



NUS Law Working Paper 2018/022  
NUS - Centre for International Law Working Paper 18/01

## **Report: Survey on Obstacles to Settlement of Investor-State Disputes**

Seraphina Chew  
Lucy Reed  
J Christopher Thomas QC

seraphina.chew@gmail.com  
lucy.reed@nus.edu.sg  
ciljct@nus.edu.sg

**[September 2018]**

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: <http://law.nus.edu.sg/wps/>

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## Executive Summary of Report on Survey: Obstacles to Settlement

### The purpose and parameters of the survey

In a time of growing criticism of investor-State dispute settlement, whether justified or not, we – the International Dispute Resolution team at the NUS Centre for International Law (CIL), led by Christopher Thomas QC and Professor Lucy Reed, director of CIL – considered it opportune to ask why parties are not settling disputes more frequently. We developed an online survey to gain insight into what experienced players consider to be the key challenges to settlement. Identifying these obstacles could enable parties, counsel, and mediators to be more aware of the special obstacles to settlement in investor-State cases and, at the same time, think about ways to navigate around those obstacles whenever possible.

In November 2016, CIL sent the survey to 97 recipients known to us to have substantial personal experience in investor-State arbitration. The survey asked them to rank 29 possible obstacles to settlement of investor-State disputes (identified in our preparatory work) and also posed several open-ended questions. The survey received 47 responses, from private counsel, institution representatives, and academics. More than half of the participants (64%) had experience advising both investor and State parties.

### Key findings

- A majority (70%) of participants think the State is the party more reluctant to settle. None identified the investor as the party more reluctant to settle.
- By far, the most significant obstacle to settlement is **the desire to defer responsibility for decision-making to a third-party**. This is especially applicable to States: it might be easier to blame a tribunal for a forced, rather than voluntary, outcome.
  - This factor was ranked **1<sup>st</sup>** as the top obstacle (the highest number of participants ranked it as highly relevant) and also mentioned most frequently in response to open-ended questions.
- Another significant obstacle to settlement is **fear**: fear of public criticism (ranked **3<sup>rd</sup>**), fear of allegations of or future prosecution for corruption (ranked **7<sup>th</sup>**), and fear of setting a precedent (ranked **16<sup>th</sup>**). (This list is not exhaustive nor precise, since the various fears might and do overlap.) Again, this is of greatest concern to State officials.

- Obstacles to settlement also arise from the structure of the State, namely the existence of **multiple stakeholders** in agencies and ministries across all levels of government:
  - Agreement may prove impossible because of the stakeholders’ conflicting and competing perspectives and priorities (ranked **6<sup>th</sup>**).
  - It might be more difficult for an official to obtain budgetary approval for a settlement, as opposed to any sum awarded by an arbitral tribunal or court (ranked **4<sup>th</sup>** most relevant).
  - The time taken to consult all the relevant stakeholders might mean the State misses opportunities to settle.
  
- Some obstacles are common to all disputes, including commercial arbitration: participants mentioned **unrealistic expectations** and an **inaccurate evaluation of the merits of the case** most frequently in response to the open-ended question of what they thought was the third most relevant reason disputing parties did not settle their disputes.
  
- Some obstacles are unique to State parties:
  - Media (international and domestic) coverage might cause the dispute to become even more politically inflamed, pressuring the State into taking a firmer stance (this was ranked **2<sup>nd</sup>**).
  - The dispute might involve a **highly sensitive or politicised issue**, such as tobacco packaging, making it politically difficult for a State to be seen to ‘capitulate’ via settlement (ranked **5<sup>th</sup>**).
  - A new administration might not settle a dispute, in order to blame the dispute on the outgoing administration.
  
- Participants held a mixed view on the perceived impact of counsel on settlement prospects. While the **role of counsel** was ranked in the bottom five relevant obstacles (**25<sup>th</sup>** and **27<sup>th</sup>**), the self-interest of counsel in avoiding settlement was mentioned frequently in response to open-ended questions.
  
- The survey also highlighted the **corresponding lack of incentives** for disputing parties to settle. In the face of numerous obstacles, there were inadequate and even non-existent incentives for parties – especially State parties – to settle a dispute.

## Report on Survey: Obstacles to Settlement

### I: INTRODUCTION

Investor-State arbitration is a controversial topic, so much so that trade agreements have sparked debate and protests around the world,<sup>1</sup> including in countries whose investors are frequent users of investor-State dispute settlement ('ISDS').<sup>2</sup> While many disputes apparently are settled,<sup>3</sup> there is growing interest in encouraging more settlement.<sup>4</sup> Against this backdrop, the International Dispute Resolution (IDR) team at the NUS Centre for International Law (CIL), led by Professor Lucy Reed, director of CIL, and Christopher Thomas QC initiated a project to identify potential significant obstacles to settlement. The team compiled a comprehensive, though non-exhaustive, list of possible obstacles as well as pathways to settlement, resulting in notes and "mind maps" summarising the factors.

As a next step, CIL developed a survey to test the validity and relative relevance of the possible obstacles identified, to be sent to an array of experienced users of ISDS (arbitrators, private counsel, academics, and institution representatives). While the survey would necessarily collect more anecdotal than empirical evidence, we considered the findings would still be useful in revealing what this community perceives to be common obstacles to settlement.

#### 1) Survey methodology

The list of potential participants was drawn up based on the individual's experience with international arbitration—specifically investor-State arbitration—whether in the role of private counsel, arbitrator, institution representative or academic.<sup>5</sup> Most of the participants have a background in private practice, and a significant number of them have experience advising governments (both as external and internal legal counsel). Participants were mostly in the advanced stage of their careers, ranging from counsel to partners. The survey was eventually

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<sup>1</sup> See for instance the debates and protests over CETA, TTIP, and the TPP. The latter two might be largely moot at the time of writing given the Trump's administration criticism of both agreements.

<sup>2</sup> For instance, according to the UNCTAD Investment Policy Hub, there are 148 cases where the United States is the Home State of the claimant. The country with the second highest number of claimants is the Netherlands, at 92. (accessible here: <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>) (last checked: 22 March 2017).

<sup>3</sup> According to the 2016 UNCTAD database, out of the 495 concluded cases, 121 (or 24.4%) settled. This excludes 50 (10.1%) cases that were discontinued, which might have been settled but not formally recorded as one. (accessible here: <http://investmentpolicyhub.unctad.org/ISDS>) (last checked: 22 March 2017).

<sup>4</sup> See for instance, the seminal article by Professor Jack C. Coe, "Towards a Complementary Use of Conciliation in Investor-State Disputes – a Preliminary Sketch" (2005) 12 University of California, Davis 7.

<sup>5</sup> As with any non-random survey, results cannot be generalised to the entire population. However, the nature of the survey was such that the experience and background of the participants were crucial, and hence, careful thought had to be put to drawing up a list of potential participants.

sent out to **97** international arbitration practitioners and academics and received **47** responses. The geographic background of the participants is slightly skewed in that there was no participant from the African continent (see Figure 1 below).<sup>6</sup> However, representation was fairly balanced, with equal numbers from Europe and East Asia (Hong Kong, China, Korea, and Japan). While this report does not consider in detail how attitudes and approaches to settlement might differ across regions, a study done in 2010 on settlements in international commercial arbitration suggests that “in some key areas distinction persists with respect to the factors that operate as barriers to settlement”.<sup>7</sup>

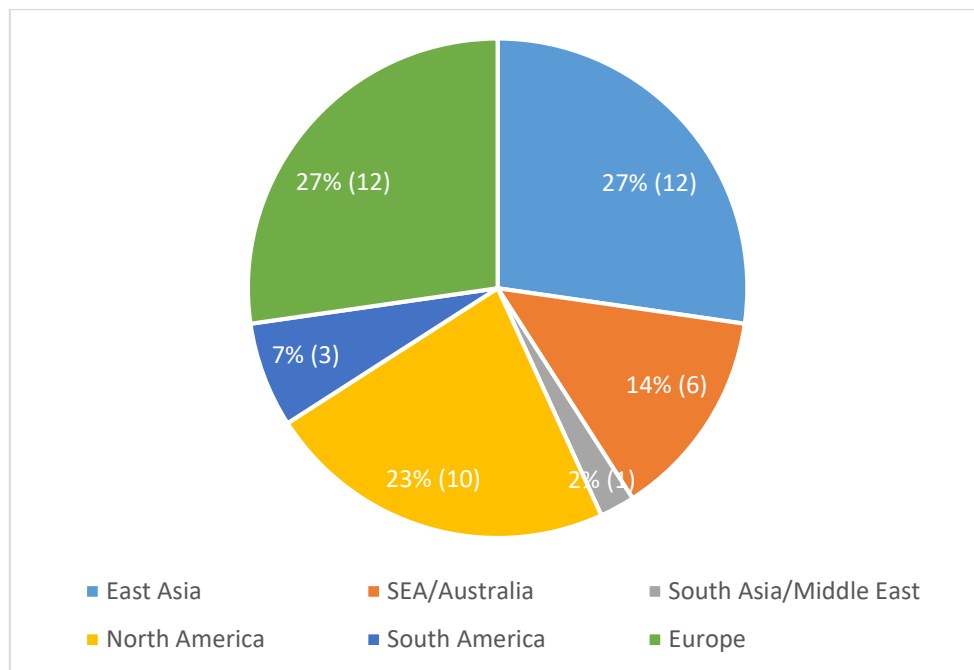


Figure 1: Geographic background of the participants

This was a small sample size, and we recognise that accordingly, the results might not necessarily be reflective of the obstacles to settlement in all investor-State disputes. However, the responses from our carefully curated list of participants, with their combined experience, offer important insights.

The survey itself was broken down into a number of key sections.

*First*, we gathered some **basic information** about the participants, such as whether they had acted for both States and investors, or just one side, what the relative split of their client base

<sup>6</sup> This report defines geographic background by where the participant is primarily based.

