16 to fit the simultaneous two-step Heckman selection model for binary outcomes.
8. Results are presented in the Online Appendix, Table A1.

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