



Santa Clara Journal of International Law

Volume 12

Issue 1 *Symposium on the Law and Politics of Foreign Investment*

Article 12

1-17-2014

Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law A Reponse to Professor Yackee

Catherine M. Amirfar

Follow this and additional works at: <https://digitalcommons.law.scu.edu/scujil>

Recommended Citation

Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law A Reponse to Professor Yackee*, 12 SANTA CLARA J. INT'L L. 303 (2014).

Available at: <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/12>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com, pamjadi@scu.edu.

**Dispute Settlement
Clauses in Investor-
State Arbitration:
An Informed Approach
to Empirical Studies
About Law
A Response to Professor
Yackee**

Catherine M. Amirfar

TABLE OF CONTENTS

I. Introduction.....	305
II. Preliminary Observations	305
III. Critiques of Professor Yackee’s Model	307
IV. Revised Model and Conclusions.....	312

I. Introduction

Professor Yackee's paper, "Do States Bargain over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties," offers a useful reminder to social scientists and lawyers alike that each can benefit from the other in order to generate more reliable empirical studies in the legal field. On that point, Professor Yackee and I agree. We also agree on several points that flow from that basic premise, namely that the law can benefit from empirical research; that reliable empirical research requires sound methodologies that social scientists are best suited to provide; and that empirical studies assessing legal issues must be based on accurate underlying assumptions that lawyers are best suited to provide.

Professor Yackee and I diverge, however, when it comes to the methodology and underlying assumptions he employs in the example he has chosen to demonstrate that sound empirical research requires an interdisciplinary approach. In his paper, he critiques a 2010 article by social scientists Todd Allee and Clint Peinhardt, entitled "Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions." Specifically, Professor Yackee challenges the underlying assumptions and the corresponding values assigned by Professors Allee and Peinhardt in coding the "strength" of investor-state dispute settlement ("ISDS") clauses in bilateral investment treaties ("BITs") to test their theory that the variance in ISDS clauses can be explained by the relative bargaining power of States. Professor Yackee offers an alternative ranking of the strength of ISDS clauses in order to demonstrate the value of collaboration between social scientists and lawyers.

In this response, I offer different views on the role of empirical research in the law, the value of collaboration, and the relative strength of ISDS clauses providing for resolution of disputes in different arbitral fora, based on my experience as a practitioner regularly using empirical data and frequently grappling with the themes underlying Allee and Peinhardt's study. Part II of my response makes two preliminary observations that I believe should inform the approach to interdisciplinary collaboration in the development of empirical studies about law. Part III discusses specific critiques of Professor Yackee's model, and suggests alternate values for coding the strength of ISDS clauses in BITs. In Part IV, I use Professor Yackee's data to run a regression model using my alternate coding system. As will be discussed, my results vary markedly from Professor Yackee's and suggest some conclusions about both the methodologies employed in empirical research and the important role lawyers can play in that research.

II. Preliminary Observations

As Professor Yackee notes, a primary line of empirical research on BITs considers treaties as dependent variables and attempts to explain why States sign BITs or why

they sign BITs with particular provisions.¹ The answers to these questions can provide critical guidance to arbitral tribunals interpreting those provisions and to counsel arguing in favor of a particular interpretation. Thus, as an initial matter, I agree with Professor Yackee's first basic premise: Empirical research has an important place in legal scholarship, and, in particular, in the study of international investment arbitration.

Professor Yackee's second basic premise is equally non-controversial: At present, empirical legal studies are not sufficiently robust and can be much improved through greater interdisciplinary collaboration between lawyers and social scientists. On the one hand, the legal academy and profession are not well equipped to produce, and in some instances are not producing, reliable empirical results. Far too many examples exist of the "fluid" use of statistics by lawyers, and, as a profession, we must become more self-critical of our shortcomings in this area and strive to import methods that social scientists consider reliable (defined as being replicable and consistent) and valid (defined as being free from bias). At the same time, studies on law and legal phenomena that are produced by social scientists, such as the study by Professors Allee and Peinhardt, can suffer from the authors' lack of legal training and fundamental misunderstandings as to how the law works and is perceived by those who practice it. As Professor Yackee rightly observes, it is unrealistic to expect either camp to become expert in the other's methodologies.