<sup>7</sup> Shahla F. Ali, “Barricades and Checkered Flags: an Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement Among Arbitration Practitioners in East Asia and the West” (2010) 19 Pacific Rim Law & Policy Journal 243, p. 253.

was, and the frequency with which they advised the disputing parties or their clients to settle. We then posed a number of open-ended questions where the participants could share their perspectives and experiences on why a disputing party might be reluctant to settle, and why they did or did not advise parties to settle.

*Second*, the bulk of the survey asked the participants to **rank specific factors** according to how relevant they were to a disputing party's consideration of whether to settle. These factors were identified during internal CIL discussions, and many were also mentioned by the participants in their responses to the open-ended questions. These factors were further classified under three broad themes:

- 1) political factors;
- 2) structure of the State; and
- 3) other factors.

Participants were asked to rank factors from 1 to 5, with 5 indicating that a factor was highly relevant to a disputing party's consideration of whether to settle, and 1 being not relevant at all. Along with the mandatory ranking of the factors, participants were also given the option of listing examples of their experiences with these factors as obstacles to settlement. A table listing all the factors according to how they were ranked can be found in Annex 1.

*Lastly*, the survey concluded by asking participants to briefly list, in their opinion, the **top three** most salient reasons why disputing parties chose not to settle their dispute. This was, again, an open-ended question.

A copy of the survey in its entirety can be found in Annex 2.

## **2) Limitations to the survey**

A number of limitations to the survey are listed below. These should be considered when assessing the significance of the survey findings.

*First*, by focusing on disputes involving a State party, the survey assumes that disputes involving States settle less frequently. One participant astutely observed that the survey presumes "some universe of other disputes (not involving States) that do settle more frequently and that disputes involving States are somehow different". This is a possible area of further research, comparing the rates of settlement within commercial litigation and commercial

arbitration as opposed to arbitration involving a State (whether inter- or investor-State).<sup>8</sup> However, it can be safely said that States have unique “considerations that individuals do not”, and these considerations affect the likelihood of settlement.

*Second*, the survey did not specify when a dispute arose, i.e. whether from the time a difference in positions arose or from the time the dispute is formally notified. Assuming the majority of disputes (including those that never proceed to a formal filing) settle, the findings of the survey might be affected by selection bias. These obstacles to settlement might apply only to a specific sub-set of disputes—those that could not be amicably settled before formal steps like filing of a claim were taken.

*Third*, the sample size was relatively small. While the survey was sent out to 97 practitioners, we only received 47 responses. Results might not be reflective of the general practice of disputing parties. Further, the backgrounds of the participants might be another limiting factor in that the majority have a background in private practice and/or academia, rather than being in government service. While 64% have experience acting for a State, only 17% act for States over 60% of the time (see Figures 2 and 3 below). It is possible that participants ranked the role of counsel as being a relatively irrelevant obstacle in part because of their background bias. This is something to consider, given that, in response to open-ended questions, several participants mentioned the role of counsel as one of the top three most relevant reasons why parties do not settle (see sections III(4) and (5) below).

*Fourth*, the survey focused on obstacles rather than pathways. One participant commented that it was just as important and relevant to discuss why disputing parties settled. Incentives and obstacles complement one another. The survey could have presented a more balanced picture by including reasons why disputing parties settle, especially the incentives for private individuals and entities. CIL will explore this as a future research possibility.

*Fifth*, the CIL internal discussion presumed that many obstacles lay with the State, a presumption that was also reflected by the survey results (see Figure 5 below). Indeed, the vast majority of the factors mentioned were applicable only to a State. This perception might skew the results and present a less-than-complete picture of the reasons why disputing parties, including investors, do not settle their disputes. On the other hand, States are complex

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<sup>8</sup> There are some indications of settlements rates of above 80%, but these studies are rather dated. See for instance, Coe, *supra* note 4, at p. 18 fn. 57 citing settlement rates from various studies ranging from 81-85%, but these studies were conducted in the mid to late-1990s.

institutions that have to reconcile conflicting interests, and are certainly more complex and unwieldy than private firms when it comes to identifying their interests in legal disputes.

*Sixth*, participants were asked to indicate how relevant they thought each factor was, but their choice might have been influenced by the context in which the factor appeared. For example, participants might subconsciously rank a factor as less relevant when it is presented alongside other factors which they consider more relevant, and rank it as more relevant if it had been presented in isolation. Further, one of the risks of using a five-point scale is that participants might tend to choose the middle option ('3'). However, this would also mean that certain findings below are even more significant given how heavily skewed the results are towards either end of the spectrum.

*Seventh*, some of the obstacles mentioned are not satisfactory stand-alone factors, i.e. there are other underlying reasons behind these obstacles. To give an example, one of the identified obstacles is that it was easier for a State to defer the responsibility of deciding on a settlement to a third-party adjudicator. However, this raises the obvious question of *why* it is easier for a State to do so. Similarly, if it is more difficult for a State to obtain budgetary approval for a settlement as compared to paying a sum when ordered to, this difficulty requires an explanation.



## II: BACKGROUND OF RESPONDENTS

### 1) Representation

One of the first questions the survey asked was the participants' experience of representing either disputing party. This was a mandatory question. Out of **47** participants, **30** (64%) have acted for both States and investors, whereas the remaining **17** (36%) have not (see Figure 2 below).<sup>9</sup>

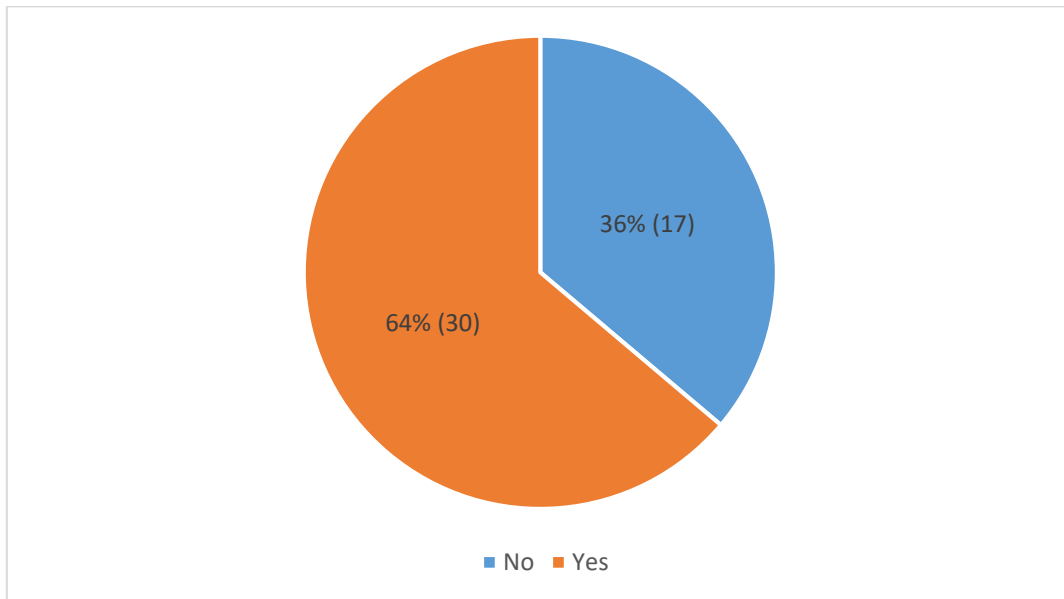


Figure 2: Have you acted for both States and investors?

Of the **30** who have experience acting for both States and investors, a slightly smaller number (**8**) have States forming the majority of their client base.<sup>10</sup> The majority (**12**) had a roughly equal mix of investor and State clients, and the remaining (**10**) acted mostly for investors (see Figure 3 below).

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<sup>9</sup> For the purposes of the survey, participants who have not assumed the role of private counsel before, for instance, institution representatives or arbitrators, were told to select 'no'.

<sup>10</sup> The survey defined majority as being above 60%, i.e. the respondent would have a majority client base of States if they act for States above 60% of the time.

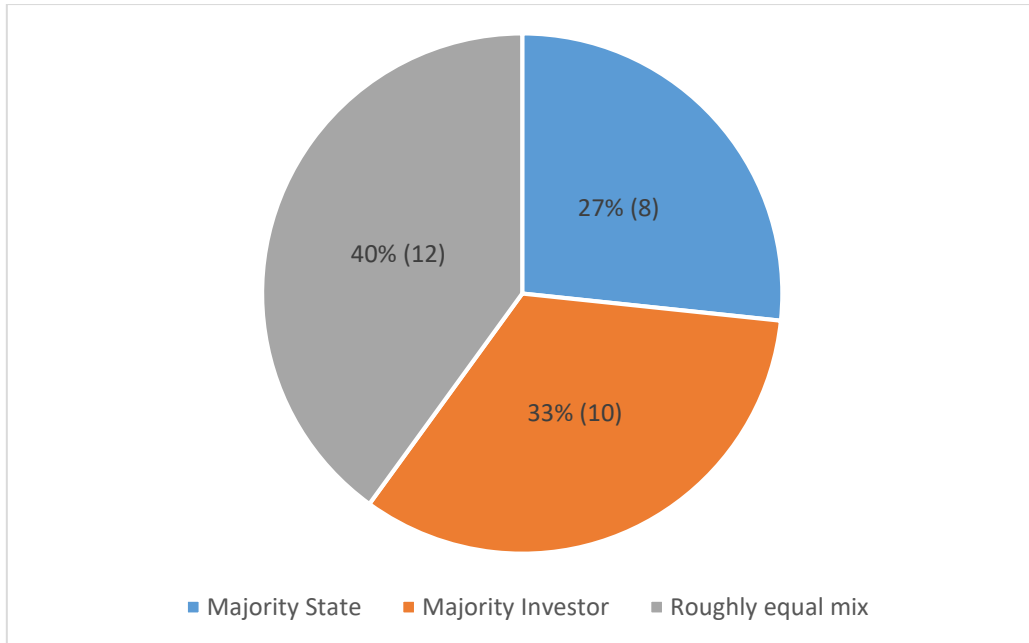


Figure 3: What is the split of your client base?

