



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 86 | Number 1

Article 2

---

12-1-2007

# Empirically Evaluating Claims about Investment Treaty Arbitration

Susan D. Franck

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

Available at: <http://scholarship.law.unc.edu/nclr/vol86/iss1/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# EMPIRICALLY EVALUATING CLAIMS ABOUT INVESTMENT TREATY ARBITRATION\*

SUSAN D. FRANCK\*\*

*As a blossoming field of study, empirical legal scholarship can offer valuable insights on issues of international importance. The resolution of disputes from investment treaties is one such issue that affects international relations, implicates international legality of domestic government conduct, and puts millions of taxpayer dollars at risk. However, there is little empirical work that transparently explores this area. While suggesting there has been a “litigation explosion,” commentators make untested assertions about investment treaty disputes. As the first research article that explains its methodology and results, this Article is a modest attempt to evaluate claims about investment treaty arbitration. The Article explores: (1) who is involved in arbitration and what is arbitrated, (2) increases in awards, (3) win/loss rates, (4) amounts claimed and awarded, (5) arbitration costs, (6) use of other dispute resolution processes, and (7) nationality and gender of arbitrators. Subjecting these areas to empirical scrutiny provides information that sets the stage for future research to provide insights to government officials responsible for negotiating investment treaties and parties planning their dispute resolution strategies. Replication and convergence of such research offers an opportunity to*

---

\* Copyright © 2007 by Susan D. Franck.

\*\* Assistant Professor of Law, University of Nebraska Law College. The American Society of International Law selected the author to present this paper at the 101st Annual Meeting. The author wishes to thank Kirsten Carlson, Laura Cooper, Christopher Drahozal, John Gotanda, Chris Guthrie, Michael Heise, Daniel Klerman, John Lande, Leandra Lederman, David S. Law, Colleen Medill, Richard Moberly, W. Michael Reisman, Jennifer Robbennolt, Andrea Schneider, Bob Schopp, Anna Shavers, D. Daniel Sokol, Nancy Staudt, Steve Willborn, Jason Yackee, and David Zaring for their comments. The author also recognizes the suggestions she received during workshops at the George Washington University School of Law, the Kansas University School of Law, the University of Georgia School of Law, the University of Illinois College of Law, the University of Wisconsin’s Global Legal Studies Center, the Washington & Lee University School of Law, and Yale Law School’s Junior International Law Scholars Roundtable. The author wishes to thank Mindy Anderson-Knott, Vicki L. Plano Clark, Walter Stroup, Julia McQuillan, and Lindsay Burford, Jamie Marincic, Leanne Hicks of the Survey, Statistics, and Psychometrics Core Facility at the University of Nebraska-Lincoln for their invaluable assistance with methodology design and data analysis. The author acknowledges the contributions of her research assistants, Jenna Perkins, who helped create tables, and Melanie Neely, who was steadfastly meticulous in her approach to gathering, coding, and discussing data. A McCollum Research Grant provided support for the research and writing of this Article.

*promote dialogue about and evaluation of the appropriateness of a dispute resolution process with profound public implications.*

INTRODUCTION .....	3
I. INVESTMENT TREATIES AND INVESTMENT RELATED CONFLICT .....	7
A. <i>The Role of Foreign Investment</i> .....	7
B. <i>Investment Treaties</i> .....	8
1. Substantive Rights .....	9
2. Procedural Rights: Resolving Investment Treaty Disputes .....	9
II. THE ROLE OF EMPIRICAL LEGAL RESEARCH.....	13
III. METHODOLOGY FOR EMPIRICAL ANALYSIS OF INVESTMENT TREATY ARBITRATION.....	16
A. <i>Selecting the Data: Publicly Available Arbitration Awards</i> .....	16
1. Choosing the Unit of Analysis.....	16
2. Distinguishing Awards from Orders and Other Decisions.....	20
B. <i>Gathering the Data</i> .....	22
C. <i>The Coding Process</i> .....	23
IV. THROUGH THE LOOKING GLASS: INVESTMENT TREATY ARBITRATION AWARDS .....	24
A. <i>Basic Information About the Population</i> .....	24
1. Cases.....	24
2. Final Awards.....	24
B. <i>Claim #1: Are Investors from Developed Countries         Subjecting Developing States to Investment Arbitration?</i> .....	26
1. Parties to the Cases: Investors and Governments .....	26
a. Investors.....	26
b. Respondent Governments .....	31
c. Symmetry of Investment Treaty Arbitration.....	33
2. Arbitrated Treaties .....	36
3. Arbitral Institutions and Rules.....	38
4. Industries Affected.....	41
C. <i>Claim #2: Is There an Increasing Number of Treaty         Arbitrations?</i> .....	44
D. <i>Claim #3: Do Investors Win More Often than         Governments?</i> .....	48
1. The Winners and Losers of Investment Treaty Arbitration.....	49
2. Winning and Losing Jurisdiction .....	52
3. Winning and Losing on the Merits .....	53
4. Winning and Losing at the Damages Stage .....	53

5. Implications of Winning at Different Stages .....	54
E. <i>Claim #4: Do Investors Recover Large Amounts?</i> .....	55
1. Amounts Claimed .....	57
2. Amounts Awarded .....	58
3. Amounts Received .....	64
F. <i>Claim #5: Are Arbitration Costs Substantial?</i> .....	66
1. TCE: Tribunal's Costs and Expenses .....	68
2. PLC: Parties' Legal Costs .....	69
3. Future Research .....	70
G. <i>Claim #6: Are Other Forms of Dispute Resolution Used?</i> .....	70
1. Awards Embodying Settlement Agreements .....	72
2. Case Disposition .....	73
H. <i>Claim #7: Are Arbitrators a "Pale, Male, and Stale"</i> <i>"Mafia"?</i> .....	75
1. Arbitrator Nationality .....	77
2. Arbitrator Gender .....	81
A PRELIMINARY SYNTHESIS AND RECOMMENDATION FOR FURTHER ANALYSIS .....	83

“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”

—Justice Oliver Wendell Holmes, Jr.<sup>1</sup>

## INTRODUCTION

With surges in international investment and the number of treaties protecting foreign investment,<sup>2</sup> there is increasing interest in how investment treaty conflict is managed. Given the implications for international relations, public policy, and the fiscal responsibility of governments,<sup>3</sup> this interest is not misplaced. A purported “litigation

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1529–47 (2005).

3. MARY BOTTARI & LORI WALLACH, PUBLIC CITIZEN, NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005, at vii–viii (2005) [hereinafter PUBLIC CITIZEN, RECORD], available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>; see also Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 49 (2005) (noting that the increase in international investment disputes “have a significant financial impact”); Michael D. Goldhaber, *Wanted: A World Investment Court*, FOCUS EUR., Summer

explosion"<sup>4</sup> in investment treaty conflict has led to a teething period. Parties and nonparties have cheered and jeered the efficacy, efficiency, and fairness of the current system for resolving investment treaty disputes.<sup>5</sup> Meanwhile, commentators make empirically unsubstantiated claims about investment treaty conflict, sometimes designed to cast doubt upon the credibility of investment treaties and their dispute resolution mechanisms.<sup>6</sup> Recent comments from the President of Bolivia suggest that these claims may contribute to efforts to withdraw from institutions affiliated with the World Bank.<sup>7</sup>

Empirical legal scholarship<sup>8</sup> can and should aid the examination of the current system to test conventional wisdom, dispel myths, and provide data

2004, at 26, 29, available at <http://www.americanlawyer.com/focuseurope/investmentcourt04.html> (explaining claims brought by investors against Argentina were worth \$10 billion).

4. See *infra* Part IV.C (discussing the purported increase in treaty arbitrations).

5. Compare Charles H. Brower II, *Structure Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 93–94 (2000) (expressing concerns about the legitimacy of resolving NAFTA treaty claims), and Franck, *supra* note 2, at 1545–47 (expressing concerns about the legitimacy of resolution of investment treaty disputes), and Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 347–55 (2004) (outlining concerns about inconsistent jurisprudence in investment treaty arbitration), with Judith A.E. Gill, *Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?*, 2 TRANSNAT'L DISP. MGMT. 12, 15 (2005) (suggesting concerns about the system will be addressed over time), and Daniel M. Price, *NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. (SUPPLEMENT) 1, 9 (2001) (suggesting the system can handle inconsistency and “fears about over[-]reaching arbitral panels are quite premature”).

6. See, e.g., SARAH ANDERSON & SARA GRUSKY, FOOD & WATER WATCH, CHALLENGING CORPORATE INVESTOR RULE: HOW THE WORLD BANK'S INVESTMENT COURT, FREE TRADE AGREEMENTS, AND BILATERAL INVESTMENT TREATIES HAVE UNLEASHED A NEW ERA OF CORPORATE POWER AND WHAT TO DO ABOUT IT, at ix (2007), available at <http://www.ipsdc.org/reports/070430-challengingcorporatinvestorrule.pdf> (outlining a series of problems related to investment treaty dispute resolution).

7. News Release, Int'l Ctr. for Settlement of Inv. Disputes (“ICSID”), Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), <http://www.worldbank.org/icsid/highlights/05-16-07.htm>; Latin Lawyer Online, Venezuela and Bolivia Threaten to Leave ICSID (May 3, 2007), <http://www.latinlawyer.com/article.php?id=11638>; see also Leslie Mazoch, *Chavez Takes Cool View Toward OAS, Says Latin America Better Off Without World Bank*, HUFFINGTON POST, Apr. 30, 2007, <http://www.huffingtonpost.com/huff-wires/20070430/la-gen-venezuela-leftist-alternative> (quoting Evo Morales as saying “Governments in Latin America and I think all over the world never win the cases. The transnationals always win” and Hugo Chavez as saying “I didn't know that [ICSID] existed, but we're pulling out anyway”).

8. For the purposes of this Article, empirical legal scholarship involves the application of social science research methods—whether qualitative, quantitative, or mixed-methods—to gather and describe data and test hypotheses related to legal issues. Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT'L 291, 292 (2006); see also N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, AALS NEWSL. (Ass'n of Am. Law Schs., Wash., D.C.), Feb. 2005, at 1, 3, available at [http://www.aals.org/services\\_newsletter\\_presFeb05.php](http://www.aals.org/services_newsletter_presFeb05.php) (explaining research is “empirical if it involves a systematic investigation of real

that can promote efficient conflict management. Scholars call for a systematic analysis of investment treaty claims.<sup>9</sup> However, there are few valid and reliable empirical assessments of investment treaty disputes. Such analysis is critical.

There is an ongoing debate about whether investment treaties are worth the cost.<sup>10</sup> Economists and political scientists have begun to assess whether treaties achieve their purported objective of increasing levels of foreign investment.<sup>11</sup> There has, unfortunately, been little empirical work operationalizing other variables, particularly those related to costs.

Empirical insights are nevertheless vital. They have the potential to aid major stakeholders such as governments and investors, their lawyers, arbitrators, and the public. Government officials negotiating treaties to secure foreign investment may benefit from information about what disputes are likely to arise, what government behavior is likely to be the most problematic, what industries are likely to experience the greatest conflict, and what the government's potential financial exposure is. With this information, governments can better decide whether to enter into treaties. It would also aid the design of treaties that could address real problems and achieve governmental objectives. Similarly, parties in the midst of a dispute could use information to assess the costs and benefits of different dispute resolution options to facilitate selection of an effective

---

world facts or actual societal functioning, whether by quantitative or qualitative methods, for the purpose of making law more effective and just or the administration of justice more fair").

9. See Jeswald W. Salacuse, *Explanations for the Increased Recourse to Treaty-Based Investment Dispute Settlement: Resolving the Struggle of Life Against Form?*, in COHERENCE AND CONSISTENCY IN INTERNATIONAL INVESTMENT LAW (Karl P. Sauvant ed., forthcoming 2007) (manuscript, on file with the North Carolina Law Review) [hereinafter Salacuse, *Explanations*] (observing that there is little evidence about negotiation of investment treaty conflict and suggesting it should be explored); Jeswald W. Salacuse, *Alternative Methods of Treaty-Based, Investor-State Dispute Resolution 3* (2006) (unpublished manuscript, on file with the North Carolina Law Review) [hereinafter Salacuse, *ADR*] (urging that "states should study ways of enhancing [the] use [of ADR]"). See generally Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. (forthcoming Nov. 2007) (recommending analysis of investment conflict to design dispute resolution methods).

10. See, e.g., Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 962 (2007); Johanna Kalb, *The Institutional Consequences of Bilateral Investment Treaties*, INT'L AFF. J. U.C. DAVIS, Winter 2006, available at <http://davisiaj.com/content/view/110/86/>; Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 74 n.88 (2004).

