Opening Up International Adjudication -
Mapping Procedural Transparency in International Disputes
(Very Preliminary First Draft – Please Do Not Cite or Circulate)

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1. Introduction

Under anarchy, it is often argued, States must create international institutions to manage uncertainty as well as enhance compliance with international norms. International institutions facilitate cooperation via the production and dissemination of information regarding States’ behaviour. Information on compliance may lead to reputational costs, since other states may update their beliefs about that party’s propensity to comply, to potential retaliations by agreement-peers, or mobilization by domestic actors or transnational actors.

Among many others, international adjudicating bodies have traditionally been perceived as crucial “information clearing houses” which, through their rulings, hearings, and audio-visual coverage, diffuse information about states’ compliance-behaviour. A necessary condition for these functionalist theories to hold seems to be the actual production of information regarding States’ behaviour via adjudication. Yet, very little is known about when or why “information production” actually occurs in international adjudication.  

This working paper attempts to contribute to the literature on international law and international judiciary politics in two ways. First, by providing a theoretically informed survey of the procedural transparency rules and practices across the main global adjudicators. Specifically, with a focus on

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2 The only exception, to the best of my knowledge, being Hafner-Burton, E.M. and Victor, D.G., 2016. Secrecy in International Investment Arbitration: An Empirical Analysis. Journal of International Dispute Settlement, 7(1), pp.161-182., In this excellent research, Hafner-Burton et al. look into the correlates of award disclosure in investment arbitration. Drawing from bargaining theory and transaction costs economics insights, the authors theorize and find evidence that secrecy is used to facilitate bargaining settlements which are welfare-enhancing for both parties due to sunk-costs. The argued mechanism seems to be that by not releasing the award, post-adjudicative bargaining, in isolation from domestic political pressure, becomes easier to achieve.
whether the rule is mandatory or a default-rule, and, if belonging to the later, what is the status-quo option, scope for possible shifts to the status-quo, and the number veto-players in said change. Secondly, by exploring the first dataset systematically measuring disclosures related with international disputes. Using “automated web data collection” methods, all publicly available notices of complaint, written submissions, measurements of access to oral proceedings, press-releases, and decision/award in 1380 disputes across several international adjudicators were collected.

The structure of the paper goes as follows. Section two, reviews the literature on compliance with international law and Judgments from International Courts. It will be argued that many of the assumptions underlying these theories depend on procedural transparency. Section three describes how of information is produced in international adjudicating bodies as well as provides a theoretically informed survey of the design of the rules related with procedural transparency in several International Adjudicating Bodies. Section four of the paper describes the novel dataset and explores variations in procedural transparency outcomes across different adjudicating bodies as well as intra-adjudicating body variance. Section five concludes with possible future directions for the new agenda of empirically measuring procedural transparency in international disputes.

2. Why Procedural Transparency Matters

Why “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”\(^3\), in the absence of an overarching enforcer, is a question that has puzzled students of international law and relations for many decades. Yet, since the 1980’s much theoretical and empirical work has been done to describe possible mechanisms of compliance with International Law and rulings by International Adjudicating Bodies. While varying in their underlying epistemic basis and conclusions, most proposed mechanisms seem to share one element in common: information about state behaviour being made available to certain key audiences. In this section, I make the case for why the access to information on international disputes matters, and why empirical variance in levels of transparency intra- and inter-adjudicating bodies merit more research. This will be done by reviewing the relevant theoretical and empirical literature on compliance with international law and show the role of access to information on international disputes associated with this literature.

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2.1. Procedural Transparency and the Enforcement of International Law

Below, it will be argued that procedural transparency is a necessary condition for most mechanisms of compliance, being rationalist approaches to the enforcement of international “under anarchy” as well as norm- and legitimacy-based approaches. The table below synthetizes the arguments by pointing out the presence of “information-dependency”, the theorized audiences, and how procedural transparency may play a role in each of the main mechanisms found in the literature.

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Table 1: procedural transparency and compliance mechanisms

Traditional rationalist accounts of international cooperation⁴, in the absence of an enforcer, posit that cooperation is possible if an agreement is self-enforcing. Under repeated interactions and assuming some functional interdependence, a state’s decision about compliance will depend mostly

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⁴ LITERATURE REVIEW INCOMPLETE – WORK IN PROGRESS
on the expected costs of a defection in terms of foregone future benefits from the regime. The underlying causal story is that the calculus of whether state $i$ reneges a commitment at round $t$ will depend on the short-run benefits obtained therefrom being larger than those obtained at $t+n$ if the state does not defect. The latter may be lost if the other states retaliate in following rounds (“tit-for-tat”)$^6$ or update their beliefs about $i$’s reputation as that of a reliable cooperative partner$^7$. Information is key to these models. More specifically on the reputational argument, Minhas and Remer$^8$, in an empirical paper, argue that there is evidence that more transparent ICSID disputes lead to higher reputational costs for the loosing responding states than more opaque disputes. While the proxy used to measure the opacity of a dispute in this paper is highly debatable$^9$, the reasoning is sound and so is the interpretation of the measured proxy.

In his seminal work on international regimes, Keohane notes that “From the perspective of market-failure theories, the informational functions of regimes are the most important of all”$^{10}$. In a similar line, Mitchell advances this idea by claiming that “[…] promoting transparency - fostering the acquisition, analysis, and dissemination of regular, prompt, and accurate regime-relevant information - is often one of the most important functions regimes perform”$^{11}$. The rationale underlying these claims seems to be that information about states’ behaviour being accessible to agreement peers and third-states is a necessary condition for these mechanisms – retaliation or reputation – to work. Hence, many scholars have investigated how provisions related with the collection of information about state’s behaviour are designed, and what the correlates of the design variances may be$^{12}$. Scholarly work pursuing this line of inquiry tends to focus mostly on monitoring bodies.

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$^9$ The authors seem to use “time” as a proxy for how transparent a dispute was, namely whether or not it occurred before or after ICSID’s 2006 “transparency” reform. However, they do not show any empirical evidence that the reform led to more transparent dispute. They rather assume it away and assess variations in the reputational impact of disputes before and after that period. However, both Hafner-Burton et al., 2016, finding regarding disclosure of awards as well as my data on that and other procedural transparency aspects suggest that it’s not clear that the reform has led to a consistent improvement in transparency outcomes.

$^{10}$ Keohane, 1984, p. 92.


Yet, international adjudicating bodies also fulfil a fundamental role in contributing to the effectiveness of a regime via information production. In Carrubba and Gabel’s theoretical framework\(^\text{13}\), the informational role of international adjudicating bodies is two-fold. Firstly, they act as an institutionalized “fire-alarm”\(^\text{14}\) mechanism which, through litigation, diffuses information about non-compliance thus, by increasing its salience, raising the potential costs of defections. Secondly, based on incomplete contracting theory, the above authors find a “information clearinghouse” function in these institutions. Provisions in International agreements coordinate the expectations over what is “to comply”. However, provisions cannot predict all future applications of the rules, and the costs of compliance tend not to be fixed. For example, exogenous shocks, such as financial crisis or natural disasters, may increase the costs of cooperation to an extent that makes defecting the only path even at the cost of no future cooperation. International Courts, so the authors argue, work as venues where parties, and third-states (through amicus briefs), credibly exchange information over the compliance costs of the situation at hand. The ruling of the institution than may work as a coordination point updating the beliefs of all parties over what it is expected of each state for it to be compliant.

