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Do States Bargain Over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties

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Abstract: In this Symposium Essay I argue that social scientists interested in the empirical study of law-related phenomena should take greater advantage of opportunities to collaborate with traditionally trained legal experts. Legal experts can play a critical role in improving the quality of social scientific understandings and operationalizations of law. The legal expert's role should be considered as substantial and important to the research enterprise, as it entails the verification that the social scientist's observations of law meaningfully capture the ideas contained in the theoretical concepts of interest. I illustrate my argument by reference to a recent empirical study by two political scientists that examines the extent to which states bargain over investor-state dispute settlement provisions in bilateral investment treaties.

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TABLE OF CONTENTS

I. Introduction

This symposium essay was originally prepared for a workshop on the "Political Economy of Bilateral Investment Treaties" organized by the London School of Economics. It was subsequently presented at and refined for the Symposium that produced the papers published in this volume of the Santa Clara Journal of International Law.

The LSE workshop brought together a group of prominent international legal experts, political scientists, and economists. The workshop organizers asked participants to "discuss research approaches and results, methodological challenges, and possibilities for future collaboration" on the empirical study of bilateral investment treaties (BITs). The discussion at the workshop was fruitful and stimulating, as was the Symposium, and as I've reflected on the exchanges I've come to accept as probably "true" two interrelated impressions.

First, traditionally trained legal experts interested in the empirical study of BITs typically don't know much about the modern statistical methods of theory-testing and causal inference that underlie many social scientific studies of investment treaties. This impression is probably not too surprising. As two prominent political scientists pointed out several years ago, even self-consciously "empirical" legal academics often violate social scientific norms of empirical inquiry.[1] Legal experts typically have no formal training in social science methods, and there are few professional incentives for them to learn those methods, or to apply them in ways recognized as appropriate by the social scientific community.

But second, and more surprisingly (at least to me), it seems that social scientists interested in BIT questions but untrained in law itself often don't know much about how legal experts involved in the BIT community experience and understand the law of BITs. That gap between law as viewed by social scientists and law as viewed by legal experts was especially evident in discussions of how social scientists had constructed key concepts (such as the "strength" of investment treaties), or in how they operationalized those concepts as variables in statistical analyses. While statistical tests of social phenomena always require the simplification of complex realities into the numerical scales and categories that make statistics possible, in some important cases it seemed as if the social scientists had simply gotten the law "wrong" in some objective sense.

If those two impressions are accurate, they are positive in the sense of suggesting that lawyers and social scientists enjoy room to collaborate in a fruitful and mutual way. The notion that lawyers and social scientists should collaborate is not new, of course. In recent years legal academics have been accused, probably with some degree of justification, for naively and perhaps negligently ignoring essentially sound and fundamental rules of causal inference when making and testing claims about how the world works. Perhaps the most well-known and scathing critique is contained in a 2002 article by political scientists Epstein

1. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (providing a scathing critique).

and King.[2] They argue that virtually all empirical studies in law reviews fundamentally violate basic norms of acceptable empirical research and are largely inferentially worthless.[3] While Epstein and King's critique doesn't explicitly call on law professors to embrace quantitative/statistical research methodologies, their admonitions can be viewed as representing a certain kind of "statistical worldview"[4] that is today well represented in the burgeoning "empirical legal studies" (ELS) movement.[5]

It seems supportable to hold that the legal academy is ill suited to autonomously producing sophisticated or even high-quality empirical (and especially quantitative) studies of law. This is due to such things as a lack of methodological training and, probably less importantly, the lack of a peer-review process that might, in theory, prevent poor-quality empirical studies of law from being published in the first place.[6] One solution that is sometimes mentioned is to promote collaboration between social scientists and law professors.[7] But such calls can seem one-sided, with the benefits of collaboration presumed to flow in a single direction—from the methodologically well-trained social scientist to the methodologically naïve or illiterate legal scholar. In this view, the primary aim of collaboration seems to be to improve the empirical scholarship of *legal* academics, and not (mutually or instead) to improve the law-related empirical scholarship of non-lawyer social scientists.

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2. *Id.*
3. *Id. S*ee *also* Gregory Mitchell, Essay, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 171-172 (2004).
4. As McKeown has called it, criticizing similar arguments made by King in an earlier book aimed at political scientists. Timothy J. McKeown, *Case studies and the statistical worldview*, 53 INT'L ORG. 1 (1999).
5. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006) (praising empirical legal studies as "arguably the next big thing in legal intellectual thought"); Theodore Eisenberg, *The Origins, Nature, And Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713 (2011) (describing the history of the empirical legal studies movement).
6. Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in Law*, 53 J. LEGAL EDUC. 311 (2003) (advocating that law reviews incorporate a peer-review process); Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* 71 LAW & CONTEMP. PROBS. 17, 26 (2008) ("most criticism of empirical research by law professors is based on quality. . . . Most of this critique is aimed at law reviews and the unique conventions of law-review publishing"). Of course, peer-reviewed law reviews would do nothing to encourage or enable law professors to produce empirical research of social scientific quality. It would only—in theory—prevent "bad" research from being published.
7. Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 367 (1995) (advocating for collaboration); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 817-18 (1999) (suggesting same); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 828-829 (1991); Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 386 n.129 (2008).

In this essay I suggest that there is, in fact, much to be gained *by social scientists* from collaboration with traditionally trained law professors or lawyers (collectively, "legal experts"). Where the social scientist is interested in producing an empirical study about law, whether law is taken as a dependent or independent variable, the legal expert can play an especially valuable role helping to ensure the validity of the social scientist's measurements of legally related phenomena. This role should be considered as substantial and important to the research enterprise, as it entails the verification that the social scientist's observations of law "meaningfully capture the ideas contained in the theoretical concept[s]" of the study.[8]

The remainder of the Essay proceeds as follows. First, in Section 2 I describe in general terms the potential contribution of the legal expert to social scientific studies of law and law-related phenomena. Then, in Section 3, I provide a concrete example of the problem that collaboration with legal experts might help mitigate, focusing on a recent social scientific study of bilateral investment treaties that contains conceptualizations of international law that, in my view, would have benefitted from legal expertise. In Section 4, I draw on legal expertise ISDS to suggest three basic legal "facts" about ISDS that might inform a social scientific examination of the question of whether and how states bargain over ISDS. Section 5 then applies those facts to recode the dependent variable of the original social scientific study discussed earlier. Section 6 presents a sample statistical analysis demonstrating how empirical results are materially sensitive to the recoding exercise. Section 7 provides a brief conclusion.