11. The literature on this issue is mixed. While some scholars suggest that signing an investment treaty does increase foreign investment, others observe the opposite effect. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 348-52 (2007) (surveying the empirical literature including studies by Hallward-Dreimer, Rose-Ackerman and Tobin, the United Nations, Salacuse and Sullivan, Neumayer and Spess, and Swenson).

strategy. These scenarios suggest that empirical analysis could provide critical information to aid effective conflict management, reduce investment risk, and promote international development. An increased emphasis on empirical dimensions of legal scholarship<sup>12</sup> in this area will not solve all the problems, but it offers an opportunity to make more informed policy choices.

As a modest attempt at beginning to provide foundational information, this Article provides the first analysis of investment treaty conflict that examines treaty arbitration awards and explains the methodology and substantive results. Part I discusses investment treaties, investment treaty conflict, and how arbitration can be used to resolve disputes. Part II discusses the application of empirical methods to investment treaty dispute resolution. Part III describes the project's research methodology.

Part IV provides descriptive quantitative data needed for a systematic understanding of investment treaty disputes. It presents seven claims about investment treaty arbitration and uses data to assess them. The data suggests that some claims were correct; namely, that the number of arbitration awards increased, arbitration costs could be substantial, there were a small number of settlements, and a small fraction of arbitrators were women. The data also points to flaws in the conventional wisdom. Countries in the developing world were not the only respondents. A large percentage of claims were brought against Organization for Economic Cooperation and Development ("OECD") countries, whereas there were very few claims brought against the Least Developed Countries ("LDCs"). Additionally, investors did not win more disputes than governments, and tribunals did not generally award large damages. Despite assertions that an arbitration "mafia" decides cases, there was a relatively large number of arbitrators and a small number of arbitrators with repeat appointments.

After describing and analyzing the data, this Article concludes by synthesizing notable results, making an initial assessment of the dispute resolution system, and suggesting areas for future research. By taking an empirical approach to investment treaty conflict, data can methodically assess claims, evaluate the existing dispute resolution processes, and encourage the creation and use of appropriate dispute resolution systems.

---

12. N. William Hines articulated the need to "focus attention on the empirical dimension of our scholarly research." See Hines, *supra* note 8, at 3. The theme of the American Association of Law School's annual conference was: "Empirical Scholarship: What Should We Study and How Should We Study It?" See N. William Hines, Association of American Law Schools Annual Meeting, <http://www.aals.org/am2006/theme.html> (last visited Nov. 10, 2007). Cornell Law School, New York University School of Law, and the University of Texas Law School held the First Annual Conference on Empirical Legal Studies in October 2006. See Conference on Empirical Legal Studies 2006, <http://www.utexas.edu/law/conferences/cels2006/> (last visited Nov. 10, 2007).

This research is only the first step in a larger process. Future research should replicate and expand this analysis so that converging operations can produce valid and reliable research conclusions in an area of international importance.

## I. INVESTMENT TREATIES AND INVESTMENT RELATED CONFLICT

### A. *The Role of Foreign Investment*

Foreign investment has a critical impact on the world economy and development.<sup>13</sup> In previous decades, foreign investment involved billions of dollars annually. Projections suggest that investment inflows will be close to US\$1.5 trillion by 2010.<sup>14</sup>

While its precise definition is a subject of debate,<sup>15</sup> foreign investment archetypically involves a large infrastructure project. It might range from construction of a road to financing and development of a power plant<sup>16</sup> to exploitation of intellectual property rights<sup>17</sup> or to other commercial activity.<sup>18</sup>

---

13. R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 2–7 (2005); see Stefan A. Riesenfeld, *Foreign Investments*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 435, 435–49 (R. Benhardt ed. 1995).

14. ECON. INTELLIGENCE UNIT, WORLD INVESTMENT PROSPECTS TO 2010: BOOM OR BACKLASH 6 (2006), available at [http://www.cpii.columbia.edu/pubs/documents/WIP\\_to\\_2010\\_SPECIAL\\_EDITION.pdf](http://www.cpii.columbia.edu/pubs/documents/WIP_to_2010_SPECIAL_EDITION.pdf). Net private capital flows in emerging markets are a key source of this investment. See Diana I. Gregg, *Flows to Emerging Markets Set Record of \$553 Billion in 2006, Remain Strong*, INT'L BUS. & FIN. DAILY, June 5, 2007, available at <http://www.bna.com/> (select "International Business & Finance Daily" in the drop-down box at the top of the page; then search for "Flows to Emerging Markets Set Record of \$553 Billion in 2006, Remain Strong").

15. Many treaties define "investment." See Treaty Between Government of the United States of America and the Government of \_\_\_\_ Concerning the Encouraged and Reciprocal Protection of Investment, Feb. 5, 2004, 3, <http://www.state.gov/documents/organization/29030.doc> [hereinafter 2004 U.S. Model BIT] (defining investment). The definition of "investment" is otherwise the subject of debate. See generally PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK (1997) (defining "foreign direct investment" by contrasting it with "portfolio investment"); Riesenfeld, *supra* note 13, at 435 (defining "foreign investment" as the "transfer of funds or materials from one country . . . to another country . . . to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise").

16. See Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 406–07 (2006).

17. Ingo Selting, *FDI and International Protection of Intellectual Property*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 205–06 (Daniel D. Bradlow & Alfred Escher eds., 1999).

18. See U.N. Conference on Trade and Dev., *Dispute Settlement: International Centre for the Settlement of Investment Disputes: Requirements Ratione Materiae*, 19–24, U.N. Doc. UNCTAD/EDM/Misc.232/Add.4 (2003), available at [http://www.unctad.org/en/docs/edmmisc232add4\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add4_en.pdf) (suggesting service, construction, trade, and financial related investments can be



Because of its importance to development and economic prosperity, there is competition among developed and developing countries to attract foreign investment. Governments use various strategies—at a national or sub-national level—to facilitate this objective. Some of these strategies might be straightforward, such as liberalizing an economic sector or providing tax incentives.<sup>19</sup> Other strategies might be more complex, such as improving the court system or creating effective alternative dispute resolution.<sup>20</sup>

### B. *Investment Treaties*

One tactic governments might use to promote foreign investment is signing an investment treaty.<sup>21</sup> An investment treaty is an agreement made between two or more governments that safeguards investments made in the territory of other signatory countries.<sup>22</sup> For example, the United States and Ukraine signed a Bilateral Investment Treaty (“BIT”).<sup>23</sup> In it, the United States provides a series of rights to Ukrainian investors investing in the

“investments”). *But see id.* at 17 (noting ICSID refused to register a case because a supply contract for the sale of goods was not an “investment”).

19. Governments could provide fiscal incentives (like tax concessions or subsidies), improve domestic infrastructure, promote a skilled labor force, establish agencies to promote investment, improve the regulatory environment, or enter into treaties. *See* THE WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 56–58 (2004), available at [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf); World Bank, Policies to Attract Foreign Direct Investment, <http://rru.worldbank.org/PapersLinks/Policies-Attract-Foreign-Direct-Investment/> (last visited Nov. 27, 2007). While the methodology has been subject to critique, some research suggests that protecting intellectual property rights fosters investment. Paul J. Heald, *Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study*, 10 J. INTEL. PROP. L. 309, 309–11 (2003).

20. Franck, *supra* note 11, at 340 (discussing how India and China are attempting to improve their alternative dispute resolution systems as a tactic for fostering foreign investment).

21. While the stated goal of signing these international investment agreements is largely to increase foreign investment levels, empirical analyses have not determined whether these treaties achieve this objective. *See generally* Franck, *supra* note 3, at 48–51 (outlining the issue); *see also supra* note 11.

22. Franck, *supra* note 3, at 52. While these treaties typically take the form of Bilateral Investment Treaties, there are also Multilateral Investment Treaties and integrated Free Trade Agreements. *See, e.g.*, United States Trade Representative, Central American-Dominican Republic-United States Free Trade Agreement, ch. 10, Aug. 5, 2004, [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/CentralAmericanFreeTradeTA.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/CentralAmericanFreeTradeTA.asp); North American Free Trade Agreement, U.S.-Can.-Mex., ch.11, Dec. 17, 1992, 32 I.L.M. 612; Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV.-FOREIGN INV. L.J. 287, 287–88 (1997).

23. *See* Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, Mar. 4, 1994, U.S.-Ukraine, S. TREATY DOC. NO. 103–37, available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_ukraine.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_ukraine.pdf).

United States. The reciprocal nature of the treaty gives U.S. investors in Ukraine the same rights as their Ukrainian counterparts.

By the end of 2005, there were at least 2,495 investment treaties signed by 175 different countries,<sup>24</sup> and around 75% are in force.<sup>25</sup> The proliferation of these investment treaties was a paradigm shift for investor rights on both substantive and procedural levels.

### 1. Substantive Rights

Investment treaties articulate substantive investment rights<sup>26</sup> and typically provide foreigners with an economic bill of rights from the host state. These rights might include guarantees of appropriate compensation for expropriation, promises of freedom from unreasonable or discriminatory measures, guarantees of national treatment for the investment, assurances of fair and equitable treatment, promises that investments will receive full protection and security, undertakings that a sovereign will honor its obligations, and assurances that foreign investment will receive treatment no less favorable than that accorded under international law.<sup>27</sup>

### 2. Procedural Rights: Resolving Investment Treaty Disputes

A key innovation of investment treaties has been to grant investors procedural rights granting direct access to dispute resolution that redresses their grievances against host governments. Rather than having substantive

---

24. U. N. Conference on Trade and Dev., *The Entry into Force of Bilateral Investment Treaties* (BITS), 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/9 (2006), [http://www.unctad.org/en/docs/webiteiia20069\\_en.pdf](http://www.unctad.org/en/docs/webiteiia20069_en.pdf) [hereinafter UNCTAD, *Entry into Force*]; U.N. Conference on Trade and Dev., *Research Note: Research Developments In International Investment Agreements*, 1–3, 13–15, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005), [http://www.unctad.org/sections/dite\\_dir/docs/webiteiit20051\\_en.pdf](http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf) [hereinafter UNCTAD, *Research Developments*].

25. UNCTAD, *Entry into Force*, *supra* note 24, at 2 (acknowledging that out of the 2,495 investment treaties in existence at the end of 2005, only 75.8% had entered into force); Marie-Franc Houde, *Novel Features in Recent OCED Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT PERSPECTIVES 143, 143–44 (2006) (suggesting the number of international investment agreements in force is around 1,700).

26. *See, e.g.*, Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 641 (1998) (discussing the controversy surrounding standards for international expropriation, including the rise and fall of the Hull Rule).

27. *See* RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES*, 165–204 (1995); *see also* Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection* 339–50, in RECUEIL DES COURS 269 (1997) (describing substantive rights in investment treaties).

rights that are legally unenforceable,<sup>28</sup> treaties give investors a forum to redress alleged wrongs.<sup>29</sup>

Such wrongs typically arise when government conduct adversely affects foreign investment. These might involve a traditional international law violation, such as nationalization of a business without fair compensation.<sup>30</sup> They may also involve more subtle government conduct, such as (1) revocation of a banking license,<sup>31</sup> (2) change in the interpretation of tax law that decreases an anticipated refund,<sup>32</sup> (3) passage of an environmental regulation that has a disparate and adverse financial impact upon foreign investors,<sup>33</sup> (4) failure to advise an investor about licenses needed to operate an investment,<sup>34</sup> or (5) alleged breach of a commercial contract to which the government is a party.<sup>35</sup>

In the past, investors had more limited and less appealing options for redressing international law violations. First, this meant investors might have to accept the political will of their own government, the host government, or both when deciding whether to address the investor's complaints.<sup>36</sup> Second, investors might have to litigate in the host government's national courts where defenses of sovereign immunity are

28. See Franck, *supra* note 11, at 343 n.25 (observing that rights that cannot be enforced have been historically viewed as a legal fiction); Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining*, 36 J. LEGAL STUD. 189, 190 (2007) (analyzing a random sample of treaties from a U.N. database but finding that only half of the treaties contained dispute resolution provisions).

29. See generally William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5–14 (2006) (describing the evolution from diplomatic protection to treaties of Friendship, Commerce and Navigation to investment treaties); Franck, *supra* note 2, at 1525–29 (same).

30. *Eletronica Sicula, S.p.A (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 4 (July 20, 1989).

31. *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), ¶ 316, 17 ICSID REV.-FOREIGN INV. L.J. 395 (2002), <http://ita.law.uvic.ca/documents/Genin-Award.pdf> [hereinafter *Genin Award*].

32. *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award (July 1, 2004), <http://www.investmentclaims.com/decisions/Occidental-Ecuador-FinalAward-1Jul2004.pdf>.

33. *Methanex Corp. v. United States*, UNCITRAL, Final Award (Aug. 3, 2005), 44 I.L.M. 1345 (2005), <http://www.state.gov/s/l/c/5818.htm>. [hereinafter *Methanex Award*].

34. *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Final Award (Aug. 30, 2000), 40 I.L.M. 36 (2001), <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf> [hereinafter *Metalclad Award*].

35. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of Jurisdiction (Jan. 29, 2004), 18 ICSID REV.-FOREIGN INV. L.J. 307 (2003), [http://ita.law.uvic.ca/documents/SGSvPhil-final\\_001.pdf](http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf); see also *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf> (finding a failure to adhere to obligations where there was an “abrogation of the guarantees under the statutory framework”). These are “umbrella clause” claims. *DOLZER & STEVENS, supra* note 27, at 81–82.

36. Franck, *supra* note 2, at 1536–37.

often available.<sup>37</sup> Third, investors may simply have to absorb the cost of adverse government action by doing nothing or making a claim under their political risk insurance.<sup>38</sup> The investor-state dispute resolution mechanism in many treaties, in contrast, permits an investor to bring the relevant host government to the dispute resolution table.<sup>39</sup>

No uniform dispute resolution process exists because treaties are individually negotiated.<sup>40</sup> There appear to be patterns, however. Many treaties have a two-tiered dispute resolution process.<sup>41</sup> At the first level, investors may (1) engage in some non-binding form of dispute resolution,<sup>42</sup>

---

37. *Id.* at 1537.

38. Salacuse, *Explanations*, *supra* note 9, at 13; Franck, *supra* note 2, at 1620 n.469 (discussing political risk insurance). Investors may also have a contractual right to arbitrate for disputes arising out of a commercial contract with an arbitration agreement. *See generally* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 151–214 (1996) (discussing political risk insurance and arbitration).

39. Investor-state dispute resolution is distinct from the state-to-state dispute resolution. *See* Bernardo M. Cremades, *Has the Proliferation of BITs Gone Too Far?: Is It Now Time for a Multilateral Investment Treaty?*, 5 J. WORLD INV. & TRADE 89, 90–91 (2004) (describing the use of state-to-state arbitration to interpret a treaty); Franck, *supra* note 3, at 53 n.26 (discussing cases where state-to-state arbitration was initiated after an investor-state claim). Not all treaties, however, permit direct investor-state dispute resolution. *See* Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Japan-Phil., art. 107, Sept. 9, 2006, available at <http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf>; Dodge, *supra* note 29, at 22–26 (discussing the Australia-United States Free Trade Agreement).

40. While there are important textual and substantive similarities in the terms of investment treaties, there are nevertheless variations. *See* Jason W. Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOKLYN J. INT'L L. (forthcoming 2008) (Univ. of Wisc. Legal Studies Research Paper No. 1053 at 11–12, available at <http://ssrn.com/abstract=1015088>); U.N. Conference on Trade and Dev., *Investment Provisions in Economic Integration Agreements*, U.N. Doc. UNCTAD/ITE/IIT/2005/10 (2006), [http://www.unctad.org/en/docs/iteiit200510\\_en.pdf](http://www.unctad.org/en/docs/iteiit200510_en.pdf).

41. *See* U.N. CTR. ON TRANSNATIONAL CORP., BILATERAL INVESTMENT TREATIES 6–0 (1988); DOLZER & STEVENS, *supra* note 27, at 119–20; U.N. Conference on Trade and Dev., *Dispute Settlement: Investor-State*, 12–14, U.N. Doc. UNCTAD/ITE/IIT/30 (2005), available at [http://www.unctad.org/en/docs/iteiit30\\_en.pdf](http://www.unctad.org/en/docs/iteiit30_en.pdf).

42. While some treaties require mandatory “amicable resolution” or negotiation, other treaties may make it a discretionary option. *Compare* United States BIT Model Negotiating Text of January 11, 1982, art. VII(2), reprinted in KENNETH J. VANDELDE, UNITED STATES INVESTMENT TREATIES: POLICIES AND PRACTICE app. A-1, at 6 (1992) (stating that according to the 1982 U.S. Model BIT “the parties shall initially seek to resolve the dispute by consultation and negotiation . . . [and] . . . may agree to rely upon non-binding, third-party procedures” (emphasis added)), with Treaty Between the Government of the United States of America and the Government of \_\_\_\_\_ Concerning the Encouragement and Reciprocal Protection of Investment, 195, art. IX (Apr. 1994), reprinted in U.N. Conference on Trade and Dev., *International Investment Instruments: A Compendium*, 201–02, U.N. Doc. UNCTAD/DTC/30 (Vol. III) (1996) (failing to reference any type of non-binding dispute resolution), and 2004 U.S. Model BIT, *supra* note 15, art. 23 (suggesting parties “should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures” (emphasis added)).

(2) litigate the dispute in local courts,<sup>43</sup> and/or (3) wait a few months after submitting a dispute notice to “cool off” prior to submitting the dispute to arbitration.<sup>44</sup> At a second level, provided an investor complies with the requisite preconditions,<sup>45</sup> governments often offer to resolve treaty disputes through arbitration and let investors elect where to resolve those claims. The potential fora might include<sup>46</sup> an ad hoc tribunal organized under the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules or institutional arbitration at the Stockholm Chamber of Commerce (“SCC”) or the World Bank’s International Centre for the Settlement of Investment Disputes (“ICSID”).<sup>47</sup>

As a concrete example, suppose that a U.S. investor buys a privatized group of Ukrainian radio stations, develops broadcasting capacity, and becomes the market leader of innovative radio programming. Then imagine that some government conduct prevents the investor from utilizing the broadcast frequencies, and the government fails to renew the investor’s broadcasting license. The U.S. investor—who once had a profitable business—wants to redress the perceived wrong. This is not unlike *Lemire v. Ukraine*,<sup>48</sup> where Mr. Lemire attempted to resolve his dispute with

---

43. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 877 (2005); Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 174–75 (2005).

44. Calvin A. Hamilton & Paula I. Rochweg, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT’L L. REV. 1, 50 n.225 (2005); see also 2004 U.S. Model BIT, *supra* note 15, arts. 24(2), 24(3) (providing an example of the process). One recent exception is a treaty between Japan and the Philippines that has only one tier of mandatory mediation. See *supra* note 39.

45. Tribunals do not always enforce these prerequisites. Christoph Schreuer, *Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 233–36 (2004) (nonobservance of waiting period and other preconditions as procedural formalities, which are not followed).

46. See Franck, *supra* note 2, at 1541–42 (discussing how countries sometimes let investors choose between national courts and arbitration). Appeals of national court decisions presumably would be through the national courts and not made in arbitration.

47. See Franck, *supra* note 3, at 54. Typically, investors select an arbitrator and the government selects another. Under the ICSID Convention, parties can agree on the appointment of the president of the tribunal. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37(2)(b), March 18, 1965, 4 I.L.M. 524, 1538 (1966) [hereinafter ICSID Convention]. By contrast, under ad hoc UNCITRAL arbitration, party-appointed arbitrators agree on the Chair. United Nations Commission on International Trade Law Arbitration Rules art. 7(1) (1976), Apr. 28, 1976, 15 I.L.M. 701, 705 [hereinafter UNCITRAL Arbitration Rules]. Where there is an appointment problem with the process, an arbitral institution or other appointing authority will step in to make the requisite appointments. *Id.* art. 7(2)(b).

48. *Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1 (Sept. 18, 2000), 15 ICSID REV.-FOREIGN INV. L.J. 530, 535–36 (2000) [hereinafter *Lemire Award*], <http://www.worldbank.org/icsid/cases/lemire.pdf>.

Ukraine initially through amicable resolution but later initiated ICSID arbitration.<sup>49</sup>

While *Lemire* provides an example of how investors might utilize a treaty's dispute resolution provisions, it is not clear whether it is representative of the broader population. Such case-specific data does not provide general information about the different dispute resolution options and how the processes function. More systematic consideration, with enhanced external validity, is therefore warranted.

## II. THE ROLE OF EMPIRICAL LEGAL RESEARCH

The idea that empiricism can enhance legal scholarship, education, and practice generally is not new.<sup>50</sup> But, its application to investment treaty conflict is novel. There is little empirical evidence in this area,<sup>51</sup> and this void has consequences.<sup>52</sup> Information about investment treaty arbitration involves war stories and anecdotes shared at conferences or described on

---

49. *Id.* at 533–35; *Foreign Operations, Export Financing, and Related Programs Appropriations for 1999: Hearings Before the Subcomm. on Foreign Operations, Export Financing, and Related Programs of the H. Comm. on Appropriations*, 105th Cong. 38–99 (1998) (testimony of Joseph Lemire, President of Gala Radio & TV Company and Olympic Champions, Limited).

50. Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 811 (1999); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 324 (1989); see, e.g., OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920); Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 581–82 (1983); Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1744 (2004); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 779–80 (1986).

51. While this Article was in progress, papers have come out, but they provided neither a broad perspective on investment treaty arbitration nor the transparent research methodology needed to establish their validity and reliability. See generally ANDERSON & GRUSKY, *supra* note 6; Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Noah Rubins et al., *ICSID Arbitrators: Is There a Club and Who Gets Invited*, 3 GLOBAL ARB. REV. 11 (2006); Matthew Weiniger & Matthew Page, *Treaty Arbitration and Investment Disputes: Adding Up the Costs*, 1 GLOBAL ARB. REV. 44 (2006).

52. These difficulties may not be unexpected because the investment treaty dispute resolution process is relatively new and data may not be available. See *Asian Agriculture Products Ltd. v. Republic of Sri Lanka*, 30 I.L.M. 577, 580 (1990), available at <http://ita.law.uvic.ca/AsianAgriculture.Award.pdf> (providing the first publicly available investment treaty award in 1990); U.N. CONFERENCE ON TRADE AND DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, at 8, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) (referring to the first BIT in 1959); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 825–26 (2002) (suggesting empirical legal research can be inhibited by “some unevenness in various fields’ overall intellectual development and maturity” and “the availability of data”).

listservs, blogs, or written publications.<sup>53</sup> While a useful starting point,<sup>54</sup> anecdotal information is insufficient, particularly if other data is available.<sup>55</sup> It can be misleading and promote myths.<sup>56</sup> Making inferences from anecdotes has questionable external validity as it draws data from a small and potentially nonrepresentative subset. Empirical research contextualizes anecdotes<sup>57</sup> and aids the assessment of informational accuracy, reliability, and validity.<sup>58</sup>

The United Nations Conference on Trade and Development (“UNCTAD”), a prominent U.N. institution addressing international investment and development, has published analysis about investment treaty arbitration.<sup>59</sup> While an important beginning,<sup>60</sup> the proper

53. OGE MID is a listserv of investment treaty arbitration practitioners, arbitrators, parties, and academics. Transnational Dispute Management is another source of information. Access to these sources is in part restricted to members and/or those paying a fee.

54. Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT’L ARB. 23, 24 (2003) (discussing differences between empirical research and anecdotes); Franck, *supra* note 11, at 347–48 (compiling anecdotal evidence about how investment treaties impact foreign investment, observing the data’s limitations, and recommending empirical research).

55. See Heise, *supra* note 50, at 808 (“[A]necdotal evidence supplies a risky foundation upon which to form generalizations applicable to a larger population.”); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1475 (2005) (discussing limitations of an anecdotal approach to empirical research). Compare Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3, 6 n.12 (1992) (“The plural of anecdote is data.”), and Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1955 n.86 (1991) (“[F]or lawyers the plural of anecdote is data.”), with Edith Green, *A Love-Hate Relationship*, 18 JUST. SYS. J. 99, 100 (1995) (“The plural of anecdote is not data.”).

56. The “no duty to rescue rule” in torts is based on an assumption that it is against human nature to put one’s life on the line for strangers. Nevertheless, Wesley Autrey’s act of jumping in front of a moving subway train to save the life of a stranger in January 2007 reflected David Hyman’s empirical results, namely that people commonly engage in not only cheap, easy rescues but also hazardous acts of heroism that would not be required by law and may not be justified in traditional cost-benefit terms. See Posting of Robert Justin Lipkin to Ratio Juris, <http://ratiojuris.blogspot.com/2007/01/when-empirical-legal-research-really.html> (Jan. 9, 2007 09:55AM EST); see also David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty To Rescue*, 84 TEX. L. REV. 653, 655–56 (2006).

57. See Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STAT. ASS’N 665, 668 (2000) (discussing ways in which empirical analysis can contextualize anecdotes).

58. See Drahozal, *supra* note 54, at 23 (observing the challenges of determining whether anecdotes or cases “are typical or atypical, frequent or infrequent, ordinary or extreme”); Heise, *supra* note 50, at 808 (discussing the lack of “mechanisms to assess anecdotal evidence for truthfulness, typicality, or frequency”).