The “fire-alarm”/”information-clearinghouse” mechanisms will also depend tremendously on the levels of procedural transparency of the dispute. On the one hand, domestic and foreign audiences will only receive a signal about the state’s defection if information about the beginning of the dispute, as well as the grounds for the complaint, is produced or if the final decision of the adjudicating body is released to the public. Similarly, states will only be able to update their beliefs about what is “compliant behaviour” if the arguments used by the parties are published, e.g. through the productions of minutes of the hearings or the publication of the written submissions, as well as information about how the adjudicating body interpreted the law in face of these arguments, is diffused.

In a book published in 2009, Simmons finds evidence of how ratifying a human rights treaty may, under certain conditions, lead to behavioural changes seemingly mediated by domestic channels. Specifically, treaty ratification may affect compliance with international rules by being associated with (i) changes in the domestic political agenda; (ii) due to domestic litigation\(^\text{15}\); and (iii) by providing a focal point which facilitates domestic mobilization in case of a defection. Some of


these insights have been used in assessing the impact of international adjudicating bodies in states’
behaviour. Helfer and Voeten\textsuperscript{16} find that ECtHR rulings significantly increase the likelihood of
European Countries adopting pro-LGBT reforms, and that this likelihood further increases in
countries with low levels of public support for members of the LGBT community. They seem to
attribute this finding to domestic litigation and to agenda-shaping effects of these rulings. Rulings
of international adjudicating bodies induce mobilization strategies by compliance constituencies
which increase the costs of non-compliance. Similarly, Dai\textsuperscript{17} theorizes that information about state
behaviour produced within international regimes, e.g. monitoring or adjudicating bodies, may
“trickle down” to domestic constituencies and impact compliance via electoral pressure. These
arguments rely to a certain extent on a dispute being made domestically salient, and this salience
relies on information being made available to domestic audiences. For salience purposes,
particularly relevant seem to be access to oral proceedings by members of the public and the media,
and pro-active press strategies by the international adjudicating bodies.

Furthermore, procedural transparency in international disputes may facilitate compliance with
international commitments via another channel. As Lupo shows\textsuperscript{18}, whether domestic litigation will
enhance compliance with international commitments depends to a certain extent on the
information costs associated with the claim. In his analysis, he investigates two factors affecting
information costs: the cost of producing evidence and the burden of proof. Rulings against states
at international adjudicating bodies that are associated with higher levels of procedural
transparency, for example in disputes where procedural stages associated with evidence
production, e.g. the written submissions of the parties, are made available to the public, are
expected to reduce the information costs associated with producing evidence, and thus to trigger
more litigation associated with that breach of international law.

\textsuperscript{16} Helfer, L.R. and Voeten, E., 2014. International courts as agents of legal change: Evidence from LGBT rights in


\textsuperscript{18} Lupo, Y., 2013. Best evidence: The role of information in domestic judicial enforcement of international human
2.2. Procedural Transparency and Compliance with International Adjudicating Bodies’ Rulings

Procedural transparency in international disputes, one may argue, seems to be both affected and endogenous to compliance with international rulings. In this sub-section I will focus on two mechanisms argued to lead to increases in the probability of a state complying with an unfavourable international ruling which are associated with procedural transparency: (i) “strategic transparency”; (ii) legitimacy.

While rarely jointly analysed, the problems faced by international adjudicating bodies are not too dissimilar to those faced by high domestic courts. International courts can rule against states found in breach of international law provisions, however they lack the power to directly enforce these decisions. This conundrum is not foreign to domestic institutions such as constitutional review. In most constitutional democracies, constitutional courts have the power to influence policy making through constitutional review. However, they lack the coercive and financial resources to enforce these decisions. Constitutional review may impact the desired policy-making goals of other branches such as the executive, who detains the monopoly of coercion. Which begs the question: why would the executive not evade an unfavourable ruling by the judiciary? President Andrew Jackson’s reaction to the US Supreme Court’s decision written by Chief Justice John Marshall (Worcester v. Georgia, 31 U.S. 515) portrays this conundrum well: “John Marshall has made his decision, now let him enforce it”. Consequently, as in the case of International Courts, the (domestic) judicial politics literature has described instances of judicial defiance in the interaction constitutional court-government.

The question of how the judiciary can deter defections by other political branches has led to fruitful research in the sub-field of Law and Courts. Among other mechanisms, one branch of the

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literature views in the public, and its “diffuse support”\(^{24}\) for the Court, the central enforcement mechanism\(^{25}\) since citizens valuing judicial independence and separation of powers may punish threats to these institutions at the ballet, through mobilization etc. Yet, as Vanberg\(^{26}\) points out, this model requires two necessary conditions. Firstly, the Court must enjoy enough public support for the public to mobilize in case of a defection attempt. Secondly, citizens must be aware of the ruling as well as the defection by the branch of government\(^{27}\). Staton\(^{28}\) endogenizes Vanberg’s model and theorizes that courts may engage in strategic diffusion of information, namely through active public relations campaigns, to edge potential threats of non-compliance by the executive and finds some evidence supporting it in Mexico’s Suprema Corte de Justicia de la Nación. Building upon the above-mentioned research, Krehbiel\(^{29}\) models a court’s decision over whether to open the hearings to the public as endogenous to the threat of non-compliance. Through an empirical analysis of Germany’s constitutional court decisions on the access to hearings, he finds evidence that indeed the risk of non-compliance seems to be associated with it.

The literature above, theoretically and empirically, gives us some guidelines as to how procedural transparency and compliance with adjudicating bodies interacts. Furthermore, it provides us a theoretical framework as well as research questions which may be applied to international adjudicating bodies. While this research may give insights to assess transparency preferences in international disputes, some caveats are in order before making direct comparisons. First, as we shall see below, in international disputes the parties often participate in the deliberation\(^{30}\) leading to the transparency outcome which alters the game structure by adding veto-players with possibly different incentives. Secondly, while both superior and international courts face an “enforcement problem”, and while it may be argued that both seem to rely, to a certain extent, on domestic audiences for its enforcement; the nature of international relations allows for, under certain conditions, alternative mechanisms of enforcement which do not solely rely on domestic audiences\(^{31}\).

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\(^{26}\) Vanberg, 2005

\(^{27}\) Or as Vanberg, 2005, p. 21, puts it: “[…]monitoring of responses to judicial rulings and activation of the Court’s support in cases of non-compliance[…”


\(^{30}\) Though with some variance across adjudicating bodies, see infra.

\(^{31}\) See infra.
While the literature above always has in the background the concept of procedural transparency, there is an entire research agenda focusing on what is legitimacy in international lawmaking/governance, and how it may influence states’ behaviour. Has pointed out elsewhere, while study of legitimacy in domestic governance goes back as far as to the times of Thomas Hobbes and John Locke, its study in the realm of international governance is far more recent. In International Legal Scholarship, Thomas Franck advanced a general theory where it is argued that the “compliance pull” of an international rule depends on how legitimate it is perceived to be. Legitimacy, in this theoretical account, is composed by four factors: determinacy, symbolic validation, coherence, and adherence. In international Relations crucial seems to have been Hurd’s analysis which, by making an analogy with social order in a domestic context, proposed advancing a research agenda focusing on studying international “authority”, and its legitimacy, as an alternative to realist and neoliberal models of “cooperation under anarchy”.

Recently, scholarly attention has been drawn to the study of the normative, i.e. the “right to rule” from a moral perspective, and sociological legitimacy, or the subjective perceptions by the relevant audiences that an entity has the “right to rule”, of international institutions and, of relevance for this paper, international courts. The relationship between the legitimacy of international courts and access to information on international disputes is relevant for a myriad of reasons.