But the idea that both sides can benefit from collaboration—that is, that lawyers have something to add to empirical research on law—should not be surprising. The question, then, is how to operationalize the collaboration, how best to draw on lawyers' expertise and implement it into empirical studies on law. In this regard, two preliminary observations should be made.

The first observation is that the search for expertise should not be limited to the legal academy. Rather, it should encompass practitioners as well. This is not only for the obvious reason that practitioners may be experts in a relevant area of law, but also because there is a perhaps "hidden" repository of statistical expertise among those who practice law. As counsel in complex international commercial and investment disputes, practitioners are frequently required to cross-examine scientific and technical experts who are highly trained in the methodologies employed by Professors Yackee, Allee, and Peinhardt. In order to conduct effective cross-examination, practicing lawyers must develop fluency in the vocabulary of statistics to become as familiar and comfortable with the terminology and the underlying concepts as are the expert witnesses being examined. This familiarity and comfort with statistical tools and concepts makes practicing lawyers well-positioned to contribute to empirical legal studies in meaningful ways.

1. Jason Webb Yackee, *Do States Bargain over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, 12 SANTA CLARA J. INT'L L. 277, 281 (2013).

My second observation is a methodological one. As we seek to improve the quality of empirical studies of law and law-related phenomena via interdisciplinary collaboration, we must emphasize the use of sound empirical methods. As Professor Yackee acknowledges, although he suggests a “reconstruction” of Allee and Peinhardt’s dependent variable—an alternative coding of ISDS clause strength—he does not perform a “replication” of their original study.² That is, he did not apply his reconstructed dependent variable to Allee and Peinhardt’s original data. Thus, his approach does not present or permit a true comparison between a study of BIT provisions uninformed by legal expertise, and the same study informed by such expertise.

While Professor Yackee’s transparency is commendable, for those seeking to draw reliable conclusions from such empirical studies, this approach can be deeply unsatisfactory. In short, Professor Yackee’s analysis is inherently limited by the lack of “replication.” If lawyers are to conduct empirical studies that produce reliable and useful results, we must embrace the proven methodologies of the scientific disciplines, such as data-sharing, replication, and peer review.

III. Critiques of Professor Yackee’s Model

While I agree with many of Professor Yackee’s observations and critiques of Allee and Peinhardt’s model, Professor Yackee’s own model in some respects suffers from what I view to be a flawed ranking of the strength of ISDS clauses.

Professor Yackee’s model assigns the greatest value (2) to ISDS clauses providing a choice between ICSID and non-ICSID options, the second greatest value (1) to ICSID-only clauses, and the lowest value (0) to ISDS clauses designating only non-ICSID fora. He excludes both BITs that contain no ISDS clause, and BITs that contain ISDS clauses covering only certain types of disputes. This latter category includes, for example, the early BITs of China and of the former Soviet Union, which limit arbitrable disputes to those involving “compensation for expropriation.”³

Professor Yackee’s primary critique of Allee and Peinhardt’s model is that they rank ICSID-only dispute resolution clauses above dispute resolution clauses containing a choice of either ICSID or other fora. On this basis, Professor Yackee inverts Allee and Peinhardt’s ranking of a 2 for ICSID-only clauses and a 1 for clauses with a choice of ICSID or non-ICSID fora. I agree with Professor Yackee’s assumption that there is some value in choice and that “context matters.”⁴ In this vein, assigning a higher value to an ISDS clause with a choice of fora than to an ICSID-only clause seems logical. In the

2. *Id.* at 292, 294.

3. *See, e.g.*, Agreement between the Government of New Zealand and the Government of the People’s Republic of China on the Promotion and Protection of Investments, China-N.Z., Nov. 22, 1988, 1787 U.N.T.S. 186.

4. Yackee, *supra* note 1, at 288.

coding I propose, as in Professor Yackee's model, an ISDS clause providing a choice between ICSID and non-ICSID arbitration is assigned a 2.