59. U.N. Conference on Trade and Dev., *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 4, 1, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/2 (2005), [http://www.unctad.org/en/docs/webiteit20052\\_en.pdf](http://www.unctad.org/en/docs/webiteit20052_en.pdf) [hereinafter UNCTAD, 2005 IIA Monitor No. 4] (claiming that as of November 2005 there were 219 known treaty-based investor-state arbitrations); U.N. Conference on Trade and Dev., *Occasional Note: International Investment Disputes on the Rise*, 1–7, U.N. Doc. UNCTAD/WEB/ITE/IIT/2004/2 (Nov. 29, 2004) [http://www.unctad.org/sections/dite/ia/docs/webiteit20042\\_en.pdf](http://www.unctad.org/sections/dite/ia/docs/webiteit20042_en.pdf) [hereinafter UNCTAD,

interpretation of these results requires more complete information about the measurement, design, and data collection procedures than have been provided.

At present, the lack of access to the data and methodology<sup>61</sup> inhibit the replicability of the research and an estimation of the validity of UNCTAD's research conclusions. For example, UNCTAD breaks data down into categories—such as between developed and developing countries—without describing the basis for the distinction.<sup>62</sup> This creates uncertainty about the reliability of the assertions about investment arbitration's impact upon the developing world. Second, the unit of analysis is not always defined. UNCTAD appears to analyze claims arising under international investment treaties, but it is not possible to determine whether their figures were inflated by including investor-state disputes arising under domestic law.<sup>63</sup> The present research builds on UNCTAD's efforts but provides

---

*Disputes on the Rise*] (discussing the increase in international investor-state dispute settlements); U.N. Conference on Trade and Dev., *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 4, 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/11 (2006), [http://www.unctad.org/sections/dite\\_pccb/docs/webiteiia200611\\_en.pdf](http://www.unctad.org/sections/dite_pccb/docs/webiteiia200611_en.pdf) [hereinafter UNCTAD, 2006 IIA Monitor No. 4]; U.N. Conference on Trade and Dev., *Investor-State Disputes Arising From Investment Treaties: A Review*, 4–6, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005), [http://www.unctad.org/en/docs/iteit20054\\_en.pdf](http://www.unctad.org/en/docs/iteit20054_en.pdf) [hereinafter UNCTAD, *Review*] (discussing the increase in number of claims involving international investment disputes).

60. Previous analyses have not captured the full scope of investment treaty arbitrations and have a narrow focus, for example, on NAFTA claims. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1384–85 (2003); see also Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366 (2003) (analyzing NAFTA arbitrations). Research focusing exclusively on ICSID might overstate the number of investment treaty claims as ICSID's jurisdiction extends to claims that arise both under investment treaties that originate under international law and commercial agreements that originate under domestic law. See ICSID Convention art. 25, *supra* note 47, at 536. It might also understate investment claims by excluding treaty claims in other arbitral fora.

61. This could be remedied by posting the information on a Web page.

62. See *infra* notes 184–94, 301 and accompanying text. The author understands that UNCTAD wishes to expand transparency related to its data and research, which would be useful.

63. In at least one instance, it appears that UNCTAD did include a dispute that did not arise under an investment treaty. See *infra* note 139 (referring to CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14 (Dec. 17, 2004), [http://ita.law.uvic.ca/documents/CDCvSeychellesAward\\_001.pdf](http://ita.law.uvic.ca/documents/CDCvSeychellesAward_001.pdf)). While there is value in understanding the potential scope for investor-state dispute resolution generally, one must be cautious about an over-generalization between treaty-based claims and pure contract claims. This distinction matters because there is a different cost/benefit calculus in establishing a right under a commercial agreement than there is in negotiating an investment treaty, which arguably should play a role in: (1) determining the rights and responsibilities under those different agreements, and (2) designing a dispute resolution tailored to those different risks. See also *infra* notes 109, 139, 320 (discussing differences between claims arising under treaties and national law).



information about the data and methodology to support its conclusions about investment treaty arbitration.<sup>64</sup>

### III. METHODOLOGY FOR EMPIRICAL ANALYSIS OF INVESTMENT TREATY ARBITRATION

Not an inconsiderable amount of ink has been spilled recently over the quality of empirical legal scholarship.<sup>65</sup> Commentators have expressed concern over the failure of empirical researchers to explain “methodology” or “research design.”<sup>66</sup> The remainder of this section provides a transparent explanation of how data was selected, gathered, and coded to aid its credibility, reliability, and validity.

#### A. *Selecting the Data: Publicly Available Arbitration Awards*

##### 1. Choosing the Unit of Analysis

The author conducted this quantitative research to provide a descriptive baseline to guide future empirical work in this area.<sup>67</sup> While it would be a worthy undertaking to analyze the complete universe of investment treaty disputes and the life cycles of those disputes, this project had more modest goals.

In an effort to begin the process of empirically analyzing investment treaty conflict, it focused on data that was readily available and of a

64. An “accurate description of the legal system can supply the information necessary for sound policymaking.” See Eisenberg, *supra* note 57, at 665; see also Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5, 5 (2003) (discussing the importance of neutral and complete data).

65. See generally Lara Catá Backer, *Defining, Measuring And Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317 (2002); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002); Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002); Eisenberg, *supra* note 50; Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191 (2002); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002); Heise, *supra* note 50; Heise, *supra* note 52; Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033 (2002); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167 (2004); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002); Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777 (2002).

66. See Epstein & King, *supra* note 65, at 38–40, 80–97, 99–114; Heise, *supra* note 50, at 834; Mitchell, *supra* note 65, at 177–87, 204; Robbennolt, *supra* note 65, at 779, 789–90.

67. See generally GARY KING, ROBERT O. KEOHANE, SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

reasonably large size—namely the population of arbitrations<sup>68</sup> with at least one publicly available award.<sup>69</sup> The subject of analysis<sup>70</sup> was the population of investment treaty arbitration awards<sup>71</sup> that were publicly available<sup>72</sup> before June 1, 2006.<sup>73</sup> Awards that were not publicly available before then were excluded.<sup>74</sup>

---

68. Claims were based under bilateral treaties or multilateral investment treaties, like NAFTA. Claims based on violation of national investment legislation were not included. If the original claims were based upon an investment treaty but the tribunal found the treaty did not apply, that award was included but further awards (i.e., awards on the merits) were omitted. Only three cases exhibited this phenomenon: (1) *CCL v. Kazakhstan*, (2) *Ceskoslovenska Obchodni Banka v. Slovak Republic*, and (3) *Tradex Hellas v. Albania*. Jurisdictional Award Rendered in 2003 in SCC Case 122/2001, 2005 STOCKHOLM INT'L ARB. REV. 123 (2005) [hereinafter CCL, Jurisdiction]; *Ceskoslovenska Obchodni Banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999) [hereinafter *Ceskoslovenska*, Jurisdiction], 14 ICSID REV.-FOREIGN INV. L.J. 251 (1999), <http://ita.law.uvic.ca/documents/CSOB-Jurisdiction1999.pdf>; *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2) (Apr. 29, 1999) 14 ICSID REV.-FOREIGN INV. L.J. 197 (1999), [http://www.worldbank.org/icsid/cases/tradex\\_award.pdf](http://www.worldbank.org/icsid/cases/tradex_award.pdf).

69. Having selected arbitration awards as the category of analysis, it was prudent to consider different methods of analyzing awards. Under a “Westlaw” approach, researchers examine published decisions in case reporters or an electronic repository of generally available information. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 84–85 (2007), available at SSRN: <http://ssrn.com/abstract=977802>; see also Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. L. STUD. 429, 429–430 (2004). Another option is the “Database” approach that uses a database managed or controlled by a governmental agency. Moberly, *supra*, at 69; Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 687–91 (2005) (analyzing statistics compiled by the United States Equal Employment Opportunity Commission). A third useful methodology involves researchers gathering their own dataset from original sources for subsequent description and analysis. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125–27 (2002); Moberly, *supra*. This last approach was selected in part because there was no “Westlaw”-like database. It was selected for its breadth and depth of analysis so it would not limit the population of awards by institution and would gather all potentially relevant awards for analysis.

70. While this research involves descriptive, quantitative data, a qualitative research methodology may create contextualized data that describes the impact of individual variations within the population. The author thanks Hari Osofsky for her insight on this point.

71. See *infra* notes 88–94 and accompanying text (defining “award” for the purposes of this research).

72. See *infra* notes 76–78 (defining the scope of publicly available awards).

73. The earliest publicly available award was dated June 27, 1990. The latest award was dated May 16, 2006. The author selected the cutoff date of June 1 for administrative convenience to enable coding over the summer and permit discussions of coding methodology with the University of Nebraska’s Survey, Statistics, and Psychometrics Core Facility (SSP) on June 6, 2006.

74. Data on file with the North Carolina Law Review (listing publicly available cases on June 1, 2006). Theoretically, the population of publicly available awards is a subset of the potentially larger population of all investment treaty arbitration awards. Anecdotal evidence suggests that the population of all awards may not be significantly larger than the population of publicly available awards. See *infra* notes 81–82, 84 and accompanying text.

There is no single repository for investment treaty awards.<sup>75</sup> Awards in this population therefore came from three categories of sources: (1) public Web sites,<sup>76</sup> (2) an online database that charges a fee for access,<sup>77</sup> and (3) print-based sources.<sup>78</sup> Awards were included irrespective of the

---

75. Unpublished decisions from U.S. state and federal courts might nevertheless be available in online databases such as Westlaw or through freedom of information laws that permit citizens to access court documents. See Rex R. Perschbacher & Debra Lyn Basset, *The End of Law*, 84 B.U. L. REV. 1, 33 (2004) (observing that only appellate level “unpublished” decisions are available from online databases). For investment treaty arbitration awards, such online databases are the typical method of obtaining decisions. See *infra* note 77. Nevertheless, the lack of transparency in investment treaty arbitration prevents citizens from accessing arbitration documents. See Franck, *supra* note 3, at 87; John Ohnesorge, *Chinese Administrative Law in Northeast Asian Mirror*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 103, 145–46 (2006) (describing China’s lack of a Freedom of Information law). But see DAVID BANISAR, *PRIVACY INT’L, FREEDOM OF INFORMATION AROUND THE WORLD: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS* (2006), available at <http://www.privacyinternational.org/foi/foisurvey2006.pdf> (discussing countries with enacted or pending legislation about freedom of information); Maria Dakolias, *Are We There Yet?: Measuring Success of Constitutional Reform*, 39 VAND. J. TRANSNAT’L L. 1117, 1150–51 (2006) (suggesting that more than sixty countries around the world have Freedom of Information Laws).

76. The data was gathered from investment treaty awards available on three Web sites: Investment Treaty Arbitration, Investment Treaty Claims and ICSID. See Investment Treaty Arbitration, Chronological Listing, [http://ita.law.uvic.ca/chronological\\_list.htm](http://ita.law.uvic.ca/chronological_list.htm) (last visited Nov. 27, 2007) [hereinafter ITA Web site]; Investment Claims, Orders and Awards, <http://www.investmentclaims.com/oa1.html> (last visited Nov. 27, 2007); ICSID, ICSID Cases: On-Line Decisions and Awards, <http://www.worldbank.org/icsid/cases/awards.htm> (last visited Nov. 27, 2007). The author is unaware of other Web sites that systematically provide treaty awards to the public. But see Canada Department of Foreign Affairs and International Trade, Dispute Settlement: NAFTA—Chapter 11—Investment, <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp> (last visited Nov. 27, 2007) (providing access to documents related to investment treaty cases arising under NAFTA); NAFTA Claims, Pleadings, Orders & Awards, <http://www.naftaclaims.com/disputes.htm> (last visited Nov. 27, 2007) (same); U.S. Department of State, NAFTA Investor-State Arbitrations, <http://www.state.gov/s/l/c3439.htm> (last visited Nov. 27, 2007) (same); Stockholm Chamber of Commerce, Stockholm International Arbitration Review, <http://www.sccinstitute.com/uk/Publications> (last visited Nov. 27, 2007) (providing access to some investment treaty cases rendered by the SCC). While the ITA Web site was the initial source for awards, these awards were cross checked against what was available from public Web sites, online databases, and other print-based sources.

77. Westlaw created a database, APPLETON-ISR, containing arbitration awards. Franck, *supra* note 3, at 74 n.105. The author had access to an Excel spreadsheet from Westlaw listing the cases in its APPLETON-ISR database. One case in the population, *IBM v. Ecuador*, was initially available only on APPLETON-ISR; after the author mentioned this gap on a professional listserv, it became available on Investment Treaty Arbitration and Investment Claims. Email from Susan D. Franck, Assistant Professor of Law, University of Nebraska Law College, to OGEMID@JISMAIL.AC.UK (May 18, 2006, 18:05) (on file with the North Carolina Law Review). It is still unavailable on the ICSID Web site.

There was also a database on Kiewit Arbitration, which was not searched given the large license fee. After this Article was drafted, the author saw a reference suggesting LEXIS had a database for investment treaty arbitration awards. Commission, *supra* note 51, at 136. The author’s conversations with LEXIS indicated such a database does not exist.