Firstly, in line with the literature above on high national courts, some literature argues that increasing the legitimacy on international courts is essential for guaranteeing compliance with its rulings. The story goes as follows. Legitimate courts increase their “diffuse support” by domestic courts of the countries associated with it. Being so “If a court is considered legitimate, the public will demand compliance with its judgments and criticize a state if it fails to comply.”

above, production of information about ongoing disputes may raise its salience, and so procedural transparency cannot be disassociated from this argument.

Secondly, from a normative perspective, the impact of international legal rulings goes beyond the two disputing parties and affect not only international but also domestic politics. This leads to an increase of the number of stake-holders to a courts’ decisions. This increases the benchmark for the legitimacy of an adjudicating body from a normative perspective as it goes against traditional, *inter partes*, consent and procedural fairness-based accounts of legitimacy. Enhanced direct interactions with these stakeholders become one crucial component of a Courts legitimacy. These interactions may be improved if the procedure of the Court is transparent and if the court engages in directly with these stake-holders, say, via press-releases and audio-visual cover of proceedings. Finally, the concept of transparency itself seems to be strongly associated with the “standard” theorized legitimacy-enhancing factors for international courts, namely (i) fair and unbiased procedure; and, (ii) political acceptability and legal soundness of the arguments justifying a decision. An open dispute process is firstly essential for the relevant audiences to assess whether the Court was biased or not by allowing the interested audiences to assess the interactions between the adjudicators and each party to the dispute during the hearings, the reasoning underlying the adjudicators interpretations of the parties’ arguments etc. Similarly, the publication of the pieces containing the arguments of the parties and the complete decision/award, with the Court’s view of the merits of these arguments, is essential to the relevant audiences, stake-holders, legal community, and other states, to assess how convincing the legal justifications are.

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38 For an overview, see e.g. Cohen, Folloesdal, Grossman, and Ulfstein, 2018; Grossman, 2009; Polack, 2017.
39 Which tends to encompass factors such as the independence of the adjudicators and its registries, as well as justification for their rulings, e.g. Grossman, 2013.
40 From this perspective Lenaerts, 2014, distinguishes between the internal and external legitimacy of the ECJ can be of use in understanding the difference and relevance of the political acceptability and legal soundness of a ruling. An example of external legitimacy: “When the ECJ interprets EU legislation, it must ensure that the latter complies with primary EU Law. However, in doing so, it may not replace the choices made by the legislature on its own”, and describing legal soundness/internal legitimacy as “[amounting to] examining whether their [the Courts] rationale is sufficiently transparent and easy to understand or whether it is cryptic.”
41 See Grossman, 2013, p. 153, “Transparency is indirectly linked to legitimacy because it allows interested parties to assess whether a tribunal is fair and unbiased and to decide whether to continue to buy in to a tribunal's interpretation and application of a particular normative regime.”. This view is also in line with Franck’s legitimacy criteria, see *Supra.*
3. Production of Information in International Disputes

3.1 Conceptualizing Procedural Transparency

The sub-section above reviewed the literature on compliance with international law and rulings and showed how information production, in general, and procedural transparency in specific, seem to be relevant. In this section we will define the working concept of procedural transparency as well as briefly go over the underlying theoretical and empirical literature.

As discussed in the introduction, there has been some scholarly work dealing, in full or partially, with the question of procedural transparency in international adjudication. Neumann and Simma\(^{42}\) focus their analysis on the rules and jurisprudential practices associated with the access to: (i) written proceedings; (ii) whether hearings ought to be public; (iii) access to information on the deliberation process and drafting of the judgement (publication of opposition votes, access to the identity of the rulings’ drafters etc.); and whether the ruling is made available to third-parties. Transparency related features of Grossman\(^{43}\)’s survey cover similar ground but also measure whether or not the reasoning underlying the ruling must be stated. Finally, Kuyper and Squatrito\(^{44}\) survey only ruling related measures of transparency, namely whether the ruling was made public, whether it was delivered in a public sitting, and whether the reasoning must be stated.

In this project, both in the *de jure* and in the *de facto* measurements, procedural transparency is measured from a functionalist perspective, specifically capturing transparency as “the dissemination of regular and useful information”\(^{45}\). Under this working definition fall all disclosures to third-parties - i.e. domestic audiences, third-states, and transnational actors – which may be of relevance to the above-mentioned mechanisms of compliance with international law and Judgements. Thus, in its current state, I surveyed the *de jure* rules and measured the *de facto* access to: (i) application instituting the proceedings/notice of complaint; (ii) written submissions; (iii) publicity of hearings, i.e. whether third-parties could observe the oral proceedings or they were held *in camera*; (iv) hearing records, i.e. whether records of the hearing were kept via transcripts or audio/visual coverage; (v) publicity of the judgement/ruling; and (vi) whether press-releases

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\(^{43}\) Grossman, 2009 *supra*.


related with an ongoing dispute were issued by the adjudicating body. Below, I briefly discuss the rationale behind including these measurements.

While not receiving much attention in the previous studies of the transparency rules and practices in international disputes, access to documents associated with the institutions of proceedings/notice of complaint should be of relevance as it provides information to the relevant audiences that a dispute is ongoing, who the parties are, and what the complaints at stake seem to be. There are two reasons for why early stage information such as this may be of relevance for compliance. First, there is some evidence that simply filling a claim against a country may have an impact on the domestic politics of the responding state. Pelc finds that a claim being registered against the United States of America at the WTO triggers an increase in information seeking behaviour on trade matters by American constituencies. He goes to interpret this as suggestive evidence that North-American domestic constituencies are responsive to “mere” signals of trade violations by their government. This is of relevance since, that being the case, that may increase the domestic pressure for the government to choose compliance, being via domestic litigation or political pressure by domestic constituencies. As Alter points out, the mere act of filling a claim may increase the pressure for the state to choose compliance: “The IC may be doing little more than simply existing at this stage, with the law, established legal doctrine, and the prospect of a court-ordered remedy doing the work of altering politics”. Secondly, as seen above and following the rationale from above, it may be that filling a complaint against a state, on its own, has some reputational impact and so whether this information is produced before the ruling is issued should matter.

As for the written submissions the arguments are straight forward. One the one hand, access to pleadings and other case submissions seems crucial for the “court as an information clearing

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46 Some examples from our dataset: IACtHR, from the case Chinchilla Sandoval y otros Vs. Guatemala, [http://www.corteidh.or.cr/docs/casos/chinchilla_sandoval/sometim.pdf](http://www.corteidh.or.cr/docs/casos/chinchilla_sandoval/sometim.pdf); ITLOS, from the M/V “Norstar” Case (Panama v. Italy), [https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/C25_Application.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/C25_Application.pdf); ICSID, from the case “Merrill & Ring Forestry L.P. v. Canada” (Case No. UNCT/07/1), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5406/DC7854_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5406/DC7854_En.pdf); PCA, from the “Arctic Sunrise Arbitration” (Netherlands v. Russia) case, [https://pcacases.com/web/sendAttach/1314](https://pcacases.com/web/sendAttach/1314); WTO DSM, for the “United States — Countervailing Measures on Super-calendered Paper from Canada” (No. DS505) case, [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009- DP.aspx?language=E&CatalogueIdList=227908&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True; etc.