My first point of departure from Professor Yackee's model concerns his assignment of a value of 1 to ICSID-only clauses and 0 to clauses designating only non-ICSID fora. Professor Yackee surveys the relative merits of ICSID versus non-ICSID arbitration, and concludes that it is only "arguable" that an ICSID-only clause is better than a clause that provides only non-ICSID options because "the case that ICSID is necessarily and significantly better than the leading alternatives is not so clear."⁵ Yet his reconstruction continues to privilege ICSID-only ISDS clauses over clauses that provide exclusively for non-ICSID arbitration. This ranking relies on the same flawed and statistically unsupported assumptions that Professor Yackee himself challenges—that ICSID is better for investors than non-ICSID arbitration and that investors prefer ICSID to non-ICSID options.

Even accepting the limited data available, we can and should still make informed observations about the preference that investors or home States accord to ICSID versus non-ICSID arbitration. First, based on the available numbers alone, it is not clear that ICSID actually is the preferred forum. The United Nations Conference on Trade and Development ("UNCTAD") reports that as of the end of 2011, a total of 279 investment arbitrations were brought under the ICSID Rules or ICSID Additional Facility Rules, while 126 were initiated under the UNCITRAL Rules, 21 under the Stockholm Chamber of Commerce ("SCC") Rules, seven under the International Chamber of Commerce ("ICC") Rules, one under the London Court of International Arbitration ("LCIA") Rules, and one under the rules of the Cairo Regional Centre for International Commercial Arbitration.⁶ Of the 279 cases brought under the ICSID Rules or Additional Facility Rules, approximately 10 percent fell into the latter category.⁷ Realistically, Additional Facility cases should be treated separately because these involve non-signatories to the ICSID Convention and are subject to enforcement under the New York Convention rather than the ICSID framework. They are thus far more like UNCITRAL or other non-ICSID cases than cases brought under the ICSID Convention. Adding the approximately 30 Additional Facility cases to the 156 cases administered outside the ICSID framework, we begin to see that non-ICSID Convention investor-state arbitrations are far more prevalent than might be imagined.

5. *Id.* at 292.

6. United Nations Conference on Trade and Development, April 2012, *Latest Developments in Investor-State Dispute Settlement*, U.N. Doc. UNCTAD/WEB/DIAE/A/2012/03 (No. 1) (Apr. 2012).

7. ICSID's most recent statistics indicate that approximately 10 percent of the cases administered by ICSID are brought pursuant to the Additional Facility Rules. *See* World Bank, *ICSID Caseload – Statistics*, Issue 2013-1 at 8 (2013).

Second, ICSID awards are still subject to challenge. Conceptually, the ICSID scheme is arguably superior; the ICSID Convention requires that Contracting States enforce a pecuniary award rendered under the Convention “as if it were a final judgment of a court in that State,”⁸ and therefore should not be subject to national court review as is the case for New York Convention awards.⁹ But there are problems with assuming that this straightforward scheme leads to higher compliance. As an initial matter, ICSID does contemplate potential annulment of the award by an annulment committee. While annulment is supposed to be restricted to narrow grounds, there have been some high-profile instances of committees annulling awards arguably outside the scope of their limited mandate.¹⁰ Also, ICSID awards, like other international arbitral awards, are subject to challenge in national courts on the same bases available under domestic law to challenge any final judgment. In the United States, for example, Federal Rule of Civil Procedure 60(b) provides for challenge of a final judgment on the bases of, *inter alia*, mistakes, newly discovered evidence, fraud by an opposing party, lack of impartiality of