**2) Frequency with which the participants advised parties to settle**

The survey then asked the participants how frequently they advised the disputing party or parties to settle. This was a mandatory question. At the two extremes, **3** participants indicated that they recommended settlement ‘all the time’, while **5** stated that they never (‘not at all’) did so. **16** participants took the middle ground of advising settlement ‘somewhat often’. Slightly more participants advised settlement ‘very often’ as opposed to ‘not usually’ (**13** against **10**). However, this result might not be significant given the small sample size.

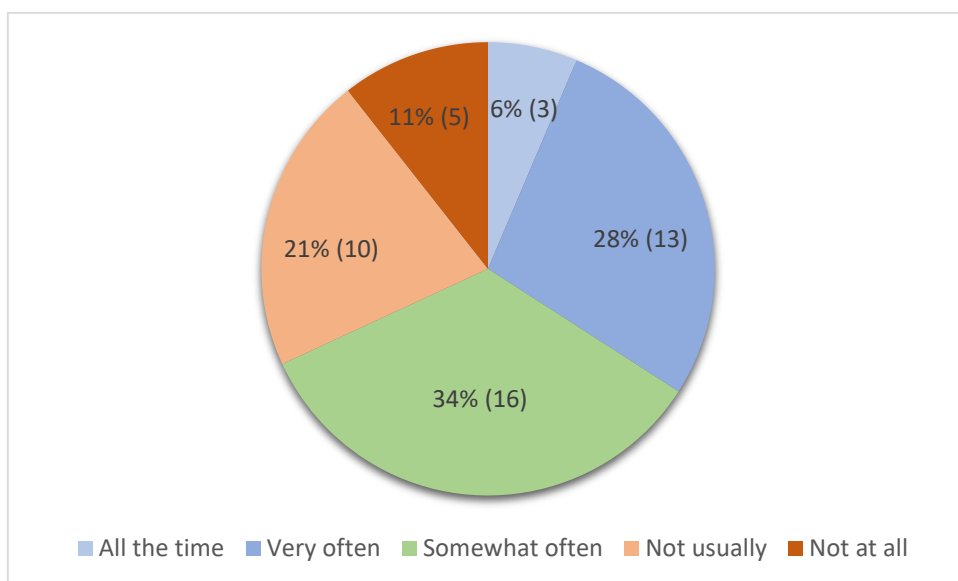


Figure 4: Frequency with which the participant advised the disputing party to settle

### 3) Why did or did not the participants advise disputing parties to settle

Along with asking whether the participants ever advised the disputing parties/their clients to settle, the survey also invited them to elaborate on the considerations that led them to recommend settling. This open-ended question received **33** responses. We observed some common trends, elaborated below.

The overwhelming number of participants mentioned **costs** as a consideration in recommending settling the dispute. The cost factor was mentioned **17** times, outstripping other factors by a significant margin. This response is consistent with growing discontent with the costs of investment arbitration.

The other frequently mentioned considerations were (i) the **long duration** of arbitration proceedings; (ii) the **weakness** of the case; (iii) the **certainty** of a settlement in contrast to the uncertainty of the outcome of proceedings; and (iv) the desire to maintain a **long-term relationship**. Each of these was mentioned **7** or **8** times each, less than half the frequency with which the cost factor was raised. One participant also mentioned that the “desire to control [the] outcome” was a consideration in recommending settlement. This is note-worthy because a party’s ability to control proceedings is one of the frequently mentioned advantages of using non-binding dispute settlement mechanisms like mediation or conciliation.

The majority of the obstacles lay with the State; conversely, the responses to this question suggested that the investor was the party more willing to settle in the interests of retaining the investment in the country. One participant mentioned the risk of jeopardising other investments in the same jurisdiction, a point also raised during the internal discussion at CIL. Investors might lose their “presence in the state” by bringing a claim. Another participant pointed out that for investors, the investment was generally “more valuable than a damages award” and a settlement that “rescued the investment” was a preferable outcome.

A final observation was how varied the responses were. For instance, a couple of participants recommended settling, because they viewed arbitration as “bad” or a “lose-lose proposition regardless of the outcome”. Another participant mentioned that it was a “matter of good practice” to recommend settling the dispute, suggesting he or she was motivated, at least in part, by a degree of professional caution or diligence.

### III: FINDINGS

#### 1) Which party was more reluctant to settle?

The survey asked participants to indicate the party they thought was more reluctant to consider settling. This was a mandatory question. The responses confirmed a point that came up during the CIL internal discussion: the main roadblocks to settlement lay with the State party. Of the **47** responses, **33** indicated that the State was the party “more reluctant to consider settling”. **14** thought that both parties, State and investor, were equally reluctant to settle, but **none** thought the investor was the party more reluctant to consider settling (see Figure 5 below). This might be due to a structural feature of the investor-State system, since States are *always* the party resisting a claim.

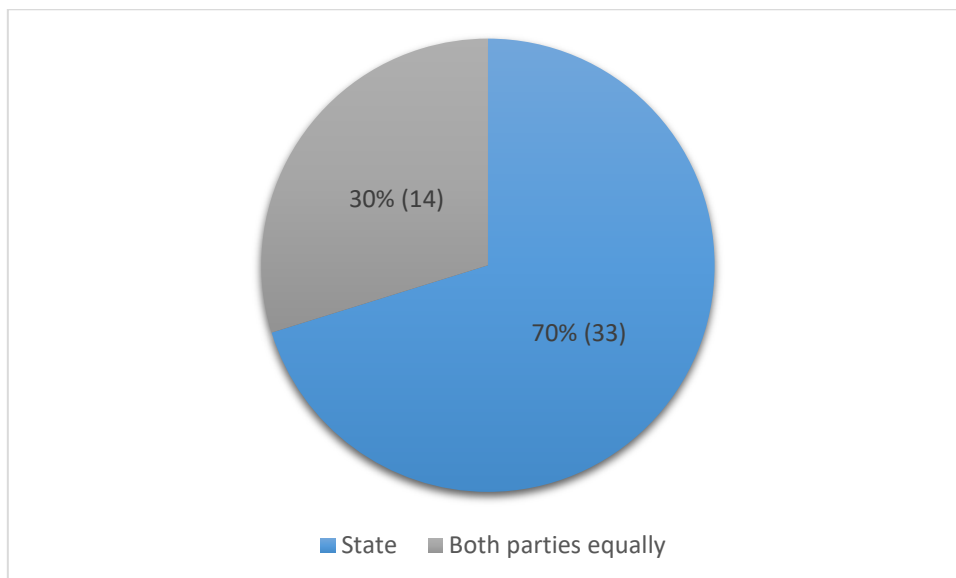


Figure 5: Party more reluctant to consider settling

#### 2) Why might disputing parties be reluctant to settle?

The survey further asked participants, if they have experienced a party’s reluctance to settle, to explain “what might have motivated” such reluctance. This optional question received **38** responses.<sup>11</sup> As this was an open-ended question, responses differed in terms of the level of detail and number of reasons offered. During analysis, the team observed that most—if not all—of the responses could be put into categories that largely mirrored those the CIL internal discussion had adopted: (i) political; (ii) structure of the State; and (iii) other factors. Each

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<sup>11</sup> The survey records that 38 participants left a response, but one response is excluded because it was too generic to offer any meaningful contribution. However, one participant who did not complete the survey sent in anonymous observations pertaining to this section.

category contained discrete reasons—for instance, the desire to defer or avoid responsibility is a discrete political reason.

Based on our preliminary analysis of the responses to this question, we noted that the following three reasons were mentioned most frequently (see chart 1 below):

- 1) the desire to avoid or defer responsibility;<sup>12</sup>
- 2) the fear of allegations of or future prosecution for corruption;<sup>13</sup> and
- 3) the fear of public and/or political criticism.<sup>14</sup>

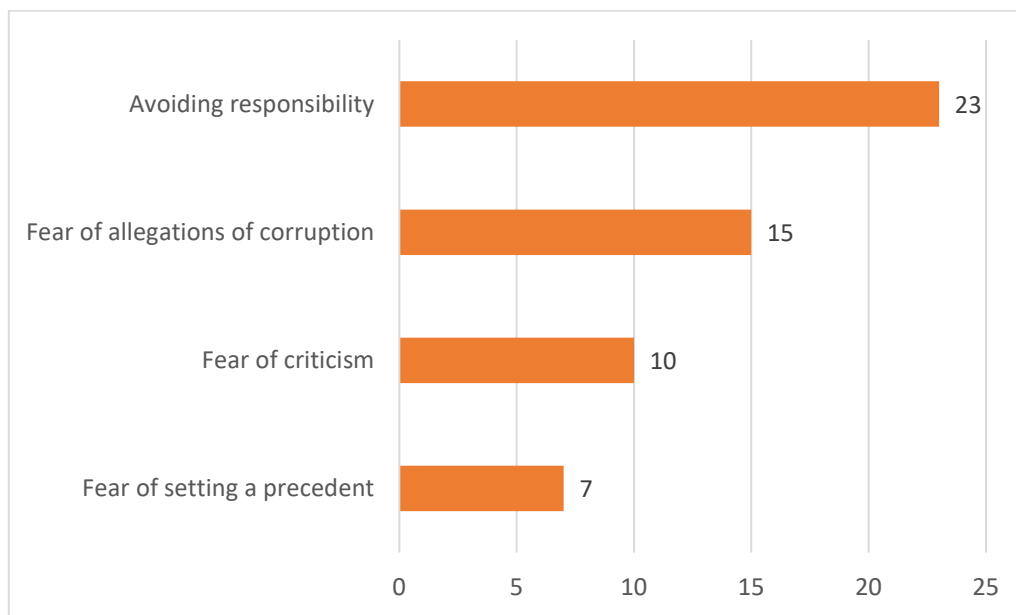


Chart 1: Number of mentions for each factor

Participants repeatedly mentioned these factors as being highly relevant, whether by ranking them in the survey or in their responses to the open-ended questions (see section III(5) below).