48 Pelc, 2013, p. 652 “American constituents do appear to react strongly to announcements about their government being accused of trade violations by another WTO member”.


house” argument to hold. It serves the informational the needs of legal professionals and other epistemic communities in narrowing down how the rules should be interpreted. Furthermore, and also in line with this, following Lupo’s argument we would expect the production of written proceedings, with the arguments used as well as reference to evidence produced by the parties, to reduce the information seeking costs for domestic litigation. On the other, it provides more information to the general public on the arguments made by the parties which will then be evaluated by the adjudicating body. This enables the interested audiences to not only assess the veracity of the complaint but also to supervise how the “court itself reacts to the claim” in its ruling, thus possibly impacting perceptions of legitimacy of the institution.

Practices of granting access to oral proceedings to third-parties are generally believed to enhance the credibility and legitimacy of international adjudicating bodies. Furthermore, as seen above, the theoretical and empirical literature on national high courts also sees them as a mechanism for increasing the salience of a dispute. Finally, and again drawing on literature on domestic high courts, the mere fact of introducing cameras in the court room may have an impact on the behaviour of the adjudicators. De Mendonça Lopes finds some evidence suggesting that the introduction of television coverage of the hearings at the Brazilian Supreme Court had a behavioural impact on the Justices. He described this finding as “when given free television time, the Justices behave in a way so as to increase their exposure”. All the above are interesting, and untested, empirical claims about the international judiciary, the merits of which could be assessed using a dataset such as the one proposed by this paper. Following the previous literature, I included in the survey and data measurements associated with the access to the oral proceedings, namely whether there are de jure and de facto access to hearings by members of the public and the media. Where my framework diverges is that I also assessed whether there were rules or practices associated with recording and archiving the oral proceedings. All the above arguments, given the limited space of the courtrooms, rely on the hearings being attended by actors who then diffuse

PCA, from the case Ireland v. United Kingdom (“OSPAR Arbitration”), https://pcacases.com/web/sendAttach/609;
Lupo, 2018, supra.
Neumann and Simma, 2013, p. 438.
Krehbiel, 2016, supra.
the most relevant information from the hearings to the general public, e.g. the media. That
presumes a priori case salience which may not always be there. By keeping record of the hearings,
via transcripts or audio- or webcast, the adjudicating bodies grant access to the proceedings to a
much larger audience, and by doing so possibly increase awareness of international law, its
performance, and make their activities less abstract.

Following the rest of the literature we collected the rules regarding whether the final rulings, being
judgements or awards, should be available to the public as well as the actual disclosure in each of
dispute. However, whether the adjudicating body had to justify the ruling was not included in the
dataset for now.

Finally, I also include in the analysis the press-release activity of the adjudicating bodies associated
with ongoing disputes. What makes public communication a particularly interesting measurement
of transparency as information provision is that: on the one hand, as we shall see below, contrary
to the other measurements public communication policies tends to be completely left to be decided
by the registry/secretariat with little intervention of the disputing parties; on the other, it can be
interpreted as the adjudicating body pro-actively engaging with their audiences via the media with
abbreviated, and so more easily diffusible, information about relevant events in a certain dispute.

While a lot of interest as went into the legitimacy of international institutions and how they are
politicized, there is surprisingly little research into public communication at these bodies, i.e. how,
or even if, they engage with their audiences. Yet, there is some research which generates some
interesting testable hypotheses. For example, Ecker-Ehrhardt, investigates why certain
international organizations improve their public communication while others do not. The findings
suggest that improvements in public communication activities are associated with increases in
democratic memberships at the IO as well as in responses to scandals and mobilization against its
activity. The literature on strategic communication at national High Courts, could also help us
here. Do international courts engage more with the international media when the risk of non-
compliance with its ruling is higher?

57 Some examples from our data: ICSID, for the case orona Materials, LLC v. Dominican Republic (ICSID Case No.
Ibarra y otros Vs. Ecuador”, http://www.corteidh.or.cr/docs/comunicados/CP_55_15.pdf; ECtHR, for the case
“LOPES DE SOUSA FERNANDES V. PORTUGAL” (Case No. 56080/13), https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5255508-
6524432&filename=Judgment%20Lopes%20de%20Sousa%20Fernandes%20v%20Portugal%20-
%20death%20of%20patient%20following%20post-operation%20negligence.pdf.


59 Idem.
3.2 How do International Adjudicators Produce Information?

In this sub-section we will briefly look into how transparency outcomes come to be. This shall be done by briefly going over the relevant key-actors as well as processes associated with the disclosure of dispute-related information to third-parties.

The registry(secretariat (hereinafter “RS”) are crucial actors in the production of information related with ongoing disputes. While understudied, these permanent bodies merit some attention. They seem to be increasing both in dimension – being composed by, as of April 2013, 2,228 staffers, 429 of them being lawyers⁶⁰ - as well as the scope of their activities. For example, the ICJ describes the scope of its registrar’s activities as touching upon “judicial, diplomatic, and administrative” matters⁶¹. Within the administrative practices, the RSs oversee the publication the relevant documents associated with the disputes⁶² as well as of engaging in the public communication; ITLOS website, for example, includes as one of the key tasks of its Registrar to ensure that information regarding the “Tribunal and its activities is accessible to Governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law and public information media”⁶³. The relevant disclosures are published in the adjudicating body’s official gazette, specific series created for disclosures of a certain type⁶⁴, and, though not homogenously as we shall see below, the published and archived in the website of the institution. The relevant documents are also stored physically with the Court, exactly where and the procedures for accessing it will vary by court⁶⁵.

However, in most instances of information disclosures, the final decision does not fall upon the RS itself. Depending on the actual design of the rules, as we shall see below in the next section, this body rather executes the transparency preferences of the parties and the adjudication body. Questions related with access to information regarding ongoing litigation are inextricably linked to procedural law, both in domestic as well as international litigation. However, a main difference between domestic law and international procedural law is, as Biehler notes, that “while in any

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⁶⁰ Cartier and Hoss, “the role of registries..”
⁶² See e.g. Article 26/1/j of ICJ’s Rules of the Court or Rule 78 of ECtHRs Rules of Court.
⁶³ https://www.itlos.org/the-registry/the-registrar/.
⁶⁴ E.g. the I.C.J. Reports or the I.C.J. Pleadings series
⁶⁵ For example, relevant dispute documents such as the parties’ pleadings or hearing minutes from ICJ disputes are stored and accessible at ICJ’s press-room, at the Reference Room at Peace Palace Library, as well as at information centres at the UN in New York, Geneva, and Brussels; see Talmon, S., 2012, A Primer on ICJ Procedure: A Commentary on Article 43 ICJ Statute. Bonn Research Papers on Public International Law No 2/2012. Available at SSRN: http://dx.doi.org/10.2139/ssrn.1969900.
country legal procedures are administered primarily if not entirely by courts this is much less so on the international level.” Of relevance to our topic, in many International Adjudicating Bodies, the decision over whether to open a certain procedure to the public moves from a unilateral decision by a Judge, as it often is the case in domestic procedures, to a bi-lateral to tri-lateral decision bargained between the complainant, the respondent, and, at times, the adjudicator.