II. The Potential Contribution of the Legal Expert

By helping to ensure what we can call "measurement validity"[9] the legal expert can improve the soundness of the social scientist's causal inferences, and of the policy recommendations that may be derived from those inferences. In the process, he also helps build better theories, as good theories depend upon sufficiently "realistic" conceptualizations of the underlying phenomena that are to be measured.

The legal expert does this by helping the social scientist understand the "grammar" of the relevant legal community. [10] As law professor Michael Byers has suggested in an essay that

8. Robert Addock & David Collier, *Measurement Validity: A Shared Standard for Qualitative and Quantitative Research*, 95 AMER. POL. SCI. REV. 529, 530 (2001) (discussing measurement validity).
9. *Id.*
10. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). As Fiss argues, Rules are not rules unless they are authoritative, and that authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative. This means, above all else, that the objective quality of interpretation is bounded, limited, or relative. It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules. *Id.* at 745.

urges greater collaboration between international law experts and international relations theorists, social scientists who study treaties have a history of "mishandling or ignoring . . . concepts . . . that . . . appear[] basic to an international lawyer" but that "might seem irrelevant or impenetrable to someone from another discipline".[11] The legal expert can help to explain the content and relevance of those concepts by drawing on his familiarity with the ways in which legal practitioners (and others engaged with the law on a regular basis) view the relevant rules and institutions as constraining or providing opportunities for action.

Put a bit differently, empirical social-scientific studies of law, or that use law, are in a very real sense dependent upon the juristic legal conceptions around which members of the legal community coordinate their actions.[12] To empirically study the law usually means borrowing the meaning of law as understood by those who use it on a daily basis. As Cotterrell notes, "the intellectual situation seems parallel to that in criminology. 'Crime' seems to be what the law says it is; 'law' seems to be what the state and the lawyers say it is."[13]

What Cotterrell has in mind, I think, is the notion that the legal community tends to focus or coordinate around particular, shared understandings of what the law "is", with a sort of equilibrium achieved iteratively through the workings and interactions of individual legal actors and legal institutions, constrained by the professions' shared legal culture, norms, outlooks, appreciations, and the like.[14] The grammar of law is this shared understanding (which can also be viewed in a Holmesian sense as a prediction of how other members of the legal community will understand the law), where the grammar both observes and influences the law.[15]

The legal expert's formal training (which embeds certain skills and attitudes) and his repeated social and professional interaction with other members of the legal community,

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11. Michael Byers, Response: *Taking the Law Out of International Law: A Critique of the "Iterative Perspective,"* 38 HARV. INT'L L.J. 201, 205 (1997) (asserting that international relations scholars who study treaties have a history of "mishandling or ignoring . . . concepts . . . that . . . appear[] basic to an international lawyer" but that "might seem irrelevant or impenetrable to someone from another discipline").
12. Roger Cotterrell, *Socio-Legal Studies, Law Schools, and Legal and Social Theory*, (Queen Mary Univ. of London, Sch. of L. Legal Stud. Res. Paper No. 126, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154404.
13. *Id.* at 4. It's also possible that social science can itself "cause" law, if the legal community adopts social scientific arguments as to what the law is, or should be. *Cf.* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 777 (1986) ("Legal economists have a tendency to claim too much; they are notoriously imperial. . . . On the other hand, [their] claim . . . may turn out to be true after all. This will happen if lawyers come to believe in the claims, and if judges and administrators actually *use* economics to solve problems."). Note, however, the determinant position of lawyers here. It is *they* who decide whether a social science understanding of law is transformed into actual law.
14. *See* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009) (describing law as the solution to a coordination game).
15. *See* Anthony D'Amato, *Legal Realism Explains Nothing*, 1 WASH. U. JURIS. REV. 1 (2009) (explaining the Holmesian "prediction theory" of law).

means that the legal expert is in a potentially strong position to describe (or predict) the community's understanding of what law means or how law works. And because that community is responsible for making the law work, their understandings act as law itself. This predictive expertise is not easily gained by those outside of the profession, who lack the requisite training and the access to (or patience for) the community's conversations that are often necessary for moving beyond simplistic and even wrong understandings of the law—for example, law as what the law books say it is (excessive formalism) or law as "politics by other means" (excessive cynicism).[16]

III.An Example of the Problem

I've suggested above that legal experts embody knowledge about the law (or about legal systems, or legal institutions); and that, furthermore, non-law-trained political scientists interested in empirically studying legal phenomena may benefit from collaboration with legal experts in designing their theories and empirical tests thereof. Let's turn now to an example of the problem through an illustration of what I view as a positive (by which I mean good, interesting) example of modern empirical political science/international relations scholarship that nonetheless, I think, gets the law "wrong" in a way that detracts from the persuasiveness of the article's underlying theory and findings. The example is drawn from the growing body of empirical studies of bilateral investment treaties (BITs).

To offer some brief background: The BIT phenomenon has attracted significant interdisciplinary and empirical attention, for the obvious reason that there are now roughly 3,000 signed investment treaties, virtually all of which contain binding state consents to investor-initiated arbitration. The result has been an explosion of BIT-based litigation, with the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) now having registered nearly as many investor-state arbitrations as the WTO has registered trade disputes.[17]

Existing empirical studies of BITs can be broken into two basic and distinct lines of research. On the one hand, a number of scholars from a variety of academic disciplines have examined BITs as independent variables, looking at whether the treaties cause increases in foreign direct investment (FDI).[18] On the other hand, a somewhat smaller number of

16. Albeit, to be fair, cynicism that is able to predict Supreme Court decisions with significant accuracy, if not much theory. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (reviewing and critiquing such studies). One of Frank's critiques is that these studies often contain overly simplistic understandings of the "legal model" of judicial decision-making that purely political models are often said to disprove.

17. At the date of writing, the ICSID website lists 449 registered disputes: 175 pending cases and 274 concluded cases. INT'l CTR. FOR THE SETTLEMENT OF INV. DISPUTES, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (last visited Oct. 17, 2013). The WTO website lists 434 registered disputes.

18. The most important empirical BIT studies are cited in Jason Webb Yackee, *Do Bilateral*

scholars, operating primarily within the discipline of political science, have examined BITs as dependent variables, attempting to explain such things as why states sign BITs,[19] or why states sign BITs with particular provisions.[20]

I focus here on the second kind of study, a recent article by Professors Allee and Peinhardt, both political scientists, that treats international investment law (BITs) as a dependent variable. Their article, "Delegated Differences", appeared in the 2010 volume of the respected international relations journal *International Studies Quarterly*.[21] By focusing on their article, I do not mean to imply that it is a "bad" article, or that it is for some reason especially deserving of criticism. Indeed, I view their empirical work on BITs, including "Delegated Differences", as providing valuable, important contributions to our thinking about investment treaties. I focus here on their work simply because it provides a useful and unusually clear example of how such work might be further improved through collaboration with legal experts.