-
8. Convention on the Settlement of Investment Disputes between States and Nationals of Other States Regulations and Rules art. 54(1), Mar. 18, 1965, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (reprinted in Apr. 2006) [hereinafter ICSID Convention] (providing in full “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”).
 9. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 25 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. National courts may refuse to recognize and enforce an award under the New York Convention on seven grounds. These grounds are interpreted narrowly in many, if not most, jurisdictions. See, e.g., Sylvia Tordova, *Compliance and Enforcement of Awards: Is There a Practical Difference between ICSID and Non-ICSID Awards?*, in 5 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 229, 246 (Ian A. Laird and Todd J. Weiler eds., 2012).
 10. See, e.g., Lucy F. Reed and Giorgio Francesco Mandelli, *Ad hoc or ad arbitrum? An Audit of Recent ICSID Annulment Decisions*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, 70 (Arthur W. Rovine ed., 2012) (discussing the controversial annulment decisions in *Helnan Int’l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19 (annulment proceeding), Decision of the *ad hoc* Committee (June 14, 2010); *Sempre Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16 (annulment proceeding), Decision on Application for Annulment (June 29, 2010), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8; *Enron Creditors Recovery Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (annulment proceeding), Decision on Application for Annulment (July 30, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf>; *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (annulment proceeding), Decision on Application for Annulment (Aug. 10, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0221.pdf>; Christoph Schreuer, *From ICSID Annulment to Appeal: Halfway Down the Slippery Slope*, in 10 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 211 (2011); and Promod Nair and Claudia Ludwig, *ICSID Annulment Awards: The Fourth Generation?*, 5 GLOBAL ARB. REV., Issue 5, Oct. 28, 2010.

the decision-maker, and unequal knowledge and bargaining power.¹¹ Similar grounds for challenge exist in the laws of Belgium, Chile, Colombia, France, Switzerland, and Venezuela.¹² While it is important not to overstate the implications of this point, since such challenges do not appear to be a serious issue in current practice, the prospect of challenge on these bases remain.¹³

Third, there is as yet little empirical proof that the ICSID enforcement regime leads to higher rates of compliance than the New York Convention regime.¹⁴ Generally speaking, most States voluntarily comply with investment arbitration awards against them. A 2008 study, for example, found that 81 percent of participating corporations did not enforce or seek to enforce arbitral awards against States, namely because of high rates of voluntary compliance and the negotiation of post-award settlements.¹⁵ The States that do resist compliance with awards have done so regardless of the arbitral fora. Argentina, for example, continues to resist enforcement of ICSID and non-ICSID awards alike.¹⁶ The bottom line appears to be that States that want access to international markets and capital will comply with adverse arbitration awards, regardless of the arbitral institution or rules by which the award was rendered.

Fourth, there are a number of practical concerns that may counsel in favor of non-ICSID arbitration options for a particular client or dispute. The cost and time of ICSID arbitrations are a significant factor weighing in favor of less costly alternatives.¹⁷ The

-
11. FED R. CIV. P. 60(b); *see also* Freya Baetens, *Enforcement of Arbitral Awards: "To ICSID or Not to ICSID" is Not the Question*, in 5 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 211, 219-20 (Ian A. Laird and Todd J. Weiler, eds. 2012); Edward Baldwin, Mark Kantor, and Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1, 9-11 (2006).
 12. *See* Baetens, *supra* note 10, at 220 (*citing* CODE DE PROCÉDURE CIVILE [C.P.C.][CODE OF CIVIL PROCEDURE] art. 1480 (Fr.); CODE DE PROCÉDURE CIVILE [C.P.C.][CODE OF CIVIL PROCEDURE] art. 1704 (Belg.); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG][FED. ACT ON PRIVATE INT'L LAW] Dec. 18, 1987, SR 291, art. 190(2) (Switz.); CÓDIGO DE PROCEDIMIENTO CIVIL [C.P.C.][CIVIL PROCEDURE CODE] art. 244 (Venez.); Baldwin et al., *supra* note 10, at 14 (*discussing* CÓDIGO DE PROCEDIMIENTO CIVIL [C.P.C.][CIVIL PROCEDURE CODE] arts. 365, 379 (Colom.) and CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.][CIVIL PROCEDURE CODE] art. 810 (Chile)).
 13. *See, e.g.*, Tordova, *supra* note 8, at 239–40.
 14. *See* Baetens, *supra* note 10, at 211, 227 (remarking that the “admittedly limited” jurisprudence indicates that ICSID and non-ICSID awards are challenged in domestic courts at similar rates).
 15. Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitration Awards: Enforcement of Awards Against States*, 19 AM. REV. INT'L ARB. 391, 403–08 (2008).
 16. *See, e.g.*, Luke Eric Peterson, *Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising Out of the Argentine Financial Crisis*, INVESTMENT ARBITRATION REPORTER (Feb. 1, 2011), http://www.iareporter.com/articles/20110201_9 (discussing unpaid and challenged arbitration awards against Argentina in both the ICSID and UNCITRAL systems).
 17. *See* LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 154–55 (2011) (although ICSID administrative and arbitrator costs are relatively low compared to other international arbitration regimes, parties’ legal costs are “typically high,” due to the frequent separation of the jurisdictional phase, the complexity of the legal and factual issues in international investment law, the number and length of written pleadings, and the use of fact