3.3 The Design of Procedural Transparency in International Adjudicating Bodies: a theory-based survey

In line with the previous literature, I survey the de jure rules associated with the above-mentioned dimensions of procedural transparency. The survey, in its current stage, covers the rules of the International Court of Justice (ICJ); WTO’s Dispute Settlement Mechanism – both at the panel and appellate body stage (“WTO-DSM”); International Centre for Settlement of Investment Disputes (ICSID); Permanent Court of Arbitration (“PCA”); International Tribunal for the Law of the Sea (“ITLOS”); African Court of the Human and Peoples’ Rights (ACtHPR); European Court of the Human Rights (ECtHR); Inter-American Court of Human Rights (IACtHR); Caribbean Court of Justice (CCJ).

3.3.1. Some Theory Behind the Design Dimensions and their Impact

Underlying the overview of the rules governing transparency in disputes at thee adjudicating bodies, will be five dimensions which should be expected to have an impact in the final outcome: (i) whether the rule is mandatory or a default rule; (ii) what is the status-quo option; (iii) which actors may set the agenda for a status-quo reversal; (iv) which actors may veto such reversal; and, (v) degree of discretion in reversing the “status quo”.

The relevance of the first and last criteria are straightforward. Default rules may also vary on the “status quo” they set: transparent or secret. The defined “status quo” should be expected to impact the transparency outcomes given that their role in increasing the “stickiness” of a policy outcome is well established in the legal and social scientific literature. Traditionally, law and economics perspectives focus on the transaction costs surrounding “opting-out”, namely bargaining and

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66 2008, p. 38
68 WORK IN PROGRESS
drafting costs\textsuperscript{70}. If the transaction costs exceed the net surplus to be obtained from a welfare-enhancing deviation from the status quo, parties will “stick” to the default rule. However, experimental and observational work seem to suggest otherwise. A crucial property in rational models of choice is that only preference-relevant features of a decision, i.e. how specific outcomes rank in the preferences of an individual, should matter; yet, there is evidence that just framing an option as the “status quo” increases the adhesion to it while holding preferences constant\textsuperscript{71}. In one of the few applications of these insights to Public International Law\textsuperscript{72}, Galbraith\textsuperscript{73} theorizes how framing treaty options in negotiations may affect state adherence to the drafted rules. Using acceptance of ICJ jurisdiction as a case study, Galbraith finds a strong correlation between whether or not ICJ jurisdiction was framed as opt-in or opt-out and its acceptance: for treaties where ICJ’s jurisdiction was framed as an explicit opt-in option, only 5% of its parties, on average, accept ICJ’s jurisdiction, in comparison to treaties where ICJ’s jurisdiction is framed as opt-out option where 80% of treaty parties, on average, accept ICJ jurisdiction. Hence, procedural transparency rules which set their “status quo” option to transparency/access may be expected to generate more open disputes. Signalling accounts of negotiations with default rules would arrive at the same conclusion. Game-theorists and legal scholars have suggested that sticking to the “status quo” may be a rational response to a problem of asymmetric information, even when such change would lead to welfare increments and the transaction costs are very low\textsuperscript{74}. Take this stylized example drawing from Ben-Shahar and Pottow’s theory\textsuperscript{75}. Country A files a claim against country B at an International Court. All parties know that more information about the dispute will raise its awareness among stake-holders such as domestic political oppositions, voters or other States. Consequently, the Court and both parties would also expect more procedural transparency to raise the consequences for B of not complying with an unfavourable ruling. And so, while there may be several persuasive and reasonable reasons to request less transparency in the proceedings\textsuperscript{76}, any proposal to change “transparency status quo” made by B may, if State A and the Court are uncertain about whether B is of type complier or defector, be interpreted as a “trick”, an attempt


\textsuperscript{72} For an overview of the possible applications of behavioural insights into Public International Law see van Aaken, A., 2014. Behavioral international law and economics. Harv. Int’l L.J, 55, p.421.


\textsuperscript{75} \textit{Idem}.

\textsuperscript{76} E.g. Witness protection, business confidentiality etc.
to minimize the expected consequences of not-complying with the ruling. Thus, such proposal could lead to both the claimant and the Court updating their beliefs about the type of B, regardless of the reason underlying the request.

The veto-players to a proposal, who they are and how many, as well as who may propose/enact a shift to the “status quo” should also be expected to impact whether the “status quo” rule is reversed. A well-known finding in veto-player theory is that the probability of “status quo changing” attempts succeeding decreases with the number of veto-players as well as their preference-distance. The identity of the veto-player here becomes crucial. Given the theorized role of information in domestic and international politics, one would expect parties to have different transparency preferences. All things equal, given the possible domestic and reputational costs, a respondent is expected to favour more opacity than a complainant would. Similarly, if an adjudicating body believes that more transparency to increase compliance with its rulings, we would expect it to favour transparency. These are, however, still answered empirical questions.

### 3.3.2. The Design of Rules on Procedural Transparency

Starting with the publication of the complaint or other document instituting the proceedings (“notice of complaint”), there seem to be no specific rule governing its publication in any of the Courts. Hence, it seems, general rules regarding access to documents apply.

As for access to documents related with the written proceedings phase, and specially parties’ submissions, we observe some interesting variation. Starting with the opacity side of the spectrum, at the WTO-DSM pleadings are treated as confidential. However, the DSU acknowledges that parties are free to disclose their own pleadings – which provides an interesting variation in disclosure choices which I explore below. ICSID’s governing rules state that the secretary-general may publish pleadings associated with a dispute if both parties consent to it. PCA’s Arbitration Rules are silent on this aspect and leave it to the parties to select the rules governing this point, being through a treaty or in a “ad hoc” manner. Roughly 50% of the cases in our preliminary dataset resort to UNICITRAL Arbitration Rules (1976, 2010). While the new UNICITRAL Arbitration Rules (2013) make arbitration slightly more transparent, this is less so under the previous rules. Though not having specific rules governing the publication of pleadings, the rules governing the hearings and awards have been interpreted extensively as constituting a presumption

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78 See Krehbiel, 2016; Staton, 2010.
79 E.g. Rules of Procedure of the IACtHR, Article 32(1) par. b); ECtHR’s Rules of the Court, Rule 33.
80 See Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article 18(2).
81 Administrative and Financial Regulations of ICSID (“ICSID Administrative Rules”), Regulation 22(2).
of confidentiality unless both parties consent to it. ICJ’s and ITLOS’s rules are almost identical in phrasing, stating that “copies of the pleadings and documents annexed” may be made public on or after the oral proceedings if the Court, after ascertaining the views of the disputing states, so decides. The ACtHPR’s rules of Court do not regulate directly when pleadings are made public. Article 25(2) par. i) of the Court’s Rules of Procedure, however, explicitly mentions that the registrar as the task of publishing the pleadings as “the Court may direct to be published”, this suggests that whether a document is published is entirely up to the Court. Similarly, the Caribbean Court of Justice only mentions the publication of documents associated with the dispute when describing the registrar’s tasks, namely that it oversees the “the publication of the Court’s judgments, and such other documents as the Court or these Rules may present”. At the IACtHR, the general rule states that pleadings and other documents from the case file shall be made available to the public, unless found “unsuitable” by the Court. This restricts the discretion of the Court in the sense that it involves engaging in legal reasoning over what makes it “unsuitable”. Nevertheless, this still provides the court with a wide margin of discretion. Finally, on the other end of the scale as the most transparent, from a de jure perspective, stands the ECtHR since according to its rules dispute-related documents, including parties’ submissions, must be made public unless falling under a narrow catalogue of exceptions.