78. Two investment cases—identified as *Nagel v. Czech Republic* and *CCL v. Kazakhstan*—were published initially in the *Stockholm International Arbitration Review*. *Final Arbitral Award*

language in which they were written. Three awards were in Spanish<sup>79</sup> and four were in French,<sup>80</sup> the remaining awards were in English.

As variables<sup>81</sup> may affect the public availability of awards,<sup>82</sup> focusing on public awards may create a case selection bias. It cannot be known whether the population of publicly available awards is a representative subset of the population of all awards.<sup>83</sup> One commentator claims “the great majority of treaty awards are public.”<sup>84</sup> Meanwhile, practitioners, arbitrators, and those affiliated with arbitral institutions have made anecdotal comments that (1) there are only a “small” number of private

---

*Rendered in 2003 in SCC Case 49/2002*, 2004 STOCKHOLM ARB. REP. 141 (2004); CCL, Jurisdiction, *supra* note 68. They are now both available on Investment Treaty Arbitration and Investment Claims. Awards may also be available in hard copy in *ICSID Reports*, *ICSID Review-Foreign Investment Law Journal* or *International Legal Materials*. See, e.g., Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, 42 I.L.M. 540 (2003).

79. Camuzzi International S.A. v. Argentine Republic, ICSID Case No. ARB/03/7, Decision on Jurisdiction (June 10, 2005), <http://www.investmentclaims.com/decisions/0%a%20%20%20%20Camuzzi2jurisdiction.pdf>; IBM World Trade Corp. v. Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction (Dec. 22, 2003), <http://ita.law.uvic.ca/documents/IBMvsRDE.pdf> [hereinafter IBM, Jurisdiction]; Olguín v. Paraguay, ICSID Case No. ARB/98/5, Decision on Jurisdiction (Aug. 8, 2000), 18 ICSID REV.-FOREIGN INV. L.J. 133 (2003), <http://ita.law.uvic.ca/documents/Endoro-Jurisdiction-Spanish.pdf> (now available in English translation at <http://ita.law.uvic.ca/documents/Olgun-award-en.pdf>).

80. Goetz v. Burundi, ICSID Case No. ARB/95/3 (Feb. 10, 1999), 15 ICSID REV.-FOREIGN INV. L.J. 454, 526 (2000), <http://ita.law.uvic.ca/documents/Goetz-Award.pdf> [hereinafter Goetz Award]; Consortium R.F.C.C. v. Morocco, ICSID Case No. ARB/00/6, Final Award (Dec. 22, 2003), <http://ita.law.uvic.ca/documents/ConsortiumRFCC-Award.pdf>; Consortium Groupement L.E.S.I.- DIPENTA v. Algeria, ICSID Case No. ARB/03/08, Award (Jan. 10, 2005), <http://ita.law.uvic.ca/documents/dipentav.algeria.pdf>; Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Decision on Jurisdiction (May 8, 2002), <http://ita.law.uvic.ca/documents/VictorPeyCasadovChile-Jurisdiction-PartI.pdf>.

81. Parties may agree or unilaterally elect to distribute awards. Arbitration practitioners involved in “beauty parades” may distribute awards to promote their own practices. Arbitration institutions may also create incentives that promote disclosure. The scope for liability for improper disclosure is unclear, particularly where one party does not consent, and may depend upon the applicable legal standards.

82. Certain governments may be subject to a Freedom of Information Act, which increases the likelihood that they will consent to or must disclose an award. See *supra* note 75 (discussing Freedom of Information legislation). Certain arbitral institutions have established practices that may promote disclosure. For example, the SCC has a journal that has previously published extracted versions of awards with identifying information removed. ICSID also has a historical practice of award publication, and, particularly in light of the new Arbitration Rules that require the publication of relevant extracts, ICSID awards are likely to enter the public domain. The more challenging question is whether there are critical differences between awards from these institutions and, for example, ad hoc awards. See *infra* note 111.

83. UNCTAD observed the “total number of treaty-based investment arbitrations is impossible to measure” and the actual number of claims is “very likely larger than what is known.” UNCTAD, *Review*, *supra* note 59, at 5–6.

84. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, at viii (2007). Van Harten, however, provides no empirical data to substantiate his claim.

awards, and (2) older and more recent awards are now largely in the public domain.<sup>85</sup>

If publicly available awards are representative, then there would be better external validity and the conclusions drawn here may be of broader applicability.<sup>86</sup> Replicability and convergence of the research can address this over time. Further research could do two things. First, research could replicate the procedures in this study but include confidential as well as publicly available awards. Second, it could determine whether publicly available awards and nonpublicly available awards vary in any systematic or substantive way.<sup>87</sup> In the interim, this data is the best available information.

## 2. Distinguishing Awards from Orders and Other Decisions

Scholars debate what distinguishes arbitration “awards” from procedural orders or other decisions, such as those related to interim measures or the confidentiality of the proceedings.<sup>88</sup> Tribunals use the term “award” in different manners.<sup>89</sup> This study defined an “award” as a written

---

85. The author received these comments in passing. Other commentary seems to reflect this. See Commission, *supra* note 51, at 136, 157 (suggesting that treaty awards are readily accessible but failing to account for the impact of confidential awards).

86. The validity and reliability of these comments is untested, however. One listing of arbitration awards includes both confidential and publicly available awards. See data on file with the North Carolina Law Review. As of August 15, 2007, this meant that out of the 109 awards made before June 1, 2006, only seven were unavailable. The public listing itself may be subject to case selection bias. Nevertheless, it should provide a useful starting point to assess the external validity of this research and aid in the replicability and convergence of research on investment treaty arbitration.

87. It is not clear what the potential effect of a case selection bias is. Investors who win have an incentive to disclose awards. For example, investors disclose awards because shareholders may positively view the information that the investor has won a claim against a government and created greater commercial certainty. Likewise, governments who win have a similar incentive to disclose awards. Notifying the public that they have won a case may restore confidence in the government or be of political utility. Moreover, governments may wish to publicize disputes where tribunals find no violation of international law as it may promote the confidence of other foreign investors in investing in that country. On balance, the selection effect may be a wash. One area where this may not be the case is data related to which arbitral institution is most likely to be used, since different institutions have different rules related to confidentiality and the disclosure of awards.

88. Cindy Fazzi, *Book Provides One-Stop Guidance in International Commercial Arbitration*, 61 DISP. RESOL. J. 88, 88 (2006) (acknowledging “‘[w]hat constitutes an award is a question with little international agreement. On the one extreme, there is a view that an award must give a party damages or other redress; at the other extreme, there is a view that any decision that finally decides an issue is an award’” (reviewing ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* (2005))).

89. *Compare* Ethyl Corp. v. Canada, UNCITRAL, June 24, 1998, 38 I.L.M. 708, 730 (1999), <http://ita.law.uvic.ca/documents/Ethyl-Award.pdf> [hereinafter Ethyl Award] (calling a jurisdictional determination an “award”) *with* Maffezini v. Spain, ICSID Case No. ARB/97/7

opinion by an arbitration tribunal that made a binding decision<sup>90</sup> on one or more of the four substantive phases of a case,<sup>91</sup> namely (1) jurisdiction, (2) merits, (3) damages, or (4) allocation of costs.<sup>92</sup> Other interim orders and decisions were omitted from the analysis.<sup>93</sup> Likewise, other decisions—from tribunals, ad hoc Annulment Committees, or national courts—were excluded.<sup>94</sup> Disputes with only a dispute notice or request for arbitration were also omitted. Future analysis may consider this additional information to provide a richer picture of investment treaty conflict and the life cycle of disputes.

---

(Jan. 25, 2000), 16 ICSID REV.-FOREIGN INV. L.J. 212 (2001), [http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_000.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_000.pdf) [hereinafter Maffezini Award] (labeling a jurisdictional decision as a “decision”). This is particularly complex for investment treaty arbitration because the ICSID Convention only permits final decisions to be labeled as “awards.” See ICSID Convention art. 48(3), *supra* note 47, at 540 (providing “the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based”). As a result, many interim decisions at ICSID are labeled as “decisions.” The same limitations are not present in ad hoc arbitration under the UNCITRAL Rules or arbitration at the SCC. UNCITRAL Arbitration Rules art. 32(1), *supra* note 47, at 713 (observing that “[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards”); ARBITRATION RULES art. 38, at 14 (Stockholm Chamber of Commerce, Arbitration Inst. 1999), [http://www.sccinstitute.com/\\_upload/shared\\_files/regler/web\\_A4\\_vanliga\\_2004\\_eng.pdf](http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_vanliga_2004_eng.pdf) [hereinafter SCC Rules] (permitting tribunals to “decide a separate issue or part of the dispute in a separate award”).

90. Because they are technically final awards and may address disputed issues such as the allocation of arbitration costs, awards embodying the parties’ settlement agreements were defined as “awards.” There were only two awards embodying settlement agreements. Lemire Award, *supra* note 48, and Goetz Award, *supra* note 80.

91. This definition means there may be several “awards” in a single case. Variables were used to prevent cases from being counted twice. For example, the “NewCase” variable coded the first award in a case with a “1.” When analyzing which treaties were arbitrated, we selected only new cases (SEL IF (NewCase EQ 1)) and analyzed the variable coding the arbitrated treaties (FRE ApplicableTreaty1).

92. This permitted analysis of each major phase at which the arbitration could terminate. Failing to define an award in this manner could prevent analysis of a dispute’s development and its association with other phases. For example, it might fail to address cost-shifting determinations that occur in multiple phases within a single case.

93. The ITA Web site refers to interim orders including: (1) requests for provisional measures, (2) petitions for participation as *amicus curiae*, and (3) requests to determine the place of arbitration. See ITA Web site, *supra* note 76; see also NAFTAclaims, [www.naftaclaims.com](http://www.naftaclaims.com) (last visited Nov. 27, 2007) (posting documents connected with NAFTA arbitration); NAFTAclaims S.D. Myers, [http://www.naftaclaims.com/disputes\\_Canada\\_sdmyers.htm](http://www.naftaclaims.com/disputes_Canada_sdmyers.htm) (last visited Nov. 27, 2007) (posting orders from *S.D. Myers v. Canada* regarding “Respecting Confidentiality” and “Crown Privilege”). None of these were included.

94. There are various actions that may occur after an award is rendered. A party may ask a tribunal to interpret an award, correct an award, or issue a supplementary decision; and, depending upon the type of investment treaty arbitration, a party may seek the aid of an ICSID ad hoc Annulment Committee or a national court to challenge the award itself. See Franck, *supra* note 2, at 1546–50 (describing different ways to contest awards); ITA Web site, *supra* note 76 (listing awards in *Wena Hotels v. Egypt* and *Loewen v. U.S.*, for example, where parties sought interpretation or supplementary decisions).

### B. *Gathering the Data*

After identifying the population, two research assistants extracted information from the awards, including basic identifying information about the case,<sup>95</sup> members of the tribunal,<sup>96</sup> party success,<sup>97</sup> damages quantified and received,<sup>98</sup> and the costs of the arbitration.<sup>99</sup> Because case records were

---

95. This included the name of and parties in each case, the treaty under which the case was rendered, the institution and/or rules under which the case was organized, the date of the award, and references to paragraphs or pages of the award from which the information originated. The author later went through each award and extracted a quotation about the investment sector that was later coded.

96. This included the names of arbitrators and which arbitrator acted as a chair. The author later went through each award and identified the following: whether it was possible to identify which party had nominated the party-appointed arbitrators, which party nominated each arbitrator (if applicable), the gender of each arbitrator (which was confirmed with a Google search), and the nationality of each arbitrator (if available either in the award or in a Google search). This information about arbitrators was gathered solely by the author.

97. This included information on the following: the award's title, whether the award was final, whether jurisdictional issues were decided and the parties' success, whether the merits were decided and the parties' success, whether damages were determined and the parties success, whether costs were addressed, and whether there was a separate opinion. As a respondent, a government has never been successful in bringing a counter-claim against an investor based upon the information in this population; the only party with a coverable cause of action is a claimant.

98. These included determinations about the following: whether the award partially or fully quantified damages, the amount of damages claimed in the original currency, and the amount of damages awarded. The information about damages claimed was added after review of a study related to attorneys' fees in class actions that suggested that the level of client recovery was the most important determinant of attorney fee amounts. See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 28 (2004). The author later used a single Web site to convert the foreign currencies into a U.S. dollar amount (using the date of the award as the relevant conversion date) to create a common currency.