According to the participants, the **desire to defer or avoid responsibility** was the most important reason for why State parties were reluctant to settle. For instance, two participants mentioned the “unwillingness” to take public responsibility for concluding a settlement, and another observed that “cases take so long [that] it could easily ultimately be someone else’s problem”. This was also described by one participant as “kicking the problem down the road” and another as “being able to blame others”. A State might find it “easier to ‘sell’ to parliament and public opinion the need to comply with a binding award”, and hence “prefer to have an

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<sup>12</sup> This was mentioned 23 times.

<sup>13</sup> This was mentioned 15 times.

<sup>14</sup> This was mentioned 10 times.

international tribunal tell it to pay”. In short, State parties might not want to bear the responsibility for concluding any settlement agreements.

However, this explanation is unsatisfactory. While the view was clear, based on the responses, that States would prefer to avoid responsibility where possible, the logical question that follows is why there was this reluctance. The other reasons mentioned might provide some explanation: various **fears** on the part of the decision makers.

The discussion and subsequent survey identified three distinct fears: (i) “allegations of or future prosecution for corruption”, (ii) “criticism”, and (iii) “setting a precedent”. There might, of course, be other fears.<sup>15</sup> It was interesting to note that most of the responses mentioning fear fell under one of these three. In fact, if all the various fears were considered together, it would be the most frequently mentioned reason to explain why disputing parties were reluctant to settle.<sup>16</sup>

- (i) Participants were attuned to the risk of **allegations of or future prosecution for corruption** for the individual official or decision maker who signs off a deal. Three participants expressly mentioned “corruption” as a concern, with one explaining that even if a government employee was “high ranking, it is likely that at one point, this decision and/or settlement agreement will be audited and/or brought before an investigator or a court”. Another suggested that this was “*especially* [the case] in developing states [ . . . ] for fear of [the settlement] being questioned in the future when [the] government changes”.<sup>17</sup> The possibility of “personal liability” also appears to be a significant institutional *disincentive* for government officials to recommend settling a dispute.
- (ii) The **fear of criticism** was the third most frequently mentioned reason. It is interesting that three participants expressly referred to the concept of “face”.<sup>18</sup> Most governments rely on public opinion and support, and hence seek to avoid public criticism. By settling, the government might be “criticised as weak or branded as puppets of foreign interests”. Such criticism would be even more undesirable “[in] a democracy, [where] the election cycle may make the relevant officials even more averse” to the risk of incurring public wrath.

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<sup>15</sup> One participant mentioned the “fear of political fallout”.

<sup>16</sup> The third fear, that of setting a precedent, was mentioned 7 times.

<sup>17</sup> Emphasis added.

<sup>18</sup> These responses were: “concerns about face”, “not to lose face in respect of public opinion”, and “fear of losing face”.

- (iii) The **fear of setting a precedent** was also mentioned. By settling a claim, other investors who were similarly affected might then proceed to threaten or even file claims, in order to also obtain compensation. A settlement could thus have an “incentivizing” effect. One participant also offered a slightly different perspective, observing that a settlement might be used by future claimants as precedent in guiding the tribunal in its interpretation of relevant treaty obligations. This is an interesting view, since settlements typically avoid any mention of liability, much less any legal evaluation.

The three most frequently mentioned reasons are all political in nature. However, a significant number of participants also mentioned reasons arising from the structure of the State, such as the existence of **multiple stakeholders**. As observed during the CIL discussion, the unity of the State is a fiction in international law, for what is treated as a single entity is in reality a complex organisation comprising ministries, administrative and other agencies, legislatures, subnational authorities and such, all overseen by the judiciary and executive, whether it is the Prime Minister, cabinet, or President.

The existence of multiple stakeholders might hinder settlement in a number of ways. For one, the **time taken to reach a settlement decision** might be longer, because of the “range of stakeholders that need[s] to be consulted and satisfied”. Another participant also echoed this sentiment, observing that the “sheer number of different officials and departments who need to consider and approve a settlement offer may mean that the State “*misses the boat*” (because it cannot make decisions as quickly as the claimant investor)”.<sup>19</sup> Certainly, compared to that of a private entity, a State’s “internal approval process for a settlement [. . .] will be more complicated and challenging”.

Another way in which the presence of multiple stakeholders might hinder settlement is due to **conflicting perspectives and/or priorities**. The various parties involved are likely to have different, even competing interests. Officials might “find it difficult to strike settlements given that doing so involves different stakeholders with varying agendas”, and an agreement to settle might not even be possible because of “difficulty in getting buy-in from colleagues”. Apart from taking more time, the process might not yield any consensus at all.

Other structural reasons include the relative difficulty of getting budgetary approval for a settlement as opposed to being ordered to pay following “a final decision from a competent

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<sup>19</sup> Emphasis added.

tribunal”, the absence of “an appropriate legal framework for settlement purposes”, and the “lack of internal organization/coherence to carry out meaningful settlement discussions”.

### 3) **Top five most relevant factors**

The bulk of the survey asked participants to rank various specific factors according to each factor’s relevance to a party’s (predominantly the State party) consideration of whether to settle. To recap, participants were asked to rank factors on a scale of 1 to 5, with 1 indicating the factor was ‘not relevant at all’ and 5 being ‘highly relevant’. To determine which factor was the most relevant across all three themes, we ranked them according to the average score.

Using this scoring system, participants identified the following **top five** obstacles to settlement. A list of all factors ranked according to the average score can be found in Annex 1. All of the top five factors were related to the State, corresponding with the finding above that the majority of participants believed that the State was the more reluctant party to settle (see Figure 4 above). Each of the top five obstacles is listed below, with a chart showing the number of participants that indicated each level of relevance, a brief discussion of the factor, an illustrative example provided by the participants, and whether this factor was also mentioned in response to the open-ended questions in the survey.

- 1) *It might be easier for the State to defer the responsibility of decision making to a third-party adjudicator: since it has to comply with the decision, it can say it has done its best to defend the offending measure.*

An overwhelming number of participants considered this factor to be “highly relevant” (see chart 2).



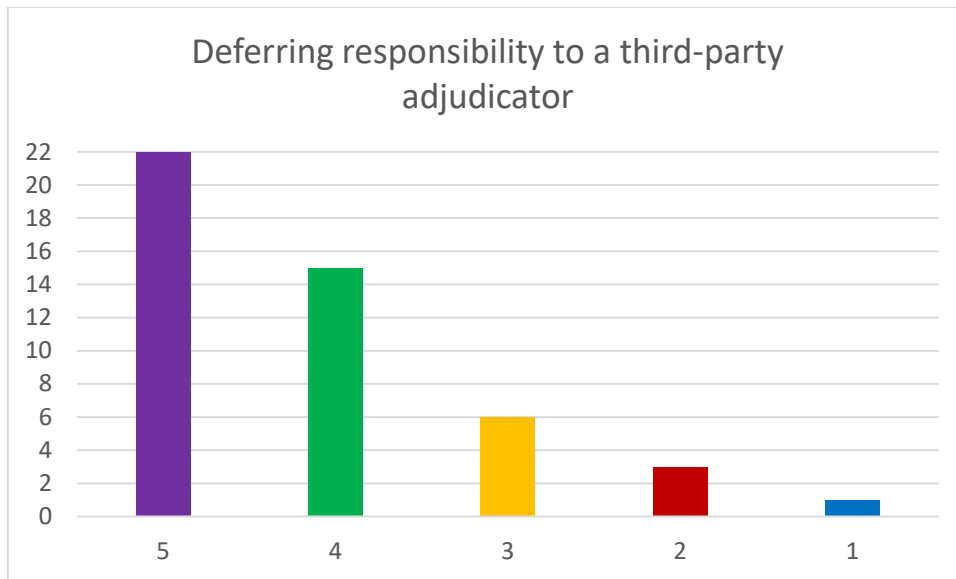


Chart 2

The State has to agree to a settlement, and if that involves paying a monetary sum, the State would have to be accountable for using taxpayer money. Further, while settlements are without prejudice and do not necessarily indicate any admission of liability, the fact that States are always the respondent in investor-State cases makes it difficult for the State to avoid all implications of some wrongdoing. Lastly, in State-State disputes where there is long-running hostility between the two disputing parties, an agreement to settle would be much harder politically than being ‘ordered’ to resolve the dispute in some way. However, as mentioned above (see section I(2)), this is not necessarily a sufficient explanation, since there might be many other underlying reasons for why it is easier for a State to defer the responsibility of decision making.

One example provided by a participant illustrates how settlement might be stymied by the State’s desire to pass responsibility to a third party. In that case, the participant’s client offered to settle for no damages and the abandonment of certain counterclaims by the State, but the State refused to settle as it could then “blame the earlier administration”. As a result, the dispute ended in an award of above USD 50 million against the State.

The relevance of this factor is confirmed by reviewing the responses to the open-ended questions, particularly the preceding question (see section III(2) above) and top three reasons (see section III(5) below). At least, within this group of surveyed participants, it is undisputed

that one significant obstacle to settlements is that it is harder for a State to settle rather than to assign responsibility of decision making to a third-party adjudicator.<sup>20</sup>

2) *The dispute becomes a political concern/issue because of media (international and/or domestic) coverage, pressuring the State to take a firmer stance.*

Fewer participants thought this factor was as “highly relevant” as the top ranking factor, and there is a more even distribution of participants indicating a 5 or 4 (see Chart 3).