In "Delegated Differences", Alee and Peinhardt are interested in explaining differences in the texts of investment treaties. As is standard in political science research, they present their empirical study in the context of testing a theory, here of state behavior (whether to sign a BIT containing particular text) and based upon on an informal rational choice bargaining model.

In thumbnail form, their theory proceeds as follows. Home and host states both want to sign BITs (to protect investors on the one hand, and to promote inward investment on the other). But the ideal-typical home and host states have different preferences as to the content of the BITs they want to sign. Allee and Peinhardt believe, as do I, that the investor-state dispute settlement (ISDS) clauses of BITs are among the most important of the treaty provisions (because they make BIT substantive guarantees enforceable, and thus credible), and they argue that home-host bargaining will take place around ISDS clauses. In particular, home states will want strong ISDS, while host states will want weak ISDS. These predictions are based on the assumptions that host states are very concerned about sacrificing sovereignty to ISDS tribunals, while home states are very concerned about gaining access to ISDS to provide legal protection for their investors.[22]

Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence, 51 VA. J. INT'L L. 397 (2011).

19. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006).
20. Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1 (2010).
21. *Id.*
22. Incidentally, I am not sure that this bargaining model makes much theoretical sense. If we assume that developing countries sincerely desire more investment, and if we assume that they are convinced that they need to sign investor-friendly BITs in order to attract that investment—because investors demand "strong" BITs as a condition to invest—then why would those developing states take a bargaining position in favor of "weak" BITs that will not attract investment?

To operationalize and test their theory, Allee and Peinhardt code the strength of ISDS provisions (their dependent variable) by noting the dispute settlement fora to which each BIT grants investors access. They also collect a number of independent variables measuring concepts related to the strength of home state preferences for strong ISDS, the strength of host state preferences for weak ISDS, and the balance of bargaining power between home and host states. So, for example, where a home state has a strong preference for strong ISDS, a host state has a weak preference for weak ISDS, and the home state enjoys significant bargaining power, the model would predict the BIT to contain a strong ISDS provision.

The key to the present discussion is the way in which Allee and Peinhardt conceptualize and operationalize ISDS strength. The authors start from the well-supported observation that the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) seems to be involved in the vast majority of known BIT arbitrations, and that ICSID is plausibly said to enjoy some practical advantages over other arbitral mechanisms, such as ad hoc arbitration under the UNCITRAL Arbitration Rules or institutional arbitration managed by private organizations like the International Chamber of Commerce (ICC). For example, the ICSID Convention requires signatory states to enforce ICSID awards as if they were non-appealable final domestic court judgments. In contrast, awards rendered under an UNCITRAL or ICC process are enforced under the New York Convention, which governs the international enforceability of international commercial arbitration awards more generally and which contains a handful of escape clauses for states that wish to refuse enforcement.

From these observations about ICSID's relative importance and its possible advantages as an ISDS forum, Allee and Peinhardt make the facially plausible argument that ISDS provisions that contain consents to ICSID arbitration are better (from the home state's and investor's perspective) than are ISDS provisions that do not grant jurisdiction to ICSID. But many BITs contain ISDS provisions that consent to ICSID arbitration and to alternatives such as those mentioned in the previous paragraph. Other BITs contain consents to ICSID alone. Some BITs don't mention ICSID, but do contain consents to alternative fora. And yet other BITs contain no ISDS provisions whatsoever. Allee and Peinhardt propose to rank these four possibilities according to the concept of the amount of "delegation" to ICSID.[23] They consider a BIT to contain a "full delegation" of dispute settlement authority to ICSID where the treaty's ISDS clause consents *only* to ICSID. This is, in their view, the "best" BIT (from the home state's perspective).

Second best is the BIT that consents to ICSID *and* to alternative fora. For Allee and Peinhardt, this kind of ISDS provision represents a "partial delegation" of decision-making authority to ICSID because the investor is free to invoke ICSID's jurisdiction, or to choose a non-ICSID option. Host states that seek to limit the extent of their sacrifice of sovereignty

23. Allee & Peinhardt, *supra* note 20, at 15 (describing their ranking scheme).

will, according to this schema, prefer a "partial" rather than a "full" delegation. The delegation is "partial" because "multiple options for dispute settlement opens the door to delay and removes the efficiency gains associated with exclusive delegation to ICSID."[24] And finally, BITs that fail to contain *any* delegation to ICSID are the weakest. This category seems to include both those BITs that consent to ICC or UNCITRAL arbitration (but not ICSID) as well as those BITs that fail to contain effective, comprehensive ISDS clauses.[25] Table 1, below, contains a summary of my understanding of their rank ordering scheme.

Table 1: Allee & Peinhardt's Dependent Variable: Concept & Operationalization

Rank Order (Higher=Better)	*Concept*	*Operationalization*
2	Full ICSID delegation	Only ICSID arbitration
1	Partial ICSID delegation	ICSID + UNICTRAL &/or other arbitration
0	No delegation to ICSID, but delegation to something else	UNCITRAL &/or other arbitration
0	No delegation to anything	No ISDS

The authors test their theory statistically. They find that a number of their independent variables are statistically significant and signed in the predicted direction. For example, home states that have strong interests in a "full" delegation to ICSID are more likely to enter into BITs with higher-ranked ISDS provisions. Host states that have a greater interest in or need for FDI (measured by such things as their reliance on foreign aid) are also more likely to consent to stronger ISDS provisions. Allee and Peinhardt conclude that for home and host states, "the decision to delegate dispute settlement authority to ICSID has been an important one."[26]

24. Allee & Peinhardt, *supra* note 20, at 7.
25. I say "seems" because Allee and Peinhardt do not expressly talk about the possibility of BITs that fail to contain ISDS provisions. Allee & Peinhardt, *supra* note 20.
26. Allee & Peinhardt, *supra* note 20, at 24.

IV. The Contribution of Legal Expertise

We can now begin to imagine how an expert in the law and practice of BITs, even one with little or no statistical training, might have contributed meaningfully to the analysis, making it potentially more realistic, or, at least, potentially more convincing to those members of the relevant legal community.[27] I organize the discussion around three basic observations about IIL that I think are likely to be shared by most legal experts working in the area but that are not necessarily obvious to non-legal experts: the value of ISDS of any kind, the importance of context, and the use of model clauses.