availability of interim relief from national courts in non-ICSID arbitrations is another important reason that non-ICSID arbitration is sometimes preferable.¹⁸ Jurisdictional thresholds also factor into advice to clients. The ICSID framework arguably has more stringent jurisdictional thresholds, requiring an “investment” to fall within the scope of both the definition of “investment” in the relevant contract or treaty and the interpretation of an “investment” under the ICSID Convention.¹⁹ Finally, considerations relating to confidentiality can also favor non-ICSID options. While ICSID can require the Secretariat to publish excerpts of a tribunal’s legal reasoning and the names of the parties,²⁰ some rules, such as the ICC Rules, contain no transparency requirements. An investor that does not want public disclosure of a dispute might favor non-ICSID arbitration. This factor may become irrelevant, however, as other arbitral institutions, including UNCITRAL, adopt transparency requirements.²¹

All of these considerations serve to challenge the notion that ICSID is necessarily superior to non-ICSID arbitration options, which Professor Yackee’s model continues to suggest. Moreover, we should not lose sight of the fact that access to international arbitration—the adjudication of a dispute by a neutral, international body—is of immense value to investors regardless of the forum. In view of the lack of empirical evidence suggesting otherwise and the inherent value of access to international arbitration, I would accordingly rank ICSID-only ISDS clauses on an equal level with those clauses designating only a non-ICSID option. In the model I propose, both types of clauses are assigned a value of 1.

My final, and from the methodological perspective, most important critique of Professor Yackee’s model relates to the exclusion from his analysis of BITs with no ISDS clauses at all and BITs with ISDS clauses that limit the arbitral tribunal’s subject matter jurisdiction, such as the “compensation only” clauses mentioned above.²² I disagree that

witnesses and experts at hearings); Anthony Sinclair, *ICSID Arbitration: How Long Does it Take?*, 4 GLOBAL ARB. REV., no. 5, 2009 (reporting that the average length of an ICSID arbitration is 3.6 years, from the filing of the request for arbitration to the date of the final award, but that this timeline is shortening; the average timeline for the 32 cases commenced the five years preceding the study was closer to 3.2 years)

18. See Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in 50 YEARS OF THE NEW YORK CONVENTION 285, 316 (Albert Jan van den Berg, ed. 2009).
19. See, e.g., *Joy Mining v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 43, 48 (6 August 2004), 13 ICSID Rep. 121 (2009) (applying the “double barrel” test).
20. See ICSID Rules of Procedure for Arbitration Proceeding Rule 48(4) (April 2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; ICSID Administrative and Financial Regulations Regulation 22 (April 2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.
21. See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (adopted by the United Nations Commission on International Trade Law on 11 July 2013) (providing for public hearings, publication of case information and pleadings, and submissions by third parties).
22. Yackee, *supra* note 1, at 294.

these two categories of BITs are “conceptually irrelevant,”²³ at least as to studies assessing the strength of ISDS clauses in investment treaties. ISDS clauses that limit the arbitration tribunal’s subject matter jurisdiction are inherently weaker than clauses that include a “full delegation” as to subject matter.²⁴ BITs that include *no* provision for the settlement of disputes between investors and states are weaker still. I would assign both of these categories a value of 0 rather than exclude them from the analysis. It is important to note that excluding these categories of BITs restricts the inferences made to within the scope of the remaining treaties included; thus potentially valuable information is discarded. Moreover, the causal relationships between independent variables and treaty type may differ at the “lower” end of weaker treaty types.