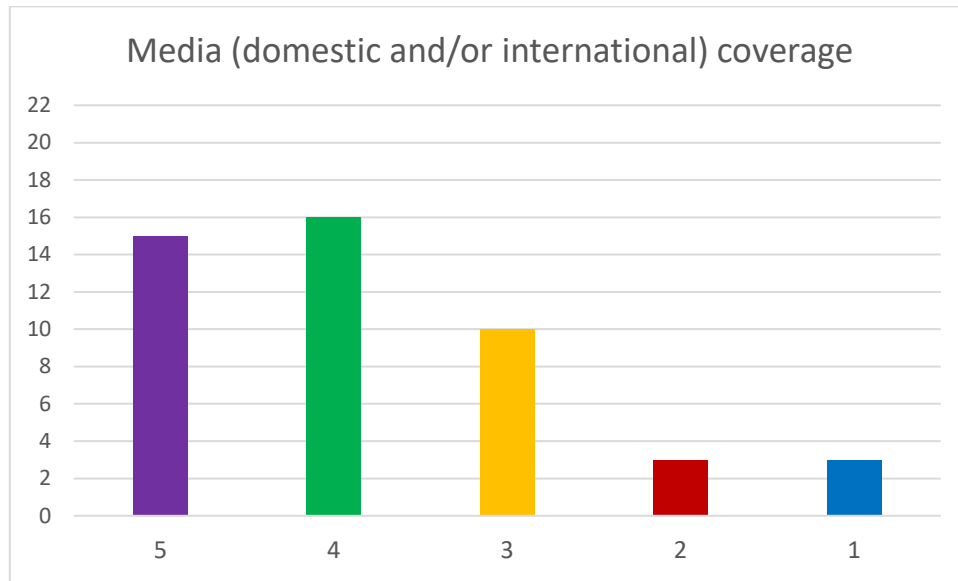


Chart 3

One aspect of disputes involving a State party versus a purely private dispute between commercial parties is the higher likelihood of media attention. While the media plays an important role in holding governments accountable, it can also inhibit decision making that might be in the greater interest of the State. One speaker at the 2010 UNCTAD-Washington and Lee University Joint Symposium thoughtfully observed that “while enhanced transparency in arbitration proceedings is important, increased transparency from an ADR perspective could produce negative effects in some jurisdictions”, because it could “further [spark] the issue in the domestic political process”.<sup>21</sup>

<sup>20</sup> Whether the third-party adjudicator has to issue a *binding* decision merits further study. For instance, if a conciliation commission composed of eminent persons issues recommendations with detailed reasons, would it mitigate the responsibility that the State bears for the settlement decision?

<sup>21</sup> Professor Shin Hi-Taek, “An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution” in UNCTAD, “*Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America*” at p. 97, 101.

This factor is illustrated through an example provided by one participant who mentioned that the State party refused to settle “even for US\$1” in part because of the “negative publicity”.

Pressure created by media coverage was not mentioned in response to the other open-ended questions, save by one participant.<sup>22</sup>

### 3) *Fear of public criticism.*

Many participants felt that the fear of public criticism was a “very relevant” obstacle to settlement. This factor had the same average score as the fourth-ranked factor (that of the difficulty in obtaining budgetary approval for a settlement), but more participants gave the former a higher score of relevance (see the blue bars in Chart 4 below).

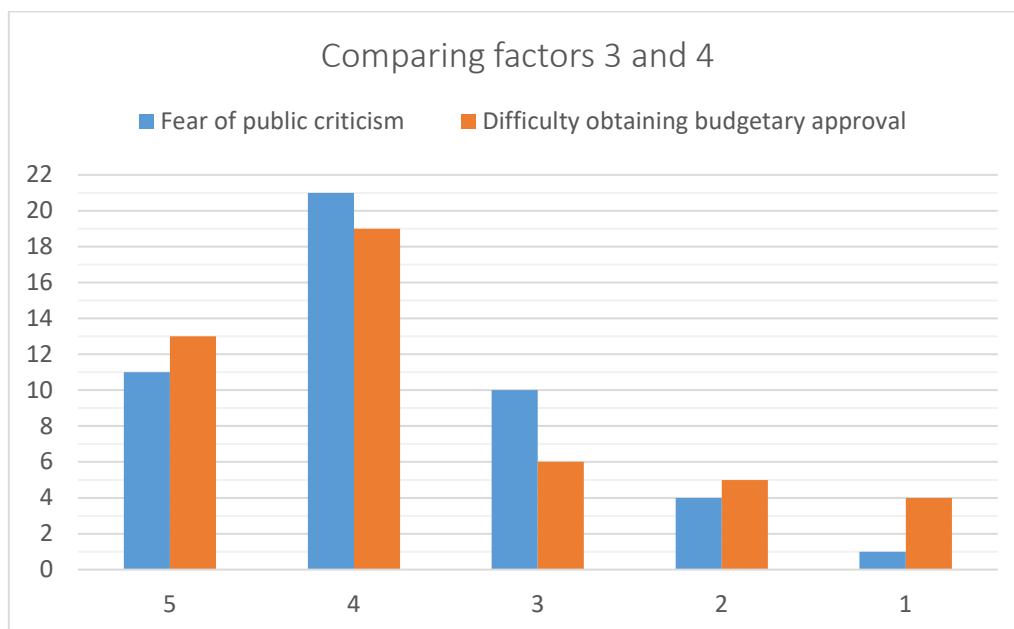


Chart 4

This obstacle is related to and overlaps to some extent with the second factor, but is also confined to specific political systems. In most countries where the government depends on popular support, a high level of public criticism would have adverse consequences for that administration, especially closer to election time. As with the case of media coverage, confidentiality might be key to the success of settlements.

One participant gave the example of two neighbouring States with a long history of hostile relations, explaining that neither was “prepared to meaningfully discuss” water resource or

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<sup>22</sup> The participant mentioned cases being “in the public eye” as the second most relevant reason why disputing parties do not choose to settle their disputes.

boundary issues, because of the “fear of political fallout, negative media response and the opposition accusing the government of sell out”.<sup>23</sup>

This factor was also mentioned frequently in response to the other open-ended questions, confirming its relevance as an obstacle to settlement within this sample group.

*4) It might be difficult for an official to obtain budgetary approval for a settlement, as opposed to any sum awarded by an arbitral tribunal or court.*

This factor obtained the same average score as the third factor but was given a lower score of relevance by more participants (see the orange bars in Chart 4 above).

There are a number of aspects to consider about this factor: *first*, the State might have no budget specifically allocated to settlement of disputes, as opposed to paying any sum awarded by a tribunal or court. *Second*, obtaining approvals from more than one ministry or agency for a settlement might be a more “complicating and challenging” process. *Third*, this process might be further complicated by concerns of corruption—or the possibility of such accusations being levelled—on the part of the official(s) negotiating or suggesting the settlement deal. Given the many other underlying reasons that could explain this difficulty, this factor is unsatisfactory as a stand-alone reason and merits further study.

One participant cited a Latin American State as an illustration of how this difficulty operates as a bar to settlement, specifically the difference between “paying in cash and paying in debt”. It will “often be very hard [ . . . ] to get approval to pay a large sum in cash, particularly if it is a payment in foreign currency (which may affect reserves and/or trigger the need for other approvals)”. In contrast, paying in debt is easier because it can be “rolled-over and consolidated”.

This factor was mentioned a number of times in response to the previous question (“why might disputing parties be reluctant to settle”), with other participants suggesting the merits of alternatives to a monetary payout.<sup>24</sup>

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<sup>23</sup> This example clearly illustrates one of the limitations of this survey—the lines between the various factors are not always clear, and in many cases, they are closely intertwined.

<sup>24</sup> One participant listed “poorly structured settlement offers by investors (under-use of non-cash options such as bonds)” as the third most relevant reason why disputing parties were reluctant to settle.

5) *The dispute involves an industry or issue that is highly politicised or sensitive, like transboundary resources, extractive industries, or civil aviation.*

The subject matter of the dispute rounds up the list of the top five obstacles. The average score of this factor is very close to that of the third and fourth factors (see Chart 5 below and table in Annex 1).

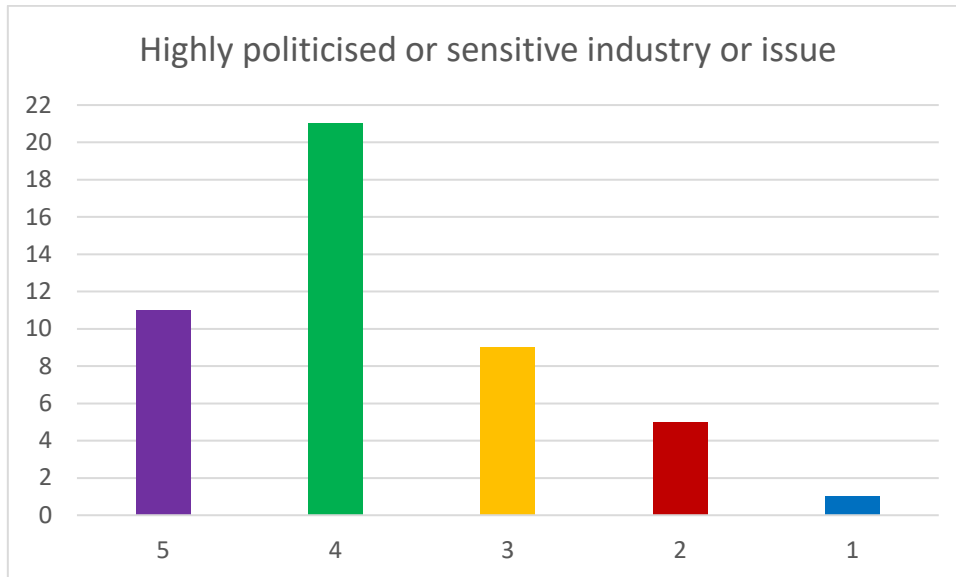


Chart 5

One of the key concerns surrounding investor-State arbitration is the number of disputes involving sensitive or politicised industries in the State. Unlike private commercial entities, a State party faces unique challenges and considerations. Thus, in such cases, it might be inappropriate to settle the dispute, especially when it could potentially affect a large number of third and/or non-parties to the dispute.

Participants offered a number of examples to illustrate this obstacle. One recent highly publicised case is instructive: that of Philip Morris Asia’s claim against Australia. The participant observed that the Australian government could “*never* have settled his dispute, because of the asset class (tobacco), the nature of the measures (plain packaging regulations for tobacco products) and what would have been involved in settlement (monetary compensation to a tobacco company or reversal of the relevant regulations)”.<sup>25</sup>

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<sup>25</sup> Emphasis added.