A. The Value of ISDS of Any Kind

Let's start at the bottom of Table 1. Lawyers are trained to appreciate that rights unaccompanied by remedies are often of dubious value to the rights-holder. In that vein, and as I have argued elsewhere, BITs that contain no ISDS provisions are probably of very little theoretical or practical value as host state credible commitment devices.[28] A BIT that promises investors favorable substantive treatment, in vague terms, but that doesn't give the investor the right to access international arbitration to interpret and apply those terms in an authoritative and enforceable way offers foreign investors little to no international legal protection against opportunistic host state behavior. From that perspective, equating BITs with no ISDS with BITs that provide access to non-ICSID ISDS is problematic. This is especially so because arbitral alternatives to ICSID (pure ad hoc arbitration, non-institutional arbitration under the UNCITRAL Rules, institutional arbitration under the ICC) have historically proven to be a valuable addition to the foreign investor's legal arsenal. Indeed, in the 1960s and 1970s ad hoc contract-based arbitration produced numerous important awards supporting the international legal principles of *pacta sunt servanda* and of meaningful compensation in the event of expropriation.[29] As a starting point, the legal expert would probably suggest that BITs with no ISDS are likely to be significantly worse for investors than are BITs with an ISDS provision consenting to ad hoc or any other kind of arbitration.

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27. It is always possible for political scientists to refuse to care whether lawyers think their law-related theories and findings are persuasive or not. But where we are interested in explaining how states as collective abstracts understand and experience law, it seems to me pretty relevant to have an accurate understanding of how the lawyers who advise and constitute the state see the law; their lawyer's view of the law becomes the state's view, in a sense. To not care about their views is to devalue realism as something that political science theories should reflect. I suppose that this devaluation may be acceptable, depending on one's view of what the point of the research enterprise is.
28. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOKLYN INT'L L. J. 405, 427 (2008).
29. Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L. J. 1550, 1551 (2009).

B. The Importance of Options

Move up Table 1, to the distinction between "partial" and "full" ICSID delegations. Lawyers are trained to be sensitive to the importance of options, as the best choice will often depend upon particular contexts and "facts on the ground" that are difficult to predict ex ante. In the world of ISDS, it is possibly true that ICSID arbitration will be the preferred arbitral mechanism for most investors. But it is not necessarily the preferred arbitral mechanism for all investors. This is because context matters. ICSID represents a particular matrix of trade-offs, and before ranking the desirability of different arbitral options we need to understand what the arbitral consumer's preferences actually are. For example, while investment-treaty awards are arguably more readily enforced under ICSID than under the New York Convention—itself an empirically undemonstrated fact—ICSID arbitrations are also typically subject to greater demands of "transparency", including the now-mandatory publication of excerpts of decisions. The investor who wishes his dispute to stand a good chance of remaining confidential might reasonably prefer UNCITRAL to ICSID.

ICSID arbitration involves other tradeoffs as well. For example, ICSID arbitrations are subject to an annulment process that allows a limited right to appeal. UNCITRAL arbitrations are not subject to annulment. While the New York Convention provides a limited number of grounds upon which a state might refuse *enforcement* of an award, such refusals don't extinguish the ability of the investor to seek enforcement in another jurisdiction. Whether ICSID annulment review is supposed to be searching or lenient is a matter of some debate in the academic literature, as annulment committees flip-flop between showing significant deference to lower tribunal awards and showing very little. An investor that favors the finality of awards over their legal correctness might prefer UNCITRAL or ICC arbitration, neither of which is subject to annulment.[30]

Even if we accept that ICSID provides high-quality decisions, that quality comes at a price. Literally. The average cost of an ICSID arbitration (including lawyer's fees) for a party is quite high.[31] And it takes, on average, three to four years, for an ICSID arbitration to wend its way through the ICSID process, not including the time taken up by potential annulment proceedings.[32] Arbitral alternatives may be both cheaper and quicker than

30. Piero Bernardini, *ICSID versus non-ICSID Investment Treaty Arbitration*, *in* LIBER AMICORUM BERNARDO CREMADES 44 (describing ICSID's annulment process as a disadvantage compared to alternative arbitral fora).

31. A recent OECD study suggests that average cost to the parties for an investor-state dispute is $8,000,000. David Gaukrodger & Kathryn Gordon, *Investor-state dispute settlement: A scoping paper for the investment policy community* 18 (OECD, Working Paper No. 2012/3, 2012). The OECD study does not provide separate cost estimates for ICSID versus non-ICSID arbitration. My suggestion in the essay that non-ICSID arbitration may be cheaper is conjectural.

32. Anthony Sinclair, Louise Fisher & Sarah Macrory *ICSID arbitration: how long does it take?,* 4 GLOBAL ARBITRATION REVIEW (2009), *available at* http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf.

ICSID, potentially decisive criteria for aggrieved investors who don't enjoy a significant legal war chest of money or time.[33]

The viability of a BIT-based consent to ICSID also depends on the willingness of the host state to remain a party to the ICSID Convention. A host state that withdraws from the Convention (as Venezuela, Bolivia, and Ecuador have recently done) makes an investor's access to ICSID via a BIT-based consent uncertain at best.[34] Investors that are particularly worried about the possibility of denunciation would greatly welcome the availability of alternative fora, the investor's access to which cannot be defeated by unilateral state action since there is no institution from which formal withdrawal is possible.

In other words, from a legal perspective it probably doesn't make much sense to suggest that fewer options are necessarily better than more options, especially when the "more options" category contains all of the options residing in the "fewer options" category.[35] An ISDS clause that provides for ICSID arbitration, and *only* for ICSID arbitration, may be perfectly fine for most investors. It's a belt that suffices to hold up most pairs of pants. But some investors will find themselves in a situation in which they rationally prefer suspenders to belts, or they discover that their belt has burst. Giving investors the option of wearing suspenders—if they wish—hardly detracts from their preference for wearing belts in most cases.

Another way of looking at the issue of whether less is better than more is through the concept of "delegation." When lawyers write arbitration clauses in ordinary international commercial contracts, they recognize that they are removing dispute-settlement authority from state authorities (presumed biased against the foreign party), and delegating it to private actors. In the drafting exercise, one consideration is or should be the scope of the delegation. But that consideration is not one of whether the delegation is to multiple arbitral fora. It is whether to circumscribe the *subject matter* over which the arbitral forum is entitled to rule. A broad (or "full") delegation would include language such as "All disputes arising out of or in connection with the present contract shall be finally and exclusively settled under the Rules of Arbitration of the International Chamber of Commerce." If a party wants to limit the scope of delegation, it will replace the words "all disputes" with a more

33. Bernardini, *supra* note 30, at 43, makes a similar point, noting that "delay" is a "critical" (e.g. undesirable) aspect of ICSID arbitration compared to ICSID alternatives.