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83 See ICJ’s Rules of the Court, Article 53 para. 2; See also Talmon, 2012, pp. 88-90, supra.
84 See ITLOS Rules of the Tribunal, Article 67(2).
85 CCJ’s Rules of the Court, Rule 2.7 (1) par. i).
86 However, as we shall see below, that does not seem to be the case from a de facto perspective.
87 Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Article 40 (2) ; and ECtHR’s Rules of the Court Article 33(2).
Now turning to rules regarding access to hearings\(^88\), again we find some interesting variance in rule design. The question of granting access to hearings in disputes at the WTO is not a new one\(^89\) and it’s a frequent case study in discussions about the legitimacy of international institutions\(^90\). The DSM does not have a specific rule governing whether the hearings may be open to the public, however the general practice was of holding them in camera\(^91\). In September 2005, during the “US – Continued Suspension” dispute, in response to requests by the parties the to open proceedings to the public, a panel opened its hearings for the first time. In 2008, the same dispute was argued at the Appellate Body and, again by request of the parties, the Appellate Body was called to rule on whether access to hearings was covered by Article 17.10 of the DSU, under “confidential proceedings”. In a procedural ruling\(^92\), the Appellate Body recognized that, as a form of “ad hoc” procedure\(^93\), it could authorize public hearings provided that “joint request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process”\(^94\). Both Arbitration Bodies in our sample seem to have dealt with this question in their

\(^{88}\)The focus will be on whether the hearings are conducted publicly or not. Minutes of hearings and other forms of record tend to fall under the same rules as other documents related with a case file, such as the pleadings, and so the rules above should also be applicable to records of hearings.


\(^{91}\)Ehring, 2018 supra.


\(^{93}\)Appellate Body’s Working Procedures, Rule 16; see Appellate Body Report, supra, par. 7.

\(^{94}\)Idem.
Arbitration Rules. At the ICSID and PCA, unless the parties use different procedural rules, the default rule is *in camera* hearings. Public hearings may be held, but only if both parties actively consent to it. In Article 46, the Statute of the ICJ states that the hearings will be held publicly unless (i) the Court, on its own impulse, decides otherwise, or (ii) both parties agree to hold the hearing *in camera*. ITLOS’s rule mirrors closely that of the ICJ. It should be noted, however, that this adjudicating body goes further by making the publication transcripts of the hearing’s mandatory. The ACtHPR’s follows this line but removes one barrier to closing the hearings: consent of the parties. According to Article 39 of the Statute of the Court, the hearing will be open to the public unless the Court “on its own motion or upon application by the parties” decides otherwise. The CCJ starts from a general default rule of open hearings, yet it grants the court the power of closing the session on its own motion. Finally, the ECtHR and the IACtHR have a similar rule which diverges only on the breadth of the standard used to justify holding hearings *in camera*. As before, the hearings at these Courts will be open and may only be held in a closed session if (i) the circumstances overlap with the list of categories of exceptions provided by the rule, in the case of the ECtHR, or, in the case of the IACtHR, (ii) under “exceptional circumstances” or for “serious reasons”.

<table>
<thead>
<tr>
<th>AB</th>
<th>Status quo option</th>
<th>Status quo reversible?</th>
<th>Agenda-Setters</th>
<th>Veto-Players</th>
<th>Discretion in decision</th>
</tr>
</thead>
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</tr>
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<td>none</td>
<td>wide</td>
</tr>
<tr>
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<td>parties</td>
<td>1 (party)</td>
<td>full</td>
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<tr>
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<td>parties</td>
<td>1 (party)</td>
<td>full</td>
</tr>
<tr>
<td>ITLOS</td>
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<td>ab or party</td>
<td>none or 1 (party)</td>
<td>full</td>
</tr>
<tr>
<td>ACtHPR</td>
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<td>ab or party</td>
<td>none or 1 (ab)</td>
<td>full</td>
</tr>
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<td>narrow</td>
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<tr>
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<td>none</td>
<td>wide</td>
</tr>
<tr>
<td>CCJ</td>
<td>transparency</td>
<td>yes</td>
<td>ab</td>
<td>none</td>
<td>full</td>
</tr>
</tbody>
</table>

Table 3: Rules regarding public hearings

95 PCA’s Arbitration Rules, Article 28(3); ICSID’s Rules of Procedure for Arbitration Proceedings, Article 32(2).
96 Meaning that one party requesting the hearing to be closed would not, on its own, suffice, see von Schorlemer, ‘Article 46’, in Zimmermann, Tomuschat, and Oellers-Frahm (eds), p. 1162.
97 ITLOS’s Rules of the Court, Article 74.
98 *Idem*, Article 86(6).
99 CCJ’s Rules of the Court, see Rule 3.2(3).
100 See ECtHR, rule 63(2), and ECHR, Article 6(1).
Finally, we look at \textit{de jure} transparency regarding access to the judicial outcome. Here we observe far less variation. Most international adjudicating bodies make the publication of their Judgments mandatory. The only two exceptions in our sample are ICSID and PCA. ICSID arbitration rules provide that the final award of a dispute will not be published, unless both parties consent to its publication\textsuperscript{101}. The rule at the PCA is far more complex. On the one hand, it also sets a default rule of non-disclosure unless both parties contract-around it. On the other, it provides for the mandatory publication of the award “where and to the extent” disclosure is required by one party either by domestic legal duty or for protecting a legal right\textsuperscript{102}.

<table>
<thead>
<tr>
<th>AB</th>
<th>Status quo option</th>
<th>Status quo reversible?</th>
<th>Agenda-Setters</th>
<th>Veto-Players</th>
<th>Discretion in decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICJ</td>
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<td>none</td>
<td>none</td>
</tr>
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<td>parties</td>
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<td>full</td>
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Table 4: Rules regarding the publication of the final decision

4. Mapping Transparency in International Adjudication

In this sub-section, we look into the \textit{de facto} transparency of international adjudicating bodies. This shall be done by exploring a novel preliminary dataset measuring procedural transparency at case-level from disputes in ten major adjudicating bodies. We start by discussing the dataset, its methodological choices and data collection methods, to then explore inter- and intra-adjudication variance in transparency outcomes.

\textsuperscript{101} ICSID’s Rules of Arbitration, Article 48(5).
\textsuperscript{102} PCA’s Arbitration Rules, Article 34(5).
4.1. The Dataset

One of the main contributions of this research project is the creation of the first dataset measuring procedural transparency comprehensively and across adjudicating bodies. As discussed above, adjudicating bodies may fulfil their *de jure* transparency requirements in a myriad of ways. Specifically, adjudicating bodies may release case information to the public by publishing the relevant information in gazettes/official document; by allowing individuals to make specific queries of case files; or by publishing it in their websites. Measurements of information disclosures could have been based on any of these three methods, however I opted for the latter.

The choice of measuring information disclosures by tracking international adjudicating bodies’ online publications is grounded on both reasons of the theoretical as well as pragmatic kind. From a theoretical perspective, it may be argued that disclosing information online facilitates the diffusion of information about international disputes by reducing the costs, time and resources, of acquiring the same information as one would obtain in gazettes/official series, which are often stored in selective archives, or by making requests for case-files. While legal experts or individuals participating in derivative litigation may be open to incur in such costs, it would be hard to presume the same levels of effort by, say, domestic voters; and, as seen above, these very same actors are crucial for many models of compliance with International Law and Judgements. From a pragmatic perspective, it has been used in other research projects which look into theories and research questions very similar to the ones I ask in this project. Pelc’s above-mentioned research being one example. Creamer and Simmons research on national human rights’ associations disclosures of state compliance human rights, being another.