99. This included information about the following: (1) whether tribunals allocated the parties' legal costs, (2) who was responsible for those costs and the applicable percentages and financial obligations in the original currency, (3) the legal authority and rationale for the tribunal's determinations about the parties' legal costs, (4) whether tribunals allocated the tribunal's costs and expenses, (5) who was responsible for those costs and the applicable percentages and financial obligations in the original currency, and (6) the legal authority and rationale for the tribunal's decisions about its own costs and expenses. The same Web site was used to convert foreign currencies. This list of factors is not exclusive. Future research might also identify the time when cases are submitted to arbitration to determine the length of the time it takes to secure an arbitral award.

largely not publicly available,<sup>100</sup> information came from the text of the award.<sup>101</sup>

### C. *The Coding Process*

The author drafted a code book to facilitate transparent, reliable, and valid coding.<sup>102</sup> There were two coders: the author and a research assistant.<sup>103</sup> The two coders trained and coded a subset of cases to assess intercoder reliability and revised the code book.<sup>104</sup> After coding four subsets, intercoder reliability was 98.58%.<sup>105</sup>

The author used a random numbers table<sup>106</sup> to randomize the awards. Each coder coded all of the randomized awards.<sup>107</sup> Intercoder reliability after coding was 97.5%.<sup>108</sup> Where there were coding variations, coders agreed upon an approach and amended the code book for future replicability. The remainder of the Article provides quantitative and descriptive analysis of the data.

---

100. Particularly for non-NAFTA cases, the underlying record is not publicly available. *But see* NAFTAclaims, www.naftaclaims.com (last visited Nov. 27, 2007) (disclosing some cases, pleadings, and materials). Most arbitration rules require that the arbitration is confidential and documents cannot be disclosed without the consent of both parties. ICSID Convention art. 48, *supra* note 47, at 540 (requiring parties' consent for publication of the award); *cf.* UNCITRAL Arbitration Rules art. 25, *supra* note 47, at 711 (requiring hearings to "be held *in camera* unless the parties agree otherwise"); *id.* art. 32, at 713 (requiring that the "award may be made public only with the consent of both parties").

101. Exceptions were minor. First, for awards in Spanish or French, <http://babelfish.altavista.com> was used as a translation device. Second, where awards were in a foreign currency, a Web site was used to calculate the U.S. dollar equivalent. Third, the gender and nationality of arbitrators were determined or verified through Google searches. Fourth, a press release issued by Poland available on the Web in *Eureko B.V. v. Poland* was used to interpret the underlying award.

102. The Code Book was revised after consulting with the Survey, Statistics, and Psychometrics Core Facility at the University of Nebraska-Lincoln.

103. The assistant was a graduate of the University of Texas Law School who is currently a Ph.D. candidate at the University of Nebraska-Lincoln in biochemistry.

104. Vicki Plano Clark recommended use of a measure of reliability that was equal to the total number of agreements divided by the total number of coding decisions. MATTHEW B. MILES & A. MICHAEL HUBERMAN, *QUALITATIVE DATA ANALYSIS* 63 (2d ed. 1994). Recognizing this might be viewed as a liberal measure, we required a high percentage of reliability before proceeding.

105. The author has a document detailing each phase of this process that indicates which cases were selected for initial reliability testing, selection methodology, the results of initial coding, and changes made to coding procedures during this phase.

106. GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, *STATISTICAL METHODS* 463–66, tbl.A-1 (7th ed. 1980).

107. Coders originally planned to only code half the awards. Since this was the first study of its kind, out of an abundance of caution, both coders coded all awards.

108. The Excel spreadsheet containing the data had 10,812 data points. The coders agreed on 10,545 decisions and disagreed on 267 coding decisions.



#### IV. THROUGH THE LOOKING GLASS: INVESTMENT TREATY ARBITRATION AWARDS

This section offers descriptive, quantitative data about the population of awards to contextualize assertions and assess attributive hypotheses about investment treaty conflict. It provides basic information about the parties and underlying disputes, the winners and losers, the financial implications of the awards in terms of amounts awarded and arbitration costs, the use of other forms of dispute resolution, and information about the arbitrators.

##### A. *Basic Information about the Population*

The population of the study consisted of 102 awards.

###### 1. Cases

For the purposes of this research, a “case” was a dispute submitted to arbitration that spawned at least one award.<sup>109</sup>

The 102 awards came from eighty-two separate cases. Seventeen cases spawned multiple awards. There were sixty-five cases with one award, fifteen cases with two awards, and one case with three awards. Only one case—*Pope & Talbot v. Canada*—had four awards separately addressing jurisdiction, merits, damages, and costs.

###### 2. Final Awards

Of the 102 awards, fifty-two awards—more than 50% of the population<sup>110</sup>—finally resolved the case’s treaty claims.<sup>111</sup>

---

109. For the purposes of providing context, it is useful to observe that UNCTAD’s recently released database of “known cases” suggests that there were approximately 255 cases by the end of November 2006. UNCTAD Database of Treaty-Based Investor-State Dispute Settlement, available at <http://www.unctad.org/iia-dbcases/search.aspx> (last visited Nov. 27, 2007). This database of “known cases” appears to include investor-state disputes for which there is public information. This appears to include cases arising under investment treaty disputes arising under international law as well as ordinary commercial disputes under domestic law involving a state entity. The known cases database also appears to include cases, for example, where disputes were articulated (but proceedings never commenced and sometimes the investor is not even known), cases where an arbitration is pending, and concluded cases (irrespective of whether they resulted in an award). See also *supra* notes 68–87 and accompanying text (addressing the limited nature of the population and the possible limitations on the data’s generalizability).

110. The remaining fifty awards did not finally resolve the case’s treaty claims. As of June 1, 2006, the cases were either ongoing, settled, or discontinued.

111. Using the number of final awards, forty-nine were final and fifty-three awards were non-final. This measure does not address those non-final arbitration awards that finally resolve investors’ investment treaty claims, such as *Ceskoslovenská Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Final Award (Dec. 29, 2004), [http://www.worldbank.org/icsid/cases/czech\\_po2.pdf](http://www.worldbank.org/icsid/cases/czech_po2.pdf), *CCL v. Rep. of Kazakhstan*, SCC Case No. 122/201 (Dec. 31, 2005),

The fifty-two treaty claims became final at different phases of the arbitration process. Three awards finally adjudicated treaty claims after addressing only jurisdiction; nine awards were final after addressing both jurisdiction and costs; fifteen awards were final after addressing jurisdiction, merits, and costs; fourteen were final after having addressed jurisdiction, merits, damages, and costs; two were final after addressing the merits and costs; four were final after having addressed merits, damages, and costs; one award was final after having addressed only damages and costs; and four awards only addressed cost issues.<sup>112</sup>

The data from these fifty-two awards suggests that there were two patterns in how tribunals managed their cases.<sup>113</sup> First, tribunals were willing to bifurcate proceedings and separately address issues related to jurisdiction and merits/damages. This would account for the twelve awards that focused primarily on jurisdictional issues and the seven that addressed issues focusing on merits and/or damages. The second pattern relates to holding consolidated proceedings to deal with all the issues of the case in a single process. This might appear to be the more popular approach of tribunals as the two most frequent combinations (jurisdiction, merits, and costs:  $n=15$ ; and jurisdiction, merits, damages, and costs:  $n=14$ ), occurred a total of twenty-nine times. These different approaches may result in the need for additional time and money to resolve the dispute, but there is also the possibility that bifurcation could create efficiencies.<sup>114</sup>

Future research may consider issues of case management—particularly as ICSID recently amended its rules to permit preliminary objections to jurisdiction<sup>115</sup>—to determine the costs and efficacy of different approaches. Such information could be used in various ways. First, governments may wish to design their dispute resolution systems to require or encourage case management strategies that are likely to decrease

---

1 Stockholm Int. Arb. Rev. 123, [http://www.investmentclaims.com/decisions/CCL-Kazakhstan-Final\\_Award.pdf](http://www.investmentclaims.com/decisions/CCL-Kazakhstan-Final_Award.pdf), and *Tradex Hellas v. Albania* (ICSID Case No. ARB/94/2, Award, 197, 249 (Apr. 29, 1999), [http://www.worldbank.org/icsid/cases/tradex\\_award.pdf](http://www.worldbank.org/icsid/cases/tradex_award.pdf)). This accounts for the difference between final awards and awards finally resolving treaty claims.

112. Overall, forty-nine of these cases involved a cost determination. Two awards from *S.D. Myers, Inc. v. Canada*, *supra* note 93, and *Pope & Talbot* only addressed costs; and the two settlement agreements, *Lemire*, *Lemire Award*, *supra* note 48, at 541, and *Goetz*, *Goetz Award*, *supra* note 80, at 456, only had decisions related to costs.

113. Although the unit of analysis contains fifty-two data points, as the breakdowns in categories are small, care should be taken when drawing inferences.

114. Future research also might consider whether there is a difference in the arbitration costs for bifurcated versus non-bifurcated proceedings.

115. ICSID, ICSID Convention, Regulations and Rules: Rules of Procedure for Conciliation Proceedings R.29 (2006) [hereinafter ICSID Arbitration Rules], *available at* <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>. One might consider analyzing whether cases with multiple or single phases are likely to favor a particular party.

the time and cost of dispute resolution.<sup>116</sup> Second, parties may use or advocate use of case management strategies most likely to lead to the cost-efficient administration of the dispute.<sup>117</sup> Third, tribunals may wish to consider the financial impact of their decision to bifurcate or combine proceedings.<sup>118</sup>

*B. Claim #1: Are Investors from Developed Countries Subjecting Developing States to Investment Arbitration?*

There are questions about who are the subjects and objects of investment treaty arbitration. At present, there are few public claims about who the parties are and what is arbitrated. There have been anecdotal assertions that investors come from the developed world and that the developing world is unduly burdened by investment treaty arbitration.<sup>119</sup> To evaluate the veracity of these claims, this section offers data about (a) who were the parties to the arbitrations, (b) what treaties were arbitrated, (c) where claims were brought, and (d) in which sectors arbitrations arose.

1. Parties to the Cases: Investors and Governments

a. Investors

While treaties define the term in different ways, an “investor” is typically an individual or corporate entity.<sup>120</sup> Information about investor nationality indicates who is participating in the arbitrations and which home governments have arguably benefited from investment treaties.<sup>121</sup>

116. Although the author is unaware whether its action was based upon empirical analysis, the United States has taken steps in this regard. See 2004 U.S. Model BIT, *supra* note 15, art. 28(4)–(7) (giving tribunals authority to decide certain objections as a “preliminary question”).

117. There may be strategic advantages to extending the time and cost of arbitrating claims. Not all parties will have the same incentive to use empirical evidence to promote cost-efficient case management.

118. Decisions may be based on many criteria. Tribunals may determine that unique legal or factual issues of the dispute are pertinent and may therefore be less concerned with efficiency.

119. ANDERSON AND GRUSKY, *supra* note 6, at 5, 10–19.

120. DOLZER & STEVENS, *supra* note 27, at 31–41; see also 2004 U.S. Model BIT, *supra* note 15, art. 1, 4 (defining an “investor of a Party” as “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality”).

121. With its nationals investing abroad, home governments of those investors presumably obtain benefits. The benefits might involve, for example, greater economic, cultural, and political integration between the two countries. It may also create economically healthy domestic enterprises that may be able to contribute more to the economic health of the home government. Because the opportunity for multinational companies to lower their worldwide tax burdens (for example through deferral and transfer pricing) increases with the breadth of their global

UNCTAD has not analyzed investor nationality. The author is unaware of other research that gathers and describes investor nationality.

The eighty-two cases encompassed a total of 107 investors from twenty-three different countries.<sup>122</sup> There were approximately 1.3 investors in each case, which means that cases tended to involve more than one investor. The maximum number of investors in a single case was five.<sup>123</sup>

The largest number of investors came from the United States, with forty-five investors making claims in thirty-two different cases. Other countries with large numbers of investors filing claims were Canada (seven investors in six cases), Italy (eight investors in six cases), the Netherlands (five investors in five cases), the United Kingdom (five investors in five cases), Spain (six investors in four cases), and France (five investors in three cases). There were also cases initiated by investors from transitioning economies, such as the Russian Federation, Malaysia, Turkey, Peru, Lithuania, and the Czech Republic (See Table 1).

---

operations, investment abroad does not generally improve a nation's ability to tax its resident companies. However, transnational efforts at the OECD toward information exchange and uniformity in transfer pricing methods could alter this result and enhance the ability of home governments to enforce their tax systems with respect to these companies. The author is grateful to Professor Allison Christians for her thoughts on this issue.

122. Given that there are approximately 175 signatory countries to investment treaties, this finding is interesting. Future research might consider why investors from particular countries are represented more and why others less so.

123. *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, at 3 (Nov. 11, 2007), <http://ita.law.uvic.ca/documents/champion-decision.pdf>.