34. An important and contested legal issue is whether a state's withdrawal under ICSID Convention Article 71 extinguishes a state's consent to ICSID's jurisdiction that reside in BITs that themselves haven't yet been denounced—or that have been denounced but which remain in effect as to covered investments through BIT-based continuation-of-coverage clauses. *See* Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 L. & BUS. REV. AM. 409, 429-430 (2010) (discussing some of the legal uncertainties related to withdrawal from ICSID).

35. As a recent treatise on Chinese BITs notes, "The best position for an investor with regard to dispute resolution is to have as many options as possible for international arbitration." NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 377 (2009).

limiting phrase. Perhaps "all disputes relating to the quality of the delivered goods". Or "all disputes relating to the interpretation of this contract".

In the IIL context, state parties have similar opportunities to limit the subject-matter scope of their delegations to ICSID or other fora. They may, for example, define the concept of "investment" as used in their BITs narrowly rather than broadly. ICSID's jurisdiction is limited to "investments" under Article 25 of the ICSID Convention, and ICSID tribunals will typically look at how the state parties to a BIT have defined investment in their investment treaties. A state might also expressly exclude certain classes of disputes, such as disputes over tax matters, as does Article 21 of the 2004 Model U.S. BIT. Or it may wish to maintain its sovereignty to implement prudential financial regulations, as provided in Article 20 of the 2004 U.S. model. Or it may wish to carve out an exception for decisions related to whether a treaty violation was necessary to protect the host state's essential security interests, as in Article 18 of the same model treaty. As yet another example, BITs involving Communist countries traditionally limited their ISDS provisions to disputes over the treaty's expropriation provision, excluding disputes over the meaning of other treaty provisions, like the guarantee of "fair and equitable treatment". States may also use the ICSID Convention itself to limit the subject-matter scope of their delegations. Article 25(4) of the Convention allows states to notify ICSID as to the kinds of disputes that they do not wish to submit to ICSID jurisdiction, as Ecuador recently did.

The point is that there are more natural ways for states to limit the scope of delegations to ICSID than to decide whether to give investors the option of choosing ICSID or some arbitral alternative. In legal terms, a "full" delegation to ICSID is one in which an investor may submit more or less *any* investment dispute to ICSID, if the investor wishes to do so. A "partial" delegation is one in which the investor's right to access ICSID, or any other arbitral fora, is meaningfully limited to only particular legal questions or particular kinds of disputes.

C. A Note on the Use of Model Clauses

Contract drafting decisions may be profoundly influenced by the use of model forms and clauses, which are often plugged into contract documents in a rather mechanical and unreflective way.[36] Even where there is some measure of bargaining over the inclusion or exclusion of a particular kind of clause, there may be no bargaining about the actual text of the clause that ends up being included, the model text taken as a given. There may not even be much bargaining about the inclusion of the clause in the model form at all.

BIT negotiations are no stranger to the phenomenon of the model clause. Most capital exporting states develop model investment treaties that serve as the beginning, and perhaps

36. *See generally* Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI.-KENT L. REV. 59 (2001).

more or less the end, of most BIT negotiations. ISDS clauses are themselves "modeled" within model BITs. So, for example, the Swiss model in effect in the mid-1990s contains an ISDS clause that provides ICSID as the only ISDS option.[37] The United Kingdom model from the same period contains "alternative" ISDS clauses, from which the negotiating partner might choose. The first names only ICSID; the second possible clause names ICSID, ICC, and UNICTRAL arbitration.[38] The 1991 German model also contains alternative ISDS clauses, the first specifying only ICSID, the second specifying only ad hoc arbitration. The United States' 1994 and 2004 models contain just one ISDS clause, providing access to ICSID and UNCITRAL arbitration. Model BITs by capital importing states are more unusual, but not unheard of. For example, Chile developed a model BIT in 1994 that contains an ICSID-only ISDS clause.

This is not to deny that in some cases the decision to include *any* ISDS clause has been controversial. Australia, for example, insisted that the United States delete ISDS from the investment chapter of the US-Australia Free Trade Agreement.[39] Some host states may also insist on marginally weakening model ISDS text by, for example, requiring longer waiting periods between a dispute's crystallization and the investor's right to access arbitration.[40] Leaked texts from ongoing negotiations between the European Union and Canada also illustrate significant if often highly technical debates over the ISDS. ISDS can be controversial, and states can, and sometimes do, specifically negotiate over it.

The question is whether there is meaningful and regular bargaining over ISDS content amongst the rank-ordered dimension identified by Allee and Peinhardt.[41] In that regard, the variation in model treaty practice discussed above poses some interesting apparent anomalies. For example, why would we expect Switzerland, a small and relatively weak capital-exporting state, to embed in its model a "full" delegation to ICSID (e.g. ICSID-only arbitration), while the United States, certainly the materially most powerful capital-exporting country over the period of study, would handicap its initial bargaining position by putting forward a weaker "partial" model clause? Such puzzlers pose a challenge to the notion that less is more, at least as far as ISDS is concerned. They also may pose deeper challenges to a "rationalist" account of investment treaty design, as the observed differences

37. The Swiss model is reprinted in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990'S 273 (1998).
38. *Id.* at 279.
39. As described in Ann Capling & Kim Richard Nossal, *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*, 19 GOVERNANCE 151, 152 (2006).
40. An example, cited by Allee and Peinhardt, is the 1985 BIT between the US and Turkey. Turkey inserted a one-year waiting period in the ISDS, among other changes from the US model. The BIT nonetheless gives the investor the right to access ICSID arbitration. *See* Allee & Peinhardt, *supra* note 20, at 5. In contrast, the BIT with the Democratic Republic of Congo, signed around the same time, contains a waiting period of six months. An extra six months of waiting is "marginal" in light of the length of time it takes for the typical ICSID dispute to work through the ICSID system (a matter of years).
41. *See* Allee & Peinhardt, *supra* note 20, at 14-20.

in model ISDS practice don't on their face seem to reflect the sorts of considerations, or understandings of interest, that Allee and Peinhardt's theory suggests.[42]

V. Putting the Legal Expert's Input Into Action

In this section I present a reconstruction of Allee and Peinhardt's dependent variable that reflects the first two points of legal expertise presented in the previous section (the value of any kind of ISDS and the importance of context).[43] For the purposes of this reconstruction, I set aside the third point made above, concerning the use and content of model clauses. The first two points can readily be used to suggest a recoding of their data without disturbing the overarching bargaining-theory framework in which their empirical analysis takes place. The third point uses legal expertise to suggest the desirability of a more fundamental re-thinking of Allee and Peinhardt's larger enterprise by calling into question the ways in which they conceptualize states' interests and bargaining as to the details of ISDS. Operationalizing the third point would require a new theory, perhaps incorporating or building upon the "data" of model treaty text, of what aspects of ISDS states might predictably bargain over. Such a theory is beyond the scope of this Essay.