IV. Revised Model and Conclusions

Going back to the purpose of the underlying analysis, this empirical research on BITs considers treaties as dependent variables and attempts to explain why States sign BITs or why they sign BITs with particular provisions. As described above, for purposes of my regression model, I use the following coding:

- I agree with Professor Yackee that an ISDS clause providing a choice between ICSID and non-ICSID arbitration should be assigned the highest value of 2;
- I disagree with Professor Yackee’s assignment of a value of 1 to ICSID-only clauses and 0 to clauses designating only non-ICSID fora. Instead, I rank an ISDS providing for international arbitration, whether ICSID-only or a non-ICSID option, equally, and assign a value of 1; and
- I disagree with Professor Yackee’s exclusion of BITs with no ISDS clauses at all and BITs with ISDS clauses that limit the arbitral tribunal’s subject matter jurisdiction. I instead assign those categories a value of 0.

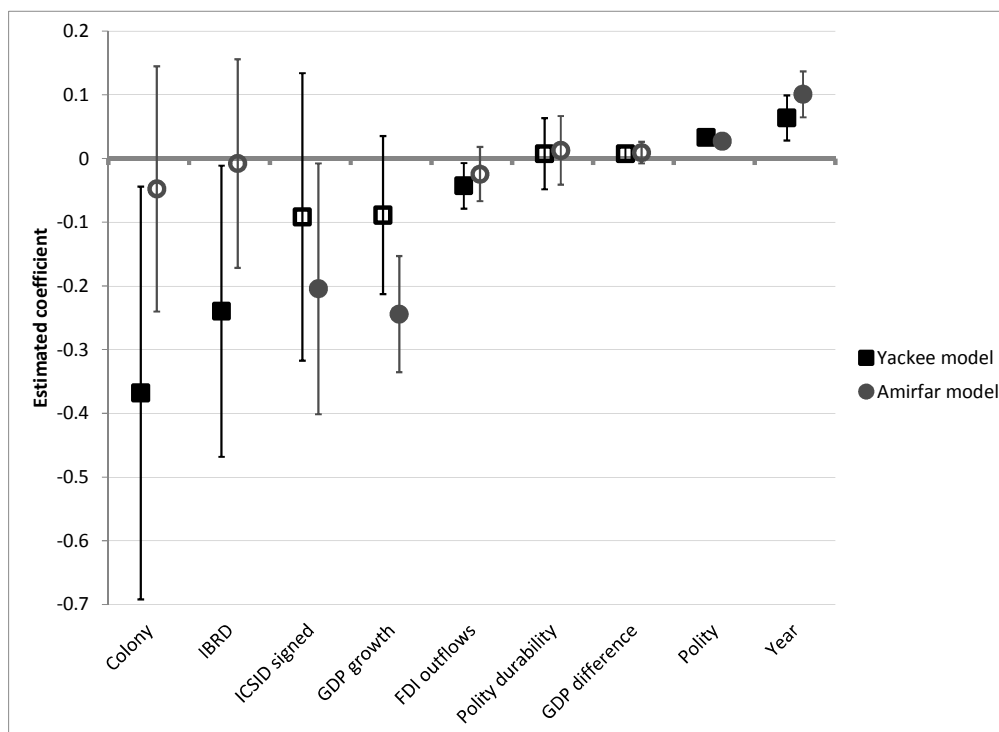
I should note that I only changed the coding of the dependent variable. I did not attempt alternative model specifications using different independent variables, nor did I perform any model diagnostics, as making valid inferences based on this analysis was not my goal. Rather, my intent simply was to explore the extent to which estimated coefficients from Professor Yackee’s model were subject to change based on the values assigned to treaty type.

By making just these two changes to the dependent variable, the model produced quantitatively and qualitatively different results. Figure 1 below displays estimated coefficients from both models along with their 90% confidence interval, ordered by the magnitude of Professor Yackee’s estimates.²⁵

23. *Id.* at 293.

24. *Id.* at 285-86.

25. I followed Professor Yackee’s choice of an alpha level of 0.10. For purposes of display, the following independent variables were re-scaled: polity durability is per decade, host GDP growth rate is per



In particular, the host colony and host IBRD dummy variables, which had exhibited statistically significant negative associations with treaty strength in Professor Yackee’s model, were substantially attenuated in my model and lost statistical significance. The FDI outflow variable similarly was attenuated and lost statistical significance in my model. Conversely, the “ICSID signed” dummy variable and host GDP growth rate had been statistically insignificant in Professor Yackee’s model, but each exhibited a stronger (and statistically significant) negative relationship with treaty strength in my model. The estimated associations (or lack thereof) with host polity durability, GDP difference, polity rating, and calendar year were qualitatively similar in our two models.