Table 1: *Number of Cases where Investor(s) Claimed to be a National of the Country vs. Number of Investors Claiming to be a National of the Country for All Cases*

Country	Total Number of Cases	Total Number of Investors in All Cases
Argentina	1	1
Belgium*	2	2
Canada*	6	7
Chile	1	2
Cyprus	1	1
Czech Republic*	1	1
France*	3	5
Germany*	2	2
Greece*	2	2
Italy*	6	8
Lithuania	1	1
Luxembourg*	2	2
Malaysia	1	2
Netherlands*	5	5
Peru	1	1
Russia	1	3
Singapore	1	1
Spain*	4	6
Sweden*	2	2
Switzerland	2	2
Turkey*	1	1
United Kingdom*	5	5
United States*	32	45
Totals	83 <sup>124</sup>	107

Note: \* = Member States from the OECD.<sup>125</sup>

<sup>124</sup> The reference to eighty-three cases reflects that in one of the eighty-two cases, there were investors from two countries. See *infra* note 160.

<sup>125</sup> The OECD Member States are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. OECD, Ratification of the Convention on the OECD, [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html) (last visited Aug. 20, 2007).

The data shows that investors from twenty-three different countries made claims under investment treaties. This was a somewhat small proportion considering that more than 175 countries have signed investment treaties.<sup>126</sup>

Investors making claims predominantly hailed from developed states. The United States had the largest number of investors making such claims, but countries such as Italy, Canada, Spain, France, the Netherlands, and the United Kingdom also had large numbers of investors. Out of the 107 total investors, ninety-five (88.9%) investors were from OECD countries. Coding investors' country of origin by the World Bank's country classification system<sup>127</sup> yielded similar results. Nearly 90% of claims were brought from investors in "high income" countries.<sup>128</sup> Interestingly, there were no investors from "low income" countries as defined by the World Bank or from LDCs<sup>129</sup> as defined by the United Nations.

The author is unaware of scholarship that provides a baseline for the expected levels of investor participation in treaty arbitration.<sup>130</sup> It is

---

126. See *supra* note 24 and accompanying text.

127. Data is available in a spreadsheet from the World Bank that classifies economies as: (1) High Income from OECD and non-OECD countries, (2) Upper Middle Income, (3) Lower Middle Income, and (4) Low Income. World Bank, Data and Statistics, Country Classification, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Nov. 10, 2007). The World Bank's main criterion for classifying economies is gross national income (GNI) per capita. *Id.*

128. Of the 107 investors, ninety-six were from "high income" countries, ten were from "upper middle income" countries, and only one investor was from a "lower-middle" income country.

129. The United Nations has an official list of Least Developed Countries ("LDCs") that includes Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, the Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, the Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, São Tomé and Príncipe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, the United Republic of Tanzania, Vanuatu, Yemen, and Zambia. See Landlocked Developing Countries and Small Island Developing States, <http://www.un.org/special-rep/ohrls/lcd/list.htm> (last visited Nov. 10, 2007); U.N. Conference on Trade and Dev., UN List of LDCs After the 2006 Triennial Review, <http://www.unctad.org/templates/Page.asp?intItemID=3641&lang=1> (last visited Nov. 10, 2007). The criteria for defining an LDC relates to (1) low income based upon gross domestic product, (2) human resource weakness criterion that considers factors related to nutrition, health, education, and adult literacy, and (3) economic vulnerability related to factors such as instability of agricultural production, exports of goods and services and merchandise export concentration. See U.N. Conference on Trade and Dev., What Are the Least Developed Countries: The Criteria, [http://www.un.org/geninfo/faq/factsheets/FS20\\_HTM](http://www.un.org/geninfo/faq/factsheets/FS20_HTM) (last visited Nov. 27, 2007).

130. This may be due to the relatively recent nature of the investor-state dispute resolution mechanism in investment treaties and the resulting gaps in academic literature.

therefore difficult to assess whether or not investors from the developed world use arbitration appropriately or disproportionately.

High levels of claims by OECD investors and investors from “high income” countries may not be completely unexpected. OECD countries historically have had more active investment treaty programs.<sup>131</sup> They also have had high foreign investment flows.<sup>132</sup> It is plausible that high levels of foreign investment are positively correlated with more investment disputes.<sup>133</sup> Further research on the relationship between investment levels and the incidence of investment disputes is desirable.

Other variables may also explain the prevalence of claimants from OECD or “high income” countries. For example, investors from non-OECD and/or “lower income” countries may not have the same level of investments abroad. They may also lack the financial or legal resources to pursue claims. In some cases, the value of investments from these countries may not justify the expenditure of resources to resolve the dispute through arbitration.<sup>134</sup> Cultural differences may also predispose investors from certain backgrounds to forego arbitration in favor of other forms of dispute resolution.<sup>135</sup> Future research might usefully consider these phenomena to evaluate whether investors from OECD and “high income”

---

131. U.N. Conference on Trade and Dev., *South-South Cooperation in International Investment Agreements*, 5–16, U.N. Doc. UNCTAD/ITE/IIT/2005/3 (2005) [hereinafter UNCTAD, *South-South Cooperation*], available at [http://www.unctad.org/en/docs/iteiit20053\\_en.pdf](http://www.unctad.org/en/docs/iteiit20053_en.pdf); see also Press Release, U.N. Conference on Trade and Dev., *South-South Investment Agreements Proliferating*, U.N. Doc. UNCTAD/PRESS/PR/2004/036 (Nov. 23, 2004), available at <http://www.unctad.org/templates/webflyer.asp?docid=5637&intItemID=2807&lang=1> (describing the recent growth trends in the development of BITs).

132. For OECD countries, foreign investment was US\$622 billion in 2005. OECD, *International Investment Perspectives* 15 (2006), available at <http://www.oecd.org/dataoecd/54/58/37010986.pdf> (prepared by Hans Christiansen and Ayse Bertrand). But see U.N. Conference on Trade and Dev., *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development*, at xvii, [http://www.unctad.org/en/docs/wir2006\\_en.pdf](http://www.unctad.org/en/docs/wir2006_en.pdf) (suggesting that the level of FDI in 2005 was US\$916 billion but noting the peak in 2000 was US\$1.4 trillion).

133. See UNCTAD, *Disputes on the Rise*, *supra* note 59, at 5 (“More investment may lead to more occasions for disputes—and more occasions for disputes combined with more [investment treaties] are likely to lead to more cases.”).

134. For example, if average investments in Costa Rica are US\$1 million but it costs twice that much to arbitrate, other dispute resolution methods may be more cost-effective. Small level investments in developed countries may not be arbitrated for similar reasons.

135. Certain countries such as China, for example, are noted for their historical preference for non-adversarial types of dispute resolution. There were no Chinese investors in the population. While historical approaches to dispute resolution may affect the decision of Chinese investors to arbitrate, the availability and scope of procedural rights and extent of investment flows may also affect the decision. Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 123 (1996).

countries are overrepresented in the population of investment treaty claimants.

b. Respondent Governments

UNCTAD's data suggests that governments in both the developed and developing world must defend claims.<sup>136</sup> In 2005, UNCTAD explained "[a]t least 61 governments—37 of them in the developing world, 14 in developed countries, and 10 in Southeast Europe and the Commonwealth of Independent States—have faced investment treaty arbitration."<sup>137</sup> In slight contrast, research from a non-governmental organization ("NGO") suggests that developing countries were 93% of the respondents.<sup>138</sup> As research methodology from those projects raises concerns,<sup>139</sup> this research attempts to address methodological concerns to aid assessment of the research conclusions.

In each of the eighty-two cases, the investor(s) filed a single arbitration to sue a government respondent. Similar to the UNCTAD data,<sup>140</sup> there were thirty-seven different respondents in the eighty-two cases. The average number of claims against each country was 2.22,<sup>141</sup> and the maximum number of cases was the fifteen filed against Argentina (See Appendix 1).

---

136. UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 3–4, 9–10; UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 2–3, 12–13; UNCTAD, *Review*, *supra* note 59, at 69–70.

137. UNCTAD, *Review*, *supra* note 59, at 6; *see also* UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 3.

138. Press Release, Food and Water Watch, World Bank Court Grants Power to Corporations (Apr. 30, 2007), <http://www.foodandwaterwatch.org/press/releases/world-bank-court-grants-power-to-corporations-article12302007> [hereinafter IPS & FWW Press Release]. The report suggests that 74% of ICSID's pending and concluded cases are against "middle-income" developing countries and 19% of concluded and pending cases are against "low-income" developing countries. ANDERSON & GRUSKY, *supra* note 6, at ix. The research has methodological difficulties similar to UNCTAD's work. It does not explain its unit of analysis or research methodology clearly.

139. UNCTAD purports to report the "known investment treaty arbitrations" and identifies countries that "have faced investment treaty arbitration." It then lists the Seychelles as a country subjected to investment treaty arbitration. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 3–4. UNCTAD's Web site indicates that the only case against the Seychelles is *not* an investment arbitration. *See* UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases, <http://www.unctad.org/iia-dbcases/search.aspx> (last visited Nov. 10, 2007) (enter "Seychelles" in the "Country involved" field; then click on "Search"). Instead, it is a commercial case governed by English law (not an investment treaty). *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Award (Dec. 17, 2004), [http://ita.law.uvic.ca/documents/CDCvSeychellesAward\\_001.pdf](http://ita.law.uvic.ca/documents/CDCvSeychellesAward_001.pdf); *see also supra* note 63 (discussing problems with distinguishing between treaty-based claims and pure contract claims).

140. UNCTAD data included almost twice the number of countries, but this difference results from their measuring submitted cases, not cases with arbitration awards. The breadth of the countries subject to arbitration was not dissimilar.

141. The mode of government respondents was one.



In contrast to the findings about investors, OECD countries do not dominate the list of government respondents. Rather, only twenty-five (30.5%) of the government respondents were OECD countries. This was somewhat similar to UNCTAD's findings that fourteen out of sixty-one respondents (22.9%) were developed countries.<sup>142</sup> While OECD countries were not the majority of respondents, they faced numerous cases. Specifically, there were nine cases against Mexico, as well as four cases against Canada, the Czech Republic, and the United States respectively. This suggests that the developing world is not the only group subjected to the risk of resolving investment treaty disputes.<sup>143</sup>

The results of the present study contradict a finding reported by an NGO that only 7% of cases were against nondeveloping countries.<sup>144</sup> Using the World Bank classification system, 18% (n=15) of respondent states were "high income" countries;<sup>145</sup> 45% (n=37) were "upper middle income" countries;<sup>146</sup> 28% (n=23) from "lower middle income" countries;<sup>147</sup> and only 8.5% (n=7) were "low income" countries.<sup>148</sup> This suggests that "middle income" countries, particularly those with a higher income, were at the greatest risk of arbitration.<sup>149</sup> While it is not clear what contributes to this phenomenon, one might postulate that higher levels of investments or more risky investments may be relevant variables that make

---

142. This difference may result, for example, in the different categories of analysis as OECD countries are not necessarily the same as "developed" countries.

143. This might, for example, take the form of countries such as Argentina, the United States, or a more prototypical country subjected to treaty claims. There were also, however, multiple claims against non-OECD countries such as Pakistan and Ukraine.

144. This may be due to the lack of clarity as to the NGO's methodology. The title of the Anderson & Grusky report suggests that they are focusing on ICSID cases, but it is not clear whether they included non-ICSID cases and/or limited their analysis to investment treaty disputes. See ANDERSON & GRUSKY, *supra* note 6. In addition, the report came out before the most recent (July 2007) World Bank Classifications, which formed the basis of analysis in this research. This may have made a slight difference as countries such as the Czech Republic and Estonia moved from "upper middle income" to "high income" countries.

145. The respondent states were Canada, the Czech Republic, Estonia, Spain, the United Arab Emirates, and the United States.

146. The governments were Argentina, Bulgaria, Chile, Kazakhstan, Latvia, Malaysia, Mexico, Poland, Romania, Russia, Slovakia, Turkey, and Venezuela.

147. The governments were Albania, Bolivia, Ecuador, Egypt, Jordan, Moldova, Morocco, Paraguay, Peru, the Philippines, Sri Lanka, and Ukraine.

148. These were Burundi, Kyrgyzstan, Myanmar, Pakistan, and Zaire (now the Democratic Republic of the Congo).

149. While the numbers are relatively small, the data suggested that as income levels increased, so did the number of overall and average number of cases against a country. To the extent that higher income levels are associated with higher investment levels, this may provide support for the theory that disputes tend to follow capital. The rough parity between the average numbers of claims against "upper-middle" and "high income" countries also suggests that there was less disparity between the developed and developing world in the likelihood of being subjected to suit.

countries more susceptible to disputes. Future research should assess the relationships.