This factor was mentioned with low frequency in response to the other open-ended questions, and might share some overlap with how the dispute might have arisen out of a State's 'regulatory choices or actions'.

#### **4) The least relevant factors**

It is interesting to note not only the factors that were ranked most highly among the **29** distinct factors, but also those that the participants ranked lowly. Factors involving counsel (both internal and external), ranked in the **bottom 5**, along with the lack of "institutional support or facilitation of settlement". The relatively low rankings of these factors suggest that reluctance stems substantially from the **disputing parties** such that their counsel do not have significant influence over the likelihood of settlement.<sup>26</sup> However, as noted above in section I(2), the background of the participants might have skewed the results, given that a number of participants mentioned counsel as one of the top three most relevant reasons why disputing parties do not choose to settle their dispute.

#### **5) Top three most relevant reasons why disputing parties do not choose to settle their dispute**

The survey concluded by asking participants to list what they thought were the **top 3 most relevant** reasons why disputing parties do not choose to settle their dispute. This was a mandatory and open-ended question. As a result, there was a greater diversity of responses to this question as compared to the other open-ended questions, and there is no clear single most relevant reason. However, certain trends can be observed that accord with the results of the rest of the survey. In line with the findings from the rest of the survey, most of the factors were **political** in nature.

##### *1) Most relevant reason*

For instance, reflecting the results from the rest of the survey, the desire to avoid responsibility and the fear of criticism were the top two most frequently mentioned factors. Despite the diversity in responses, avoiding responsibility was mentioned **9** times as the most relevant reason. One participant bluntly stated that "States don't want the responsibility of a settlement", with another echoing the sentiment with the observation that "no one [wants] to take 'ownership' of settlement talks". The fear of criticism was mentioned **7** times, though usually as part of a larger fear of political consequences. Thus, one response mentioned the "reluctance

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<sup>26</sup> See above section III(3) for the reasons given by the participants for why they did or did not recommend settling.

by State officials to take decisions that may be criticised”, while another mentioned “Face (including National Prestige)”.

Many of the other reasons mentioned by the participants were identified during the CIL internal discussion:

- “bureaucratic red tape”;
- the “range of stakeholders”;
- a “difficult internal decision-making process”;
- the “fear of prosecution” for pursuing a settlement; and
- the “fear of inviting more claims”.

Participants also identified non-political reasons, such as the **momentum of proceedings**. As one participant put it, “the arbitration takes a life of its own”. Once arbitration commences, the disputing parties might feel they are on a “tramline” and do not consider settlement after having made “inflexible commitments to litigation”. Parties might also **overestimate the strength of their case**, with both parties believing they have a “reasonable chance of winning” or even having “unrealistic expectations of success”. Settlement might also not be possible after the commencement of arbitration, because the parties might have **attempted to settle prior** to initiation of the claim. In the words of one participant, the parties “generally have done what they can to settle before filing the case”.<sup>27</sup>

While the survey focused on *obstacles* to settlement, a couple of participants thoughtfully pointed out that conversely, it was the **lack of incentives** that made settlement rare. Thus, one participant mentioned the “lack of institutional incentive for state officials to pursue settlement”. As an example, one participant mentioned how, in an inter-State dispute, one of the disputing States might need the support of the other disputing State in another context. This would be an incentive to settle rather than to pursue the dispute. Conversely, there might also be an incentive to not settle, namely the hope that if the State wins the case, the current administration could “become highly popular”.

Lastly, only one participant mentioned the “ignorance of the benefits of ADR” as the top reason why disputing parties did not settle.

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<sup>27</sup> This was noted at the start of this report, in section I(2), as a limitation. It is possible that disputes which have not proceeded to the stage of formal notification face different challenges to settlement, or the same obstacles apply to varying extents.

## 2) *Second most relevant reason*

Bucking the trend of the desire to avoid or defer responsibility being mentioned most frequently, participants thought that the second most relevant reason had to do with the **breakdown of the relationship** between the two disputing parties.<sup>28</sup> Admittedly, there is some degree of inevitable overlap with other reasons such as the party holding an entrenched position on the merits of its case, but it can be distinguished as a separate factor. Thus, participants mentioned “distrust”, “enmity” and “animosity” between the disputing parties as a reason why they do not settle. In some cases, the “lack of interest in, or possibility of, a future relationship” was the reason why parties rather proceed straight to binding adjudication than attempt to reach an amicable settlement.

It was also in response to this question that the first mentions of the **role of counsel** appeared. This factor was also mentioned a number of times as the third most relevant reason, and is an outlier in the survey results given how lowly it was ranked by the participants (see section III(4) above). This speaks to the possible limitations of the survey: the backgrounds of the participants might bias them towards ranking the role of counsel as being relatively irrelevant as an obstacle to settlement. Yet when asked to state what they thought were the top three most relevant reasons for the reluctance of disputing parties to settle, participants mentioned the role of counsel. One participant stated that settlements did not occur because of the “*failure of external legal professionals to put the case for conciliation and settlement at all stages of the arbitration*”.<sup>29</sup> Another stated that it was the “lack of clear advice”, presumably from legal counsel. Counsel might also be caught up in the momentum of proceedings. As one participant explained, “neither party (including the client and the counsel) [. . .] pay enough time and attention to the possibility of settlement”.

Many of the reasons that appeared above were raised here as well. However, one specific reason merits mention: the option of **non-monetary alternatives**. One participant thought it was a significant obstacle that “claimants only consider monetary settlement as an option”. Coupled with how a State might face “challenges to committing financial resources to settlement” and the “reluctance of investors to accept a fraction of sums claimed”, the use of cash alternatives might make it easier for States to agree to settle.

## 3) *Third most relevant reason*

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<sup>28</sup> Responsibility was mentioned 4 times, as compared to 6 for the disputing parties.

<sup>29</sup> Emphasis added.



For the third most relevant reason, **unrealistic expectations** and an **inaccurate evaluation of the case** were mentioned with almost equal frequency as the familiar reason of the desire to avoid or defer responsibility.<sup>30</sup> Participants variously mentioned the following:

- a “failure to arrive at [a] dispassionate view of [the] strength of case”;
- “the inability to assess the merits [of the case]”; and
- the “lack of information and competence to evaluate claims”. This point is interesting because it raises the question of whether an early expert evaluation process might contribute towards encouraging parties to settle.

The **role of counsel** was again raised, with one participant describing in strong terms that “law-firm business models (ADR = Alarming Drop in Revenue)”, suggesting that counsel were financially motivated to pursue claims through arbitration regardless of the relative benefits of settlement for the client.<sup>31</sup> This sentiment was echoed by another participant who stated that “counsel may have a *financial interest to continue* with the procedure rather than terminate it”.<sup>32</sup>

The usual suspects—the desire to avoid or defer responsibility and the fear of criticism—were also raised. A few other notable reasons were mentioned:

- “third party funding”, the only time this was raised as a possible obstacle to settlement;<sup>33</sup>
- “socio-cultural factors which tend to view settlement with foreign parties as surrender”;<sup>34</sup>

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<sup>30</sup> Unrealistic expectations and the parties’ assessment of the case were mentioned 8 times, and responsibility 7 times.

<sup>31</sup> Shahla Ali interviewed an East Asian arbitrator who expressed a similarly adverse view of ADR, describing it as “an ‘Atrocious Drop in Revenue’”. See *supra* note 7, p. 269.

<sup>32</sup> Emphasis added. The financial incentive to not settle also appears in the context of international commercial arbitration, see *supra* note 7, pp. 268-9.

<sup>33</sup> A funder who has done its thorough due diligence would have funded a case because of the potential gain if the claim prevailed. If the case settled, the funder might receive far less than it forecast, or might not receive anything at all if the claim was settled through non-pecuniary means.

<sup>34</sup> In contrast, Professor Shin Hi-Taek wrote in his conference report that “prematurely filing a legal action without putting in a *bona fide* effort to find a mutually acceptable solution is considered distasteful in Korean society”. However, he also adds the “caveat” that it should be “done in an unassuming manner before litigation is filed and the dispute becomes public. In other words, face-saving is an important aspect of the dispute resolution process”. See *supra* note 19, p. 100.

- confidentiality concerns: “public disclosure of terms of settlement is [. . .] most unhelpful”,<sup>35</sup> and
- structural features of within the investor-State arbitration system: “the system is not built to encourage or facilitate settlement. The rules are set for an investment arbitration, and not mediation, or settlement”.<sup>36</sup>

#### **IV: OVERALL TRENDS**

Despite the relatively small sample size, we observed a number of clear trends below.

*One*, obstacles lie mostly on the State’s side; in contrast, the role of external factors like counsel and institutional support are relatively less relevant. However, this could very well be due to the way the investor-State arbitration system is structured. The State is always the respondent, and thus, the one objecting to the claim and more inclined to defend the claim.

*Two*, obstacles are predominantly political in nature. The State has considerations specific to it: for instance, the fear of criticism or negative media coverage has greater implications for a government than for a private party. Further, there is a corresponding lack of incentives to settle: any cost savings would be countered by difficulties in obtaining budgetary approval, and even the threat of allegations of or future prosecution for corruption. In effect, in many cases, it seems safer to do nothing.

*Three*, the most significant obstacle across all questions—ranking or open-ended—is the desire to avoid or defer responsibility. However, this is unsatisfactory as a stand-alone reason and requires further considerations of why it is easier for the State party to defer responsibility. Looking at the other frequently mentioned or highly ranked factors, such as various fears, might be instructive in this respect. These various fears (personal prosecution, criticism, political consequences) played a major role in discouraging settlement and are likely to be a key underlying reason behind the desire to avoid or defer responsibility. Fears could also explain the relatively high ranking of the relevance of factors such as media coverage pressuring the State to take a firmer stance.<sup>37</sup>

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<sup>35</sup> This has particular significance when considering how media coverage might pressure a State into taking a firmer, though objectively less beneficial, approach to a dispute. This was mentioned briefly when discussing the top ranked factors, see above Section III(3), and merits further exploration.

<sup>36</sup> Here, Professor Jack Coe’s suggestion of parallel conciliation proceedings whilst an arbitration is ongoing merits serious consideration.