Table 2, below, illustrates the reconstruction. I think that most experts in the field of IIL would probably consider this view to be more intuitively plausible, or "valid," than the view provided in Table 1. Of course, that assertion itself should, in the best of all possible worlds, be subject to empirical verification via scientific methods. I have not scientifically surveyed IIL experts, and my sense of what the IIL community thinks about these issues is admittedly informal and unproven.

What are the main differences between the two Tables? First, I would consider an ISDS clause that grants the investor access to both ICSID *and* other fora to be qualitatively better, from the investor's perspective, than one that grants access only to ICSID. Let's rank those clauses as "2," or highest/best. Second, it is perhaps arguable that an ICSID-only clause is better than a clause that provides only non-ICSID options, like UNICTRAL or ICC arbitration. I say "perhaps arguable" because the case that ICSID is necessarily and significantly better than the leading alternatives is not so clear, and IIL experts might view these two treaties as roughly exchangeable.[44] Finally, I think that most if not all IIL lawyers would view BITs that contain no ISDS clause (or that limit its scope of application to a very narrow subset of disputes) as significantly inferior to all others, and perhaps even conceptually irrelevant, depending on the aims of the particular study.[45]

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42. *See* Allee & Peinhardt, *supra* note 20, at 9-14.
43. *See* Allee & Peinhardt, *supra* note 20, at 13-14.
44. *See, e.g.,* Bernardini, *supra* note 30, at 90-92.
45. For example, a study might attempt to explain why states include *any* consent to ISDS in their BITs. In that case, it would be very relevant to include observations of BITs that do not contain ISDS, and observations that do. The practical problem is that virtually all BITs from the past 20

Table 2: An alternative conceptualization		
Rank Order (Higher=Better)	Concept	Operationalization
2	Multiple fora (including ICSID)	ICSID + other for a
1	ICSID only	ICSID arbitration
0	Single or multiple fora (No ICSID)	UNCITRAL &/or ICC arbitration
. (Should probably be excluded from analysis)	No fora	No investor-state arbitration

Comparing Table 1 and Table 2, we can see that the incorporation of legal expertise can lead to very different coding decisions for particular observations. For example, the "best" treaty in Table 1 (a BIT containing only a delegation to ICSID alone) is, in Table 2, recorded as second best. And conversely, what is second best in Table 1 becomes the best in Table 2.

VI. A Statistical Example

In this section I demonstrate empirically what should be pretty intuitive: recoding a dependent variable along the lines that I have done above can, and normally should, dramatically change the results of the statistical analysis. I present results from what I call a "reconsideration" of Allee and Peinhardt's original model. I should caution that what I present is *not* a narrowly construed "replication." I use a different sample and different variables, and I rely on my own coding of ISDS clause.[46]

I should also emphasize that the point of this statistical exercise is really *not* to present and defend (or to disprove or falsify) a theoretically informed model of state bargaining over

years contain ISDS provisions, leaving no variation on the dependent variable.

46. My distinction between replication and reconsideration roughly tracks follows the distinction between "verification" and "reanalysis" discussed in Paul S. Herrnson, *Replication, Verification, Secondary Analysis, and Data Collection in Political Science*, 28 PS: POL. SCI. & POL. 452, 452 (1995):

> Replication is not the same as reanalysis, verification, or secondary analysis. The four terms have very different meanings. A reanalysis studies the same problem as that investigated by the initial investigator; the same data base as that used by the initial investigator may or may not be used. If different, independently collected data are used to study the same problem, the reanalysis is called a replication. If the same data are used, the reanalysis is called a verification. In a secondary analysis, data collected to study one set of problems are used to study a different problem. Secondary analysis frequently, but not necessarily, depends on the use of multipurpose datasets.

BITs. My model is derived from my understanding of Allee and Peinhardt's original theory, but it is not precisely the same model, and it does not use the same data. For that reason, and in part because I am not sure the underlying bargaining theory is all that persuasive to begin with (a discussion beyond the scope of this essay), I am not particularly interested in the substantive results for specific variables in the reconsidered analysis.

Following Allee and Peinhardt, my analysis takes the form of a panel regression. It should be immediately obvious that this is the kind of research activity that most law professors are *not* well-trained, or trained at all, to do. By presenting a statistical analysis, I do not mean to undermine the point of the preceding sections, and the main point of this article—that non-statistically-trained law professors will often be able to contribute meaningfully to statistical social scientific studies of law. I am able to present such a study because I am fortunate to have received graduate-level training in both law and political science. But I do not claim that such interdisciplinary training is necessary to render the typical law professor useful to the social scientific enterprise. Interdisciplinary training can be valuable, but it also has important costs—namely, the need for the researcher to complete two separate, intensive courses of graduate study. Furthermore, and as a prominent law professor told me at the beginning of my career, "you have to be disciplinary before you can be interdisciplinary." Being "disciplinary" is hard work; it is even harder to master and keep up with two sets of literatures, research norms, and techniques. The typical "interdisciplinary" scholar will often be stronger in one discipline than the other, sometimes markedly so. This is why collaboration between disciplinarians, rather than the creation of an army of socio-legal polymaths, is the more realistic solution to the problem of "poor" empirical legal research.

To conduct my analysis, I coded two aspects of the dispute-settlement provisions of all publicly available BITs between 18 top capital-exporting states and their treaty partners.[47] The first aspect was the focus of my early empirical studies on the question of whether BITs promote foreign investment. My coding scheme records whether the particular BIT guarantees the investor access to investor-initiated international arbitration for a wide variety of treaty-related disputes with the host state.[48]

The second aspect is the main the focus of this paper: if the BIT contains that kind of effective, comprehensive arbitration clause, which arbitral fora is the investor authorized to access? This latter data collection effort mirrors Allee and Peinhardt's own efforts. Like them, I find significant variation. Some BITs grant access to ICSID alone, some to ICSID and other fora, and some to other fora but not to ICSID.

47. (1) Australia (2) Austria (3) Belgium (4) Canada (5) Denmark (6) Finland (7) France (8) Germany (9) Great Britain (10) Italy (11) Japan (12) Netherlands (13) Norway (14) Singapore (15) Spain (16) Sweden (17) Switzerland (18) USA.