The data on the relevant variables was collected from the websites of each adjudicating body through “automated web data collection” methods with the scraper code written in R version 3.5.0. The automated nature of both the extraction and the processing and coding of this dataset comes with some benefits, namely making it both fully replicable as well as dynamic. While the exact methods of extraction and pre-processing of the data varied from website to website, due to their different structure, there are some features that ought to be noted.

All document-based data, i.e. notice of complaint, the written submissions, and judgement/award, was retrieved from either case-specific document repositories often found in the page of a specific dispute or in a document repository where then the documents would be paired with the cases

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103 Pelc, 2013.
104 Creamer and Simmons, 2013:
106 For example, at the PCA: https://pca-cpa.org/en/cases/117/ or at the ICJ: https://www.icj-cij.org/en/case/124.
using the official case id\textsuperscript{107}. For each of these three measurements of procedural transparency a dummy variable was coded denoting whether or not the document was available to the public. As for the written submissions, I matched each submission with the parties of the dispute and created a count variable for how many written submissions were released to the public.

For procedural transparency measurements associated with access to hearings two variables were coded. First, a dummy variable for whether all the hearings were open to the public was coded. This is far from perfect. For example, ICJ’s dispute Tunisia/Libya Continental Shelf was coded with a “0” because one of the many hearings, a film screening to be precise, was held in camera. However, this is temporary and linked with the preliminary nature of the dataset. The final measurement will match events with the actual hearings to provide a case-ratio of publicity in hearings instead of the more arbitrary dichotomous measurement. Secondly, a dummy variable captured whether there were records of the hearings – in (i) minute/transcript, (ii) audio, or (iii) film – stored and available at the website of the adjudicating body. Because not all disputes have oral proceedings, the first step taken before coding these variables involved looking for mentions that could attest that hearings actually took place by parsing the final decision, procedural orders, or in press-releases associated with the case, and extracting relevant sentences using regular expressions\textsuperscript{108}. If there were such mentions I would then go on to code the variables, if not then the case would be removed from the dataset. Whether the hearings were held publicly or in camera followed a method similar to the one described above, but with different regular expressions. As for the hearing records, the sources used were: (i) document repositories at the adjudicating body’s website (for minutes and transcripts); (ii) in the multimedia page of adjudicating body at the adjudicating body’s website\textsuperscript{109}; or (iii) official pages in video hosting websites\textsuperscript{110}.

\textsuperscript{107} For example, this method had to be used with WTO documents. The following url query will return all documents associated with the dispute DS294 (“United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)”): https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds294/*)&Language=ENGLISH&Context=FormerScriptedSearch&languageUIChanged=true#.

\textsuperscript{108} Some examples from the raw-data: “A hearing took place in public in the Human Rights Building, Strasbourg, on 16 November 2016 (Rule 59 § 3)”; “The hearing on jurisdiction and the merits in Eli Lilly and Company v. Government of Canada is scheduled to take place before a three-member arbitral tribunal from Monday”.

\textsuperscript{109} E.g. Webcast of a hearing from ECtHR’s case “Rooman v. Belgium” (no. 18052/11) stored at the Court’s multimedia page: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=1805211_06062018&language=lang&c=&py=2018.

\textsuperscript{110} E.g. Webcast of a hearing from IACtHR’s case “Alfred Agbes Woyome v. Republic of Ghana” hosted at the Court’s official “youtube” page: https://www.youtube.com/watch?v=CHCpaY2nJ58&ct=33605; or Webcast of a hearing from ICSID’s case hosted at the adjudicating body’s official “vimeo” page: https://livestream.com/ICSID/events/4347527/videos/99234577.
Finally, two press-release variables were created. A dummy variable denoting whether any press-release related with the dispute was emitted, and a count variable measuring the number of press-releases associated with that specific case.

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<td>4.520</td>
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</tbody>
</table>

Table 5: Summary statistics of the procedural transparency variables

The criteria for a case to join the sample were the following: (i) dispute must have been concluded with on final decision in favour of a party (discontinued and settled cases were removed from the sample); (ii) cases which involved solely domestic law were removed (e.g. CCJ as appeal instance were not included, only original jurisdiction matters); and, finally, (iii) only contentious disputes were included in the sample (i.e. cases falling under advisory jurisdiction, e.g. advisory opinions at the ICJ or the Consultas at the Central American Court of Justice, CACJ).

In its preliminary stage, the dataset covers 1380 disputes from the ECtHR (Grand-Chamber) (23%), ICSID (19%), WTO-DSM (DSB and Appellate Body) (17%), IACtHR (15%), CACJ (8%), PCA (7%), ICJ (6%), ACtHPR (2%), CCJ (Original Jurisdiction) (2%), and ITLOS (1%).
4.2. Access to “Notice of Complaint/Institution of Proceedings”

Above, we saw that most Adjudicating Bodies *de jure* transparency rules are silent regarding the publication of documents instituting the proceedings. The plot below shows the proportion of disputes per adjudicating body where the notice of complaint/document instituting the proceedings was disclosed at the Adjudicating Bodies’ website. It shows us a disparity in *de facto* transparency with some adjudicating bodies disclosing these documents for (almost) all disputes, namely the WTO-DSM, the IACtHR, the ICJ and the ITLOS, whereas most of the remaining adjudicating bodies disclosed none. The only exceptions seem to be the arbitration bodies, with the PCA disclosing in roughly 15% of its cases, and the ICSID in roughly 3% of its cases. The *de jure* ambiguity on these matters seems thus to map onto the *de facto* transparency outcomes.

![Figure 1: Percentage of cases where the document containing the complaint was published](image-url)
4.3. Access to Written Submissions

The findings above are not too different from what the table below suggests. The only difference now being the WTO. The topic of access to written submissions related with WTO disputes has been a contentious one, and its *de facto* seem to provide some evidence for that opacity with at least one written submission being published in only roughly 16% of disputes. We observe a slightly higher rate in PCA disputes, and a much lower rate at ICSID with written submissions disclosures in less than 5% of disputes. Four of the ten adjudicating bodies of the sample, ACtHPR, CACJ, CCK, and ECtHR do not publish written submissions. This stands in contrast with their *de jure* transparency measurements – this is particularly true in the case of the ECtHR.

![Graph showing the proportion of cases where at least one written submission was disclosed](image)

Figure 2: Proportion of cases where at least one written submission was disclosed

The plot above is agnostic to time. An interesting question to ask is if the disclosures at the arbitration bodies and the WTO are the new normal. To look for evidence of a transparency turn in these bodies, I plot the proportion of disclosures aggregated by intervals of two years. The trend at the ICSID seems relatively constant throughout the relevant time-period with the exception of a small uptick at the interval 2014-2016. At the WTO we observe an increasing trend as we approach the 2000’s reaching a maximum of 50% of the cases in the period 2005-2007. However, the trend decreases in more recent years. It should be noted that this period with the lowest disclosures coincide with one of the busiest periods of the adjudicating body’s docket. The PCA
follows a similar time trend with the difference of a large increase in the proportion of cases with disclosed submissions in recent years. However, this period has a very low number of disputes.