To illustrate the differences in conclusions that might be drawn between the two models, consider host GDP growth: the negative association between a State’s preference for strong dispute resolution clauses and the host State’s GDP growth is consistent with the theory of Professors Allee and Peinhard that the variance in ISDS clauses can be explained by the relative bargaining power of States, and in particular, that high-performing States prefer, and negotiate for, weak dispute resolution clauses. But this is the precise opposite of Professor Yackee’s results, which indicate a positive association,

10 percent, and GDP difference is per \$100 billion.

suggesting that better-performing host States are more likely to accept strong ISDS clauses. The other differences in model estimates described above lead to similar divergences in interpretation.

All told, Professor Yackee's model does not demonstrate that there is in fact "apparent tension with Allee and Peinhardt's theory. Here, the limitations of an analysis that merely "reconstructs," (i.e., applying the re-coding to a "reconstructed" data set) rather than "replicates" (i.e., apply the re-coding to Allee and Peinhardt's original data) become stark, since this approach cannot present or permit a true comparison between these studies of BIT provisions.

However, the regression model I ran with my re-coding and changed inputs is based on Professor Yackee's data, so that model does in fact "replicate" his analysis to permit a comparison between the results of his and my models. That comparison indicates that the changes in the dependent variable did in fact result in divergences in interpretation. That means, in turn, that the judgment used to "code" the strength of ISDS clauses is demonstrably important. This supports Professor Yackee's basic premise that such decisions are better left to legal professionals who are experts in the field, and that social scientists can benefit from collaborating with such professionals when devising empirical research studies.

As I have seen in my practice, sound empirical work has tremendous potential to inform legal analysis and drive policy. Before it can do so, however, a more systematic and scientific approach must be taken toward the incorporation of legal expertise into empirical research.

Appendix 1: Model Comparison Results

PROFESSOR YACKEE MODEL

depvar_best	Coef.	Std. Err.	z	P> z	[95% Conf.	Interval]
-----	-----	-----	-----	-----	-----	-----
home_fdi_o~s	-0.04287	0.021714	-1.97	0.048	-0.08543	-0.00032
host_colony	-0.36788	0.19695	-1.87	0.062	-0.75389	0.018139
host_polity2	0.0333	0.00502	6.63	0	0.023461	0.043139
host_polit~y	0.000752	0.003394	0.22	0.825	-0.0059	0.007404
host_gdp_g~h	-0.00888	0.007548	-1.18	0.239	-0.02367	0.005913
host_ibrd~s	-0.23973	0.138953	-1.73	0.084	-0.51207	0.032612
icsid_signed	-0.09169	0.137213	-0.67	0.504	-0.36062	0.177242
diff_gdp	7.63E-14	7.24E-14	1.05	0.292	-6.56E-14	2.18E-13
year_counter	0.063601	0.021592	2.95	0.003	0.021282	0.105919

AMIRFAR MODEL

cma_nomissing	Coef.	Std. Err.	z	P> z	[95% Conf.	Interval]
-----	-----	-----	-----	-----	-----	-----
home_fdi_o~s	-0.02453	0.02585	-0.95	0.343	-0.0752	0.026135
host_colony	-0.04763	0.117065	-0.41	0.684	-0.27707	0.181813
host_polity2	0.02702	0.006582	4.11	0	0.01412	0.039919
host_polit~y	0.001268	0.003271	0.39	0.698	-0.00514	0.007679
host_gdp_g~h	-0.02442	0.005546	-4.4	0	-0.03529	-0.01355
host_ibrd~s	-0.00777	0.099534	-0.08	0.938	-0.20286	0.187311
icsid_signed	-0.20448	0.11972	-1.71	0.088	-0.43913	0.030163
diff_gdp	9.22E-14	1.02E-13	0.9	0.365	-1.07E-13	2.92E-13
year_counter	0.10074	0.021975	4.58	0	0.05767	0.14381