48. I have called these ISDS provisions "comprehensive" in my earlier papers.

I recorded whether each BIT contained an effective, comprehensive ISDS provision naming any of the following arbitral fora: ICSID; UNCITRAL; ICC; Swedish Chamber of Commerce (SCC); non-UNCITRAL (or pure) ad hoc; the ICSID Additional Facility; and "other." For this symposium essay, I then created two versions of a dependent variable. The first reflects Table 1, above, and is an analogue, I think, to Allee and Peinhardt's dependent variable; the second reflects Table 2. In both cases, I have excluded BITs that do not contain an effective, comprehensive ISDS clause.[49]

For the Table 1 version, I have coded BITs that consent to non-ICSID arbitration as "0;" BITs that consent to ICSID arbitration and at least one other forum as "1," and BITs that consent to only ICSID arbitration as "2."

For the Table 2 version, I have coded BITs that consent to non-ICSID arbitration as "0;" BITs that consent to only ICSID as "1;" and BITs that consent to ICSID and at least one other forum as "2." As suggested earlier in this essay, one could also plausibly collapse Table 2's "0" and "1" categories, as it is not at all clear that ICSID arbitration is viewed by states or investors as necessarily and materially superior to non-ICSID arbitration.

In both versions of the DV, I elected to count a consent to the ICSID Additional Facility (AF) as distinct from a consent to ICSID. The AF was created administratively (and not by international treaty) to allow ICSID to arbitrate disputes involving a state party who is not a party to the ICSID Convention itself. Importantly, AF proceedings are expressly *not* subject to the ICSID Convention, which itself is the source of some of the main purported benefits of ICSID arbitration. AF proceedings should probably then be viewed as inferior to ICSID proceedings—or at least not quite equivalent.

Another difficulty is that some BITs contain ISDS clauses that appear to give the investor multiple options, but in reality provide mutually exclusive options. For example, many Australian BITs grant access to UNCITRAL arbitration, but only as long as either one or both of the states are *not* members of the ICSID Convention. If both states *are* ICSID members, then the UNCITRAL option disappears, and ICSID arbitration becomes the only possibility.[50] Complex ISDS provisions like these are rare, however, and I have elected to treat them as if they contain consents to ICSID and other fora (e.g. a "1" in Table 1's scheme, and a "2" in Table 2's scheme).

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49. So, for example, BITs that do not give the investor *any* right to arbitration are not included in my analysis. I also exclude BITs with "promissory" or "partial" ISDS clauses, as those terms are used in my earlier studies. "Partial" ISDS clauses are were overwhelmingly entered into by Soviet-era Communist countries and limited the scope of the states' consent to arbitration to a narrowly defined class of disputes. Since the collapse of the USSR BITs with partial ISDS clauses are exceedingly rare.

50. ISDS clauses that consent to both ICSID arbitration and to the Additional Facility are similar to Australia's either-or ISDS clause in the sense that if both the home and host state are members of the ICSID Convention, arbitration under the AF rules becomes impossible.

Following Allee and Peinhardt, I include a selection of independent variables. Here, my aim was to build a model that is roughly analogous to theirs, by using readily available data that reflects their basic bargaining theory as I understand it. The model is intended to provide the structure in which we can examine the sensitivity of statistical results to changes in the coding of the DV. My intent here is not to test whether Allee and Peinhardt's theory is confirmed or disproved, nor am I interested in the results (as mentioned above). However, it is probably worth discussing in a bit of detail the construction of each of the variables, and their theoretical purposes. In the discussion of the model results, further below, I will also briefly mention the theoretical implications of the results, even if I view these results—as opposed to their sensitivity—as being of relatively minor interest here.

Four variables tap the home state's ISDS preferences, as elaborated by Allee and Peinhardt:

(1) A measure of home state's FDI outflows as a percent of home state's GDP. This variable reflects Allee and Peinhardt's argument that home states with a large number of corporations engaged in FDI will face stronger domestic political pressure to negotiate strong ISDS provisions. This measure comes from the World Bank's World Development Indicators (WDI).[51] The WDI dataset does not contain FDI outflow data for Belgium, so Belgium is excluded from my empirical analysis.

(2) A dummy variable indicating whether the host state was a post-World War II colony of the home state. Allee and Peinhardt argue that ex-colonial masters will have an incentive to be more lenient in ISDS negotiations with their ex-colonies. It should be pointed out, however, that outside of Great Britain and France, none of the home states in my sample had significant post-war colonial empires.[52]

(3) The durability of the host state's Polity IV (democracy) rating. The durability indicator measures the number of years since a major change in the state's Polity rating. Allee and Peinhardt suggest that home states will view more durable regimes as less likely to take actions harmful to investors, and will thus be less likely to insist on strong ISDS. The Polity measure of democracy is widely used in political science.

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51. Allee and Peinhardt also include measures of the home country's embrace of "rule of law" principles, but their rule of law variable is insignificant in their analyses. I have elected not to include such a variable here, as the capital exporting countries in my sample have uniformly high rule of law scores; the values of the scores vary very little year-to-year; and rule of law data has been collected by the World Bank only since 1996. *See* Allee & Peinhardt, *supra* note 20, at 19.

52. There is indeed some evidence that colonial status can influence BIT practice, though not quite in the way suggested by Allee and Peinhardt. France, for example, had a policy of refusing to enter into BITs with those of its ex-colonies who were part of the CFA monetary regime. Patrick Juillard, *Les conventions bilaterales d'investissement concludes par la France* [Bilateral Investment Conventions Concluded by France], 106 J. DROIT INT'L 274, 282-83 (1979).

(4) The host state's Polity IV democracy rating. More democratic countries may be viewed as having stronger preferences for the rule of law, or as having greater ability to credibly commit to treating investors favorably. Allee and Peinhardt argue that home states will see less need to insist on strong ISDS when a host state respects the rule of law.

I include two variables arguably tapping the host state's ISDS preferences:

(5) The host state's GDP growth rate, taken from the WDI. Allee and Peinhardt argue that host states that are experiencing strong economic performance will have fewer incentives to agree to a strong ISDS clause (because they will have less objective need for the additional FDI that a strong ISDS clause might promote).

(6) A dummy variable indicating whether the host state has any outstanding loans (credits) from the World Bank, taken from the WDI. Allee and Peinhardt suggest that host states in debt to the World Bank will be more likely to accept strong ISDS clauses.

Allee and Peinhardt argue that if home states generally prefer strong ISDS, and host states generally prefer weak ISDS, then the outcome of a bargaining situation over ISDS strength should depend on the parties' relative bargaining power. Like them, I include:

(7) A measure of the difference between the home state's and the host state's GDP, from the WDI.

Finally, I also include:

(8) A dummy variable indicating whether the host state has signed the ICSID Convention prior to signing the particular BIT. The dummy reflects the fact that a BIT-based consent to ICSID is ineffective, absent a state's membership in ICSID. I suspect that where the host state has not signed the ICSID Convention, the home state will be more likely to include a non-ICSID option in the ISDS.