There was also interesting data about arbitrations with LDCs. Only three of the cases—or 3.7% of the population—involved LDCs, namely Burundi, Myanmar and Zaire (now the Democratic Republic of Congo). Each of these governments was involved in only one case. As coding using World Bank definitions means that only 8.5% of governments were “low income,” the NGO claim that 19% of cases are against “low income” countries overstates the point.<sup>150</sup> While the data demonstrated that even the most vulnerable economies were subjected to treaty disputes, the relatively limited number of such cases is encouraging.<sup>151</sup> From a development perspective, it is useful to know that LDCs face a risk but perhaps not an undue burden of arbitrating disputes. Moreover, it is noteworthy that OECD countries faced a higher percentage of claims than LDCs, even though there are more LCDs than OECD member states. Future analysis might assess the role of other variables in order to further contextualize these findings. Given the lack of an available baseline, it would be useful to assess whether particular governments are subject to a disproportionate number of claims, bearing in mind the number of investment treaties, the levels of international investment, and indicators of good governance. With this information, an informed assessment might be made as to whether the investment treaty system and its dispute resolution mechanism benefit the developed or developing countries in a disproportionate manner.

### c. Symmetry of Investment Treaty Arbitration

There have been critiques that investment treaties may be bilateral in theory but unilateral in effect, and thus foster inequality that stifles sustainable development. Although he acknowledges this may not always be the case, Professor William Dodge suggests that investment treaties “are reciprocal in theory but not in fact, for it is generally only the less developed country that bears the risk of being sued.”<sup>152</sup> This point is

---

150. Again, the difference in these figures may be caused by a difference in methodological approach. The NGO did not explain its unit of analysis, for example, and the methodology appears to focus on World Bank definitions of “low income developing countries” rather than UN definitions for LCDs. ANDERSON & GRUSKY, *supra* note 6, at ix, 33. Data is available in a spreadsheet from the World Bank that classifies economies as (1) High Income from OECD and non-OECD countries, (2) Upper Middle Income, (3) Lower Middle Income, and (4) Low Income. See *supra* note 127.

151. It would also be useful to consider how many investment treaties involve LDCs and what the capital inflows are to LDCs that have treaties. If, for example, there were a large number of claims against LDCs that had a small number of treaties and/or a small flow of foreign investment, this may suggest that LDCs are disparately impacted by investment treaty arbitration.

152. Dodge, *supra* note 29, at 3; see also Alvarez & Park, *supra* note 60, at 368–70 (commenting on double standards in investment arbitration).

important for treaty negotiators considering the costs and benefits of entering into treaties and providing foreign investors with treaty rights.<sup>153</sup>

There was some evidence that treaty arbitration exhibited symmetry in both theory and practice. Ten countries—namely Argentina, Canada, Chile, the Czech Republic, Malaysia, Peru, Russia, Spain, Turkey, and the United States—had investors with claims against host governments. Meanwhile, these same governments were also respondents in investment treaty arbitration (See Table 2).

Table 2: *Number of Cases Where Government's Investors Arbitrated an Investment Treaty Claim Against Another Government vs. Number of Cases Where Government Was a Respondent State*

Country	Cases Brought by Investors Against Other Governments:	Cases as Respondent Government
Argentina	1	15
Canada	6	4
Chile	1	2
Czech Republic	1	4
Malaysia	1	1
Peru	1	1
Russia	1	1
Spain	4	1
Turkey	1	1
United States	32	4

To put this data in context, it is useful to consider two points. First, there were fifty countries that either had an investor bring a claim or had been subject to a claim themselves. Only ten out of fifty (20%) of the states had both investors and respondents involved in investment treaty arbitration. The United States and Spain had more investors initiating investment disputes whereas other states (like Argentina and the Czech Republic) had more disputes lodged against them. Second, as the numbers are small, inferences should be made with caution and future research may reveal different patterns.

Overall, the data appears to support Professor Dodge's attributive hypothesis that the treaties are "reciprocal in theory but not in fact."<sup>154</sup>

153. One might also suggest that different countries may have varying interests in aspects of these benefits. Theoretically, the point of entering treaties for developing countries is not to receive reciprocal rights but to stimulate investment.

154. Dodge, *supra* note 29, at 3.

Less than a quarter of governments found themselves both the subject (via their investors) and object (as a respondent) of investment treaty arbitration. Rather, states tended to experience the unilateral utilization of dispute resolution where they were either a respondent state or the home state of an investor.

While the actual risks and benefits of dispute resolution did not flow in a bilateral direction, this does not mean that investment treaties are unbalanced instruments per se. The current findings may be the result of the historical evolution of investment treaties and capital flows. Investment treaties were initially between primarily capital importing and capital exporting countries.<sup>155</sup> Future analysis should look for relationships among the level of treaty disputes, the number of investment treaties and the level of foreign investment. As the number of investment treaties between developing countries increases and investment flows expand, new patterns may emerge.<sup>156</sup>

The lack of symmetry in the use of investment treaty arbitration does not necessarily mean that treaties stifle sustainable development. The data may implicate whether the cost of entering investment treaties is worth the development benefit. Overemphasizing one disparity fails to address a fundamental point: it is possible that countries obtained the purported benefits of investment treaties (namely increased investment flows or an increased probability of foreign investment)<sup>157</sup> but were not actually subjected to investment treaty arbitration. Without a more systematic analysis of the benefits of investment treaties, it is not yet appropriate to conclude that an imbalance in the utilization of dispute resolution stifles economic development, let alone sustainable development. Further research is therefore warranted.

---

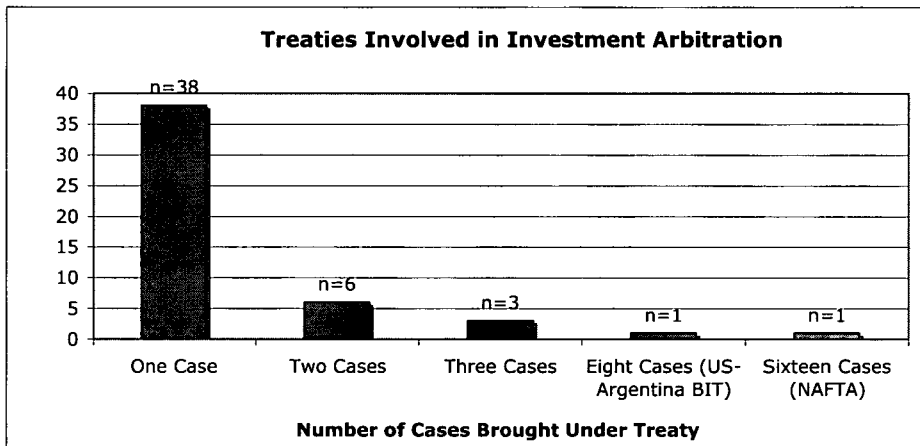
155. See UNCTAD, *South-South Cooperation*, *supra* note 131, at 9–10, 19–20, 26–27; VANDELDE, *supra* note 42.

156. For example, as large importers of foreign capital with active investment treaty programs, the United States and Canada have been subjected to investment treaty claims. Notably, the United States and Canada are signatories to NAFTA, which permits arbitration between two developed countries. Other developed nations with active investment treaty programs, such as the Netherlands and the United Kingdom, do not follow this pattern. This may be because they have primarily reached out to transitional and developing economies. See UNCTAD, Investment Instruments Online, Bilateral Investment Treaties, <http://www.unctadxi.org/templates/DocSearch.aspx?id=779> (select the desired country from the drop down menu accompanying “between”; then click submit) (last visited Nov. 11, 2007).

157. Franck, *supra* note 11 (discussing the literature analyzing whether investment treaties increase levels of foreign investment).

## 2. Arbitrated Treaties

The author is unaware of any research describing which treaties are subject to arbitration. The present data suggests that, in practice, arbitration occurs in only a fraction of the world's investment treaties. In the eighty-two cases, there were claims under forty-nine treaties. As there are approximately 1,700 in force,<sup>158</sup> forty-nine was a small segment of the population of potentially arbitrable treaties. Most treaties spawned only one case. Thirty-eight treaties (77.6%) involved a single case. The remaining eleven treaties were subjected to multiple arbitrations. NAFTA was the most heavily arbitrated treaty and accounted for 20% of the cases (n=16). The second most heavily arbitrated treaty was the Argentina-United States investment treaty with eight different cases (7%). Other highlights involve three cases under the Argentina-France BIT, three cases under the Argentina-Spain BIT, and three cases under the Energy Charter Treaty. Other treaties subjected to repeat litigation were the Argentina-Belgo Luxembourg Economic Union BIT (n=2), Italy-Morocco BIT (n=2), Netherlands-Czech and Slovak Federal Republic BIT (n=2), United Kingdom-Egypt BIT (n=2), and the United States-Ukraine BIT (n=2)<sup>159</sup> (See Chart 1).



*Chart 1: Frequency breakdown of investment treaties subject to arbitration showing that treaties were involved in only one case (n=38), in three cases (n=3), eight cases (n=1), and sixteen cases (n=1).*

158. See Houde, *supra* note 25, at 143–44.

159. Multiple investors have sued Argentina as a result of its currency crisis. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 2. This may account for the large number of claims involving Argentina.

Eighty-one of the eighty-two cases involved a claim under a single investment treaty. Only one case, *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*,<sup>160</sup> involved simultaneous arbitration of two treaties. Multiple investors bringing a single case demonstrates that investors can self-select to consolidate treaty claims. Other evidence, such as inconsistent decisions in *Lauder* and *CME*,<sup>161</sup> indicates this may not always be the case. In the future, designers of dispute resolution systems might consider creating incentives for investors to consolidate claims that would otherwise lead to inconsistent results on similar issues of law and fact. Otherwise, governments may consider creating provisions that provide them with a right to consolidate proceedings.<sup>162</sup>

These demographics provide a context for understanding the relative arbitration risk for different treaties. The large number of treaties in force that were not subject to arbitration may suggest that investment treaty arbitration is not as prevalent as it has the potential to be. It also means that when treaties are involved in multiple arbitrations, government officials preparing to renegotiate investment treaties nearing expiration<sup>163</sup> may wish

---

160. *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina Republic*, ICSID Case No. ARB/03/17, <http://ita.law.uvic.ca/documents/Suez-Jurisdiction.pdf> (May 6, 2006). This claim was brought under the Argentina-France and Argentina-Spain investment treaties. *Id.*

161. Franck, *supra* note 2, 1559–68.

162. This might be done, for example, by including a consolidation clause in treaties or creating a multi-national claim tribunal in case there are multiple cases from a similar government conduct that implicates multiple investors and/or multiple treaties. There are downsides to this approach, however. For example, such consolidation may cause difficulties as to the enforceability of the dispute resolution mechanism and/or the enforceability of an award. Martin Bartels, *Multiparty Arbitration Clauses*, 2 J. INT'L ARB. 61, 62 (1985); Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43, 64 (1996); Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law*, 15 AM. REV. INT'L ARB. 133, 138 (2004). Similarly, such a provision may not catch all the relevant disputes if such consolidation clauses do not appear in applicable treaties. See, e.g., *United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (ruling that the “district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties’ agreement to allow such consolidation”). This may, however, be a matter of the applicable law and/or the law of the arbitration forum. *But see* Rona G. Shamoon & Irene M. Ten Cate, *Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under U.S. Law*, 12 AM. REV. INT'L ARB. 335, 335 (2001) (suggesting that the U.S. may be “unlikely to compel consolidation” without party agreement or authority in the applicable law or arbitration rules and noting the uncertainty of a court’s “power to order consolidation in the face of a party’s objection, even where there is a statutory basis for consolidation”).

163. Many treaties currently in existence have sunset provisions that provide an opportunity for renegotiation of treaty terms. COMEAUX & KINSELLA, *supra* note 38, at 109; LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 61–62 (2004). UNCTAD has suggested the number of treaty renegotiations is on the rise. U.N. Conference on Trade and Dev., *Recent Developments in International Investment Agreements*, 6, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005), available at [http://www.unctad.org/en/docs/webiteit20051\\_en.pdf](http://www.unctad.org/en/docs/webiteit20051_en.pdf).

to reconsider how best to revise treaties to secure the benefits of foreign investment while minimizing exposure to unnecessary arbitration risk. This might, for example, involve clarifying substantive investment rights and providing particularized rules about government conduct that creates liability. Given the number of its treaties involved in arbitration, Argentina, for example, might wish to consider these findings. In any event, countries may also decide that the risk of any arbitration is too much and may decline to offer investment treaty arbitration or opt for a different form of dispute resolution. Otherwise, they may simply decline to extend the treaty when it comes up for renewal.<sup>164</sup>

### 3. Arbitral Institutions and Rules

In its 2006 International Investment Agreements (“IIA”) Monitor, UNCTAD describes where investors brought claims. Using a different methodology than the one described in this Article, UNCTAD stated that out of 255 “known treaty-based cases,” 156 were with ICSID or its Additional Facility, sixty-five were under the UNCITRAL Rules, eighteen under the SCC, four under the International Chamber of Commerce (“ICC”), four were ad hoc, one was at the Cairo Regional Centre for International Commercial Arbitration, and seven cases were without a known venue.<sup>165</sup>

UNCTAD has not yet clearly distinguished between institutional and ad