Another interesting dimension to explore is to what extent the propensity to disclose depends on a state’s transparency practices in other contexts or on whether it acted as a complainant or respondent in the dispute. It is reasonable to speculate whether domestic institutions play a role here. As Hafner-Burton et al. argue in their investigation of the publication of awards at ICSID disputes, “a lack of well-developed democratic institutions may correspond with a lack of domestic legal requirements and expectations of public transparency, as well as a dearth of independent pressure groups; such factors would allow governments to pursue secrecy when it is convenient”\textsuperscript{111}. Similarly, the costs of enhanced transparency may vary depending on which side of the dispute a state is. The reputational costs, all things equal, of information being produced about an ongoing dispute should be higher for a respondent. The \textit{de jure} transparency practices at the WTO maintain that submissions are confidential, but that parties are free to disclose their own submissions. This provides the perfect case-study to assess these propositions.

To capture a state’s transparency practices, I resorted to the transparency index of the “HRV Transparency Project” dataset\textsuperscript{112}. This dataset measures state transparency by modelling transparency as a latent predictor of states’ data reporting practices to the World Bank’s World

\textsuperscript{111} Hafner-Burton et al., 2016.
Development Indicators. The quality of democratic institutions was proxied using “Polity IV”’s “Polity2” aggregated measurement.\footnote{Marshall, M.G. and Jaggers, K., 2002. Polity IV project: Political regime characteristics and transitions, 1800-2002.}

The plot below displays the average number of written submissions disclosed, per state and per procedural role, i.e. state as a complainant or as a respondent., against the average transparency index and polity2 scores for the years where a claim was filed by or against that state for the period of 1990-2016. To assess possible patterns, Locally Weighted Scatterplot Smoothing, LOESS, curves were further added. The average number of written submissions was standardized by subtracting it from the global mean value of this variable and dividing it by its standard deviation.

Firstly, the procedural role may matter. On average, most of the disclosed written submissions in our sample were written by complainants. It should be noted, however, that this does not mean that the “higher costs of disclosure” hypothesis holds. It may just be that complainants, in general, file more submissions than respondents. Secondly, there seems to be no correlation between the “polity2” score of a party and its propensity to disclose written submissions and that the association between these two measurements does not seem to be mediated by procedural role as the curves suggest. Finally, there is some suggestive evidence of a possible correlation between “transparency index” of a state and its propensity to disclosed though highly mediated by the states’ procedural roles – a more robust correlation for the scores of respondents.

Figure 4: average transparency index and polity2 scores against standardized number of disclosures by procedural role
4.4. Access to Hearings

When discussing the dimensions of procedural transparency selected for this study, and how they differ from previous survey, the importance of *de facto* access to hearings in the form of hearing records (minutes and/or audio-visual) was stressed. The plot below shows how perceptions of *de facto* transparency are remarkably different when one assesses whether records of the hearings were kept. Many adjudicating bodies which have very high levels of *in loco* access to hearings fare poorly in storing the content of these hearings for the general public – namely the human rights Courts, IACtHR, ACtHR, and the ECtHR.

Also interesting to note is how the design of the rules may have an impact on whether hearings are held publicly. Take the example of the ICJ and the WTO-DSM. In both cases we find a default option which may be contracted around through a voluntary and unanimous agreement concluded by the disputing parties. Both adjudicating bodies have a large and overlapping membership, with the same countries showing up as disputants in both adjudicators in our data. And yet, as the plot below suggests, we observe strong variance in the practices of holding open hearings in these adjudicating bodies.

![Graph](image)

Figure 5: Proportion of cases where (i) public hearings, and (ii) hearing records
Now looking into the Human Rights Courts in more detail. The ACtHPRs does seem to have relatively homogenous low score across time. The IACtHPRs is a bit more puzzling. On the one hand, it has the most far-reaching *de facto transparency* in comparison to the others. Its practice of keeping record of the hearings goes back as far as the first cases. However, while keeping records of most hearings available in the first years, this practice decreases after 1995 and stays at levels between 50% and 75% until 2010, when it returns to full availability. As for the ECtHR, the patterns across time are not surprising. The Court’s method of choice when it comes to releasing the content of hearings to the public is webcast. The positive monotonic curve is possibly due to developments in Information Technologies which impact the costs of resorting to such methods.

![Figure 6: Human Rights Courts' disclosures across time](image)
4.5. Access to Judgements/Awards

Central to the debate on the legitimacy of international arbitration is the access to the general public on information of the awards. This is particularly true for disputes which impact a states’ domestic constituencies directly or indirectly such as territorial disputes or investor compensation. This has led to much debate and even to policy changes. This is most notorious at the ICSID. Since early on, the arbitration body’s secretariat has been pro-actively reforming its rules so as to increase its transparency regarding the disclosure of awards and incentivize parties to make the outcomes of their disputes public. The most extensive of these reforms occurred in 2006\textsuperscript{114}.

In line with the findings of Hafner-Burton et al.\textsuperscript{115}, our data also shows how this transparency reform did not lead to more awards being disclosed. Furthermore, there actually seems to be a decrease in the proportion of disputes where the outcome of arbitration was released to the public. As for the PCA, the plot below also suggests a decrease in \textit{de facto} access to award information since the earlier (modern) days. The only exception is the large uptick following 2015. However, our sample contains less than 10 cases in this period.


\textsuperscript{115} Hafner-Burton, 2016.
4.6. Press-activity

Finally, we look at one dimension of transparency often overlooked by legal scholarship on transparency in international disputes: press-activity by the registrar/secretariat of the adjudicating body. The plot below shows the average number of press-releases per case across the adjudicating bodies in our sample.
As stated above, this measurement should be theoretically relevant to test many of the hypothesis and theories involving strategic communication by Courts and its relationship with legitimacy and compliance with international rulings. A particularly interesting question is to what extent do we observe increases in direct engagement with domestic audiences by international adjudicating bodies, if the respondent is a known non-complier. Below, I explore this hypothesis by comparing the number of press-releases produced by two Human Rights Courts, the ECtHR and the IACtHR, across measurements of compliance with human rights at the year of when the claim was filled at the Court. Compliance with Human Rights is proxied with data from the “Cingranelli-Richards” (CIRI) human rights dataset\[116\] which measures human rights practices of states using NGO- and US-State Department reports.

Starting with measurements of violations of the Human Right to physical integrity, we observe that the IACtHR engages in more active press activity if the respondent is a known violator of this right. Whereas the ECtHR seems to be much less responsive to it. Part of this seems to be that most of its respondents have relatively high scores of respect for this right. This is very much less so at the IACtHR where in half of the cases respondents were coded below 5 (where 0 stands for no respect whatsoever for this right score and 8 for complete respect for the right).

We observe similar results when looking into the respondent measurements for “Extrajudicial killings”, though with a lower contrast.
Finally, extending the analysis to non-physical threat rights, we look into respect for freedom of speech. Again, cases where the respondent is in the lowest or middle categories measuring the respect for the right are associated with a larger number of press releases being produced by the IACtHR and, now but to a lesser extent, by the ECtHR.
5. Conclusion: Furthering the Research Agenda with the Novel Dataset

This research project, together with this dataset, opens the door for a new research agenda looking into what the correlates of transparency preferences in international disputes may be, the impact of rule design on *de facto* transparency, and the impact of transparency in international disputes.

On the first point, several research questions are worth delving into. Namely, questions related role of domestic politics and institutions in the choices of procedural transparency in international disputes. One may think of many mechanisms, such as interest group mobilization or domestic electoral politics, which may push an incumbent to favour quieter disputes. Similarly, if variations on procedural transparency rules within each adjudicating body occurred, one may test to what extent the rules, and their design, actually affect transparency outcomes. Finally, one may directly test the traditional assumption of information-based theories of compliance by assessing to what extent disputes where more information is produced increase the salience, at home or in international relations, of non-compliant behaviour.