(9) A year counter to control for the probability that ISDS- or BIT-drafting practices evolve over time. We see clear evidence of such evolution over the long term, as initially BITs never or rarely included ISDS, while today BITs almost always contain ISDS.

Because BITs did not contain ISDS provisions prior to the 1970s (and did not regularly include ISDS until the mid 1980s), I begin my analysis in 1970. I collected ISDS data up through 2002. All variable values are for the year of BIT signature.

I estimate the model using ordered probit, with robust standard errors (clustered around home countries).[53] Clustering around home countries helps control for the possibility that there are specific home-country differences in ISDS preferences or negotiating behavior. More concretely, we can think of clustering as controlling for the fact that home countries

53. The regressions were performed using the -oprobit- command in Stata 12.

base their negotiations on very different model ISDS clauses. Table 3 provides results for the Allee and Peinhardt version of the dependent variable. Table 4 provides results for the reconsidered dependent variable.

Table 3: Determinants of ISDS Strength, Allee & Peinhardt Construction of Dependent Variable (ICSID-only As Best)

Ordered probit regression — Number of obs = 580; Wald chi2(8) = .; Prob > chi2 = .; Log pseudolikelihood = −485.62699; Pseudo R2 = 0.1020

(Std. Err. adjusted for 17 clusters in home_code)

depvar_replication	Coef.	Robust Std. Err.	z	P>|z|	[95% Conf.	Interval]
home_fdi_outflows	.0392612	.025565	1.54	0.125	−.0108453	.0893677
host_colony	.1243358	.2110252	0.59	0.556	−.289266	.5379376
host_polity2	.0060029	.0066059	0.91	0.364	−.0069445	.0189503
host_polity_durability	−.0030081	.0033291	−0.90	0.366	−.009533	.0035168
host_gdp_growth	.0114491	.0046029	2.49	0.013	.0024275	.0204707
host_ibrd_credits	.0452781	.1158921	0.39	0.696	−.1818662	.2724225
icsid_signed	.8873839	.0921925	9.63	0.000	.7066899	1.068078
diff_gdp	−1.03e−14	3.52e−14	−0.29	0.770	−7.94e−14	5.87e−14
year_counter	−.0699261	.0198331	−3.53	0.000	−.1087984	−.0310539
/cut1	−2.325414	.4651398			−3.237071	−1.413757
/cut2	−.4902476	.3610675			−1.197927	.2174317

Table 4: Determinants of ISDS Strength, Reconsidered Construction of Dependent Variable (ICSID + Alternatives As Best)

Ordered probit regression — Number of obs = 580; Wald chi2(8) = .; Prob > chi2 = .; Log pseudolikelihood = −499.43941; Pseudo R2 = 0.0765

(Std. Err. adjusted for 17 clusters in home_code)

depvar_best	Coef.	Robust Std. Err.	z	P>|z|	[95% Conf.	Interval]
home_fdi_outflows	−.0428749	.021714	−1.97	0.048	−.0854336	−.0003163
host_colony	−.3678759	.19695	−1.87	0.062	−.7538909	.0181391
host_polity2	.0332997	.00502	6.63	0.000	.0234607	.0431387
host_polity_durability	.0007516	.003394	0.22	0.825	−.0059005	.0074036
host_gdp_growth	−.0088809	.0075478	−1.18	0.239	−.0236743	.0059125
host_ibrd_credits	−.2397312	.138953	−1.73	0.084	−.512074	.0326117
icsid_signed	−.0916896	.1372126	−0.67	0.504	−.3606214	.1772423
diff_gdp	7.63e−14	7.24e−14	1.05	0.292	−6.56e−14	2.18e−13
year_counter	.0636009	.0215915	2.95	0.003	.0212823	.1059194
/cut1	−.1290834	.4354118			−.9824747	.724308
/cut2	1.148556	.3779429			.407802	1.889311

First look at Table 3. The first four variables, all in theory measuring home state preferences for strong ISDS, are statistically insignificant. Of the two variables arguably measuring host state preferences, only Host GDP Growth is significant, but it is wrongly signed. The positive coefficient suggests that better-performing host states are more likely to accept strong ISDS clauses, in apparent tension with Allee and Peinhardt's theory. Finally, note that the two variables I've added—whether the host state had signed the ICSID Convention prior to signing the BIT, and the year counter, are both highly statistically significant. Host states that have not signed the ICSID Convention are less likely to accept strong ISDS (where strong means "only ICSID", as Allee and Peinhardt argue), and, over time, ISDS provisions have become weaker.[54]

Now examine Table 4. Given my re-conceptualization and re-operationalization of the dependent variable, it's not surprising to find that the statistical results are quite different, both in terms of significance and sign. Indeed, illustrating this sensitivity is the main point of my statistical reconsideration. Three of the four "home state" variables are now significant at the <.10 level, but their coefficients tell a conflicting story. The negative sign on Home FDI Outflows suggest that home states with more outward foreign investment demand weaker rather than stronger ISDS, while the positive sign for the host Polity variable suggests that home states demand stronger ISDS from more-democratic host states. Both suggestions seem in conflict with Allee and Peinhardt's theory. On the other hand, the results for the Host Colony variable support their predictions. Home states seem more likely to enter into BITs with weaker ISDS provisions when the bargaining partner is an ex-colony, though recall that the only two home countries with significant ex-colonial empires here are Britain and France. As to the two host-state variables, the IBRD credits variable is significant—though Host GDP Growth no longer is—but it is wrongly signed from the perspective of Allee and Peinhardt's theory. Finally, note that the sign has switched on the year counter, which remains highly significant. Now, BITs become stronger with time.

VII. Conclusion

Traditionally trained legal experts may believe that they are unable to evaluate or contribute to statistical analyses of legal phenomena because they don't understand the underlying statistical theory or mathematical operations. Statistics can mystify, and mystification means that the mystified object must be accepted or rejected as a matter of faith rather than as a result of careful, reasoned legal analysis. But as I suggest in this Essay, legal experts need not be trained in the latest statistical methods to play a meaningful and constructive role in empirical debates about legal phenomena. That role can be critical, but it can also be collaborative. Working with the non-lawyer social scientist, the legal expert—whether serving as co-author, or consultant, or even peer-reviewer—can use

54. Allee & Peinhardt, *supra* note 20, at 4-6.

his legal expertise (his informally empirical sense of how the law really works) to evaluate and to suggest improvements in the ways in which methodologically sophisticated social scientists translate legal phenomena into the numerical categories and values that make statistical analysis possible. The result, hopefully, will be more conceptually sound, accurate studies of legal phenomena that nonetheless provide persuasive empirical support for useful theories.