<sup>37</sup> This factor obtained the second highest average score, indicating that a higher number of participants thought this factor was very relevant as an obstacle to settlement.

*Four*, there is the underlying sense too that the disputing parties would have attempted to settle before proceeding to file a claim, and hence, the need to consider the critical role of the *timing* of settlement discussions and proposals. In addition to that, ensuring strict confidentiality might go some way to encouraging the success of settlement proceedings and mitigate various fears, especially that of public criticism if there is little to no media coverage. However, we note that this goes against the trend of increasing transparency in the ISDS system generally.

*Five*, through the survey, we have identified a number of possibilities to explore in order to encourage resort to settlement :

- considering non-monetary settlement (or not just pure monetary settlement);
- identifying pathways and incentives to settlement;
- identifying the dispute before it proceeds to a formal claim;<sup>38</sup>
- identifying the stage of the proceedings when the parties are more likely to settle, if possible; and
- providing an early expert evaluation of the claim to enable the disputing parties to make better decisions as to how to proceed with the dispute.

## **V: CONCLUSION**

Through the survey, CIL sought to confirm and assess the relevance of the numerous obstacles identified during our working discussions. We consider that we achieved that aim and more, with participants contributing new perspectives and suggesting several other obstacles.

We identified several key issues through the survey results. *First*, the reluctance of State parties to assume the responsibility and risks associated with a settlement agreement cannot be underestimated. Even when a settlement would result in significant cost savings, a State party might still feel compelled to proceed with the arbitration and leave the decision to a third party. Further, while the express exclusion of admitted liability in a settlement agreement is usually seen to be an advantage, a State party could perceive it to be detrimental, especially where circumstances could lead the public to suspect that government officials would only agree to settle for personal gain.

*Second*, even when the disputing parties consider settlement a viable and beneficial option, the bureaucratic structure of the State might be a significant obstacle to settlement prospects. From

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<sup>38</sup> This is a limitation, as noted above in the report. The survey did not specify when it regarded the dispute as arising—whether it is when a formal notification is given or from the time a difference in opinion arises.

an accountability and governance perspective, the relatively lengthy time taken to consult and seek approval from all relevant government stakeholders is necessary. However, in addition to frustrating the counter-party, this process can lead to no consensus about what position to take. It is a positive development that some countries have set up a centralised agency to deal with all investment disputes, with the authority to conclude settlements as well.<sup>39</sup>

*Third and last*, although traditionally third parties (for instance, external counsel or an arbitration institution) play a limited role when it comes to settlement, this does not mean there is no assisting role for them at all. This might prove fruitful during the period of mandatory pre-arbitration negotiations provided for in most investment treaties. However, these provisions tend to be cursory<sup>40</sup> and implemented in a perfunctory manner in practice.<sup>41</sup>

In closing, we emphasise that we do not see conciliation as a panacea. There will always be some investor-State disputes that cannot be settled except by binding dispute resolution, including those that present zero-sum options. We also recognise the potential tension between promoting conciliation of investment disputes, which generally requires confidentiality, and the positive trend of increasing transparency in arbitration.<sup>42</sup>

CIL's overall goal with this conciliation project has been to identify categories of disputes that could be settled with some encouragement and support, and thereby save valuable resources of time, funds, and political capital.<sup>43</sup> We started by identifying significant obstacles in this project phase. In the next phase of research, we seek to build on and compare the anecdotal data gathered from the survey with empirical data based on the known, concluded cases in the UNCTAD database.

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<sup>39</sup> See for instance, Peru in 2010 UNCTAD Report on Investor-State Disputes: Prevention and Alternatives to Arbitration, pp. 68-72, specifically pp. 70-71 (“The Special Commission is, among other things, responsible for *strategically assessing possibilities for reaching amicable settlement*, obtaining technical reports and information from public entities involved in a dispute, taking part in the settlement negotiations, proposing the hiring of legal practitioners, designating arbitrators, assisting in the work of outside counsel hired for the defence of the State, *approving the availability of funds for conciliation or arbitration*, and determining the liability of the public entity involved in the dispute for the payment of relevant costs and awards.”) (emphases added).

<sup>40</sup> For instance, Article 1118, NAFTA simply reads: “The disputing parties should first attempt to settle a claim through consultation or negotiation.” Similarly, Article 23, US Model BIT 2012 reads: “In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.”

<sup>41</sup> Tribunals have generally interpreted this requirement laxly.

<sup>42</sup> Some participants also commented on this, see *supra* note 21. See also *supra* note 4, p. 34.

<sup>43</sup> According to the latest UNCTAD data, a significant percentage (24.4%, or 121 out of 495 concluded cases) of known investor-State cases settled. See: <http://investmentpolicyhub.unctad.org/ISDS> (Last checked: 16 May 2017). However, as with Professor Coe, we believe it is possible for conciliation/mediation to “add appreciably to that percentage”. See *supra* note 4, p. 35.

**ANNEX 1: List of all factors ranked according to average score**

<b>Ranking</b>	<b>Factor</b>	<b>Average Score</b>
1.	It might be easier for the State to defer the responsibility of decision making to a third-party adjudicator: since it has to comply with the decision, it can say it has done its best to defend the offending measure.	4.15
2.	The dispute becomes a political concern/issue because of media (international and/or domestic) coverage, pressuring the state to take a firmer stance.	3.91
3.	Fear of public criticism.	3.79
4.	It might be difficult for an official to obtain budgetary approval for a settlement, as opposed to any sum awarded.	3.79
5.	The dispute involves an industry or issue that is highly politicised or sensitive, like transboundary resources, extractive industries, or civil aviation.	3.77
6.	Various ministries and agencies have different, competing and even conflicting perspectives and priorities.	3.72
7.	Fear of possible prosecution for either alleged corruption or sacrificing the State's interests by negotiating a settlement alleged to be disadvantageous to the State.	3.68
8.	Difficulty in reaching consensus over what position should be taken on settlement.	3.64
9.	Key political figures have previously taken a position on the dispute, making it look like the government has capitulated by settling.	3.62
10.	The hierarchical nature of government decision making: ministers and senior officials might be insufficiently apprised of litigation risk and not fully appreciate early opportunities to seek a resolution of the dispute. This can result from the distillation of information as it moves up the chain of reporting from the desk officers to his/her superior and further up to senior officials.	3.62
11.	Public sentiment.	3.57

12.	Of ministerial statements made publicly about the dispute that might constrain the government's freedom to act with regard to the dispute, especially settling.	3.57
13.	A new administration becomes more or less hostile to its predecessor.	3.55
14.	The dispute involves a regulated industry, and arises out of the State's regulatory choices or actions.	3.55
15.	Disputing parties might have no interest in maintaining a long-term relationship.	3.51
16.	Fear of setting a precedent for future demands, i.e. settling the dispute might be seen as inviting more claims.	3.43
17.	Opportunities to settle early on in the dispute might be missed because of the time taken for information to be distilled and passed up to the relevant decision makers who have the power to authorise settlement.	3.43
18.	Deadlock resulting from inability to reconcile the various priorities and perspectives.	3.38
19.	When opportunities to settle arise, decision makers might not be in a position to properly assess the opportunity or even to recognise when that opportunity arises due to lack of adequate or timely information.	3.36
20.	Subnational governments might not be aligned with central governments (the latter being responsible for the carriage of international disputes).	3.26
21.	Information might not be fully or accurately passed from the preceding official in-charge to his/her successor.	3.26
22.	A failure to regularly re-evaluate the dispute as it progresses, leading to ministers/officials relying on unadjusted early appraisals of the merits of the dispute.	3.21
23.	The bureaucratic process of obtaining inter-ministry/agency approval for a settlement is so time-consuming that States might default to a decision by a tribunal/court.	3.17
24.	Disputing parties might simply not be interested in settlement.	3.11

25.	Counsel (both internal and external) might push for strong positions right from the onset.	3.04
26.	Institutional support or facilitation of settlement might be lacking, reducing the probability that the disputing parties would consider settlement as a viable option.	2.94
27.	Counsel (both internal and external) might become increasingly entrenched in their positions as the dispute progresses, refusing to consider settlement.	2.85
28.	The weaker party might feel empowered by its equal standing before the court/tribunal, and hence reluctant to settle.	2.70
29.	The stronger party might be aggravated by a perceived lack of deference by tribunal/court.	2.66

## ANNEX 2: Full copy of the survey

### SURVEY: Obstacles to Settlement

#### Introduction

Based on research at the Centre for International Law, the following factors were raised as obstacles to settlement in investor-state and state-state cases. We would like to obtain your thoughts and input on these factors, i.e. how relevant various factors are, whether there are any other factors that occur to you and were not mentioned, and any anecdotal experiences you might want to share (see the various examples below).

This survey takes about 5 minutes to complete. Questions marked with a \* are mandatory.

#### Preliminary questions

Please use an 'X' to indicate your response within the boxes.

- 1) Have you acted for both states and investors?\*

Yes	
No	

If yes:

- 2) What is the rough split of your client base? Note that majority means above 60%.

Majority state	Roughly equal mix of state and investor	Majority investor

For both yes and no:

- 3) Have you ever advised your client to consider settling the dispute?\*

All the time	Very often	Somewhat often	Not usually	Not at all



If you have, without disclosing any confidential information, can you elaborate on what considerations led you to recommend settling?

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4) Based on your experience, which party is more reluctant to consider settling?\*

Investor	State	Both parties equally

If you have experienced such reluctance, can you explain what might have motivated it?

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**I. Political factors**

In a dispute, the state might be reluctant to settle for various political and/or public policy reasons. The dispute might have already become a political issue before it was submitted to dispute settlement. There might also be public, NGO or opposition party pressure on the government to adopt an adversarial approach. Individual decision-makers might be unwilling to negotiate a settlement for a variety of different reasons.

Based on your experience, how relevant do you think the factors below are in a state’s consideration of whether or not to settle? Please use an ‘X’ to indicate your response within the boxes.

Ranking:

5 = Highly relevant

4 = Very relevant

3 = Somewhat relevant

2 = Not really relevant

1 = Not relevant at all

1) The dispute becomes a political concern/issue because\*:

	1	2	3	4	5
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Of media (international and/or domestic) coverage, pressuring the state to take a firmer stance.					
Of ministerial statements made publicly about the dispute that might constrain the government's freedom to act with regard to the dispute, especially settling.					
Of public sentiment.					
Key political figures have previously taken a position on the dispute, making it look like the government has capitulated by settling.					
The dispute involves an industry or issue that is highly politicised or sensitive, like transboundary resources, extractive industries, or civil aviation.					
The dispute involves a regulated industry, and arises out of the State's regulatory choices or actions.					

Further comments/examples (please feel free to record your experiences below):
<i>Example:</i> during the late 1980s in a dispute between Canada and the United States over Canadian requirements that salmon and herring caught in Canada's Pacific waters be processed in Canada, after the United States succeeded in challenging the measure at the GATT, the Canadian minister of fisheries announced in the House of Commons that new Canadian measures would be legally compliant with Canada's international obligations, but would achieve the same effect as the measures previously found to be GATT-inconsistent. This led to a new US legal challenge under the Canada-US FTA. The minister's defence of the measures in Parliament made settlement virtually impossible.
<i>Example:</i> President Obama opposed construction of the Keystone XL Pipeline, a proposal to transport crude oil from Canada to the United States for downstream processing, stating that it was a political issue. This eventually led to the Canadian investor filing a claim against the USA under NAFTA rules in September 2016.
<i>Example:</i>
<i>Example:</i>

<i>Example:</i>

2) Change in political stance due to change in administration, leading to refusal/reluctance to settle a dispute\*:

1	2	3	4	5

Where a new administration becomes more or less hostile than its predecessor.

Further comments/examples (please feel free to record your experiences below):

*Example:*

*Example:*

*Example:*

3) Decision-makers/officials are reluctant to settle due to various reasons\*:

1	2	3	4	5

Fear of public criticism.

Fear of possible prosecution by a future administration for either alleged corruption or 'sacrificing the State's interests' by negotiating a settlement alleged to be disadvantageous to the State.

Fear of setting a precedent for future claimants, i.e. settling the dispute might be seen as inviting more claims.					
The bureaucratic process of obtaining inter-ministry/agency approval for a settlement is so time-consuming that States might default to a decision by a tribunal/court.					
It might be easier for the State to defer the responsibility of decision-making to a third-party adjudicator: since it has to comply with the decision, it can say it has done its best to defend the offending measure.					

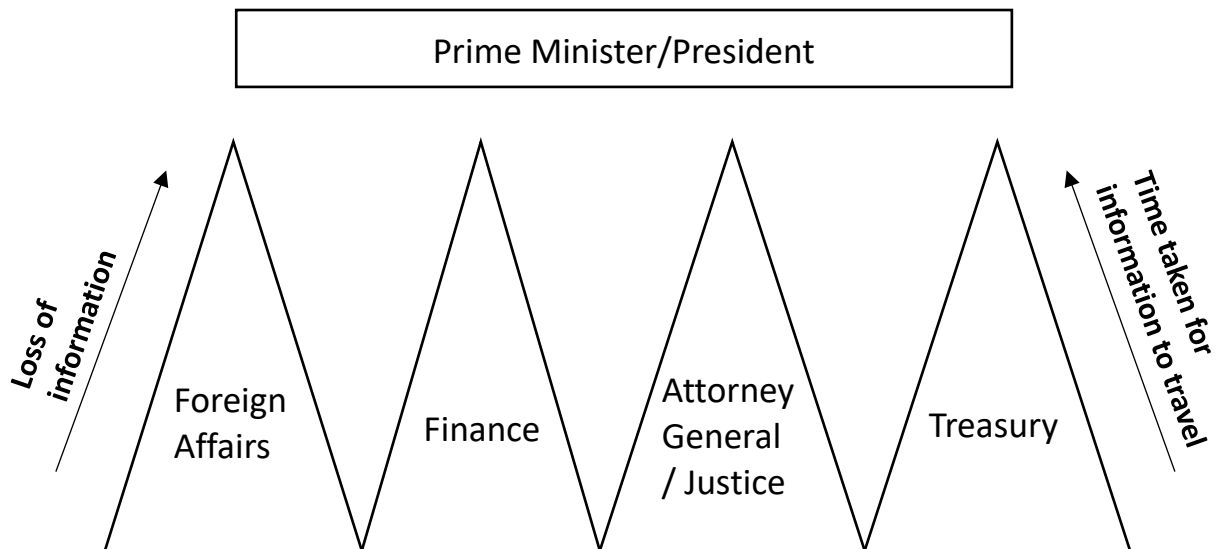
Further comments/examples (please feel free to record your experiences below):
<p><i>Example:</i> in some countries, there is legislation stating that an official can be personally liable for making a decision in his or her role that is allegedly adverse to state interests. As an example of this, a Bolivian Minister was removed from office and subsequently came under criminal investigation after she agreed to transform ICSID arbitration into proceedings under UNCITRAL Arbitration Rules before the same arbitrators. The minister had taken this step because Bolivia withdrew its consent to the ICSID Convention three days after the investor filed the claim at the Centre, and the state risked losing its jurisdictional objections.</p>
<p><i>Example:</i></p>
<p><i>Example:</i></p>
<p><i>Example:</i></p>

**II. The structure of the State may hinder effective and efficient decision-making, including whether to settle**

The structure of the State may hinder effective and efficient decision-making, including whether to settle. In order to properly evaluate a dispute and make decisions about how to proceed, including whether to pursue settlement, decision-makers require precise, accurate and timely information. The hierarchical structure of the State affects how information is conveyed, and may hinder effective and efficient decision-making about disputes and whether to settle.

Based on your experience, how relevant do you think the factors below are in a state's consideration of whether or not to settle?

A diagram illustrating the structure of the State is presented below:



- 1) The lack of precise, accurate and/or timely information about a dispute reduces the chances of settlement because\*:

Of a failure to regularly re-evaluate the dispute as it progresses, leading to ministers/officials relying on unadjusted early appraisals of the merits of the dispute.	1	2	3	4	5

Of the hierarchical nature of government decision-making: ministers and senior officials might be insufficiently apprised of litigation risk and not fully appreciate early opportunities to seek a resolution of the dispute. This can result from the distillation of information as it moves up the chain of reporting from the desk officers to his/her superior and further up to senior officials.					
Information might not be fully or accurately passed from the preceding official in-charge to his/her successor.					

Further comments/examples (please feel free to record your experiences below):
<i>Example:</i> an administration in a municipality in a Latin American State had very few records relevant to a dispute to rely upon due to the fact that the former mayor had kept all of his records upon completing his term of office.
<i>Example:</i>
<i>Example:</i>
<i>Example:</i>

2) Different perspectives/priorities of different ministries and agencies hinder effective decision-making because*:	1	2	3	4	5
Various ministries and agencies have different, competing and even conflicting perspectives and priorities.					
Of difficulty in reaching consensus over what position should be taken on settlement.					

Of deadlock resulting from inability to reconcile the various priorities and perspectives.					
Subnational governments might not be aligned with central governments (the latter being responsible for the carriage of international disputes).					

Further comments/examples (please feel free to record your experiences below):
<i>Example:</i>
<i>Example:</i>
<i>Example:</i>

3) Timing of decision-making\*:

	1	2	3	4	5
Opportunities to settle early on in the dispute might be missed because of the time taken for information to be distilled and passed up to the relevant decision-makers who have the power to authorize settlement.					
When opportunities to settle arise, decision-makers might not be in a position to properly assess the opportunity or even to recognise when that opportunity arises due to lack of adequate or timely information.					

Further comments/examples (please feel free to record your experiences below):
<i>Example:</i>
<i>Example:</i>

<i>Example:</i>
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**III. Other Factors**

Based on your experience, how relevant do you think the factors below are in a party's consideration of whether or not to settle?

The ranking is as follows:

5 = Highly relevant

4 = Very relevant

3 = Somewhat relevant

2 = Not really relevant

1 = Not relevant at all

1) Counsel (both internal and external)\*:

	1	2	3	4	5
Might become increasingly entrenched in their positions as the dispute progresses, refusing to consider settlement.					
Might push for strong positions right from the onset.					

Further comments/examples (please feel free to record your experiences below):

*Example:* after a key witness withstood aggressive cross-examination, opposing counsel raised the possibility of a settlement. However, buoyed by the witness' success, the counsel tendering him declined to discuss settlement. Later in the hearing, opposing counsel conducted a successful cross-examination of another witness and improved his case. However the time for settlement discussions had passed.

*Example:*

*Example:*



<i>Example:</i>

2) Disputing parties\*:

	1	2	3	4	5
Might simply not be interested in settlement.					
Might have no interest in maintaining a long-term relationship.					
The weaker party might feel empowered by its equal standing before the court/tribunal, and hence reluctant to settle.					
The stronger party might be aggravated by perceived lack of deference by tribunal/court.					

Further comments/examples (please feel free to record your experiences below):

*Example:* the Eritrea-Ethiopia commission, at various points, advised Eritrea and Ethiopia to settle their dispute, as it would affect their future chances of obtaining development funding from international financial institutions if liability was eventually established. However, both countries declined to settle.

*Example:*

*Example:*

*Example:*

3) External factors\*:

	1	2	3	4	5
Institutional support or facilitation of settlement might be lacking, reducing the probability that the disputing parties would consider settlement as a viable option.					
It might be difficult for an official to obtain budgetary approval for a settlement, as opposed to any sum awarded.					

Further comments/examples (please feel free to record your experiences below):

*Example:*

*Example:*

*Example:*

Finally, in your opinion, what are the **top 3** most relevant reasons why disputing parties do not choose to settle their dispute?\*

1:

2:

3:

Contact details

If you wish to be informed when we complete compilation of the survey responses, please leave your email address below.

Email address: \_\_\_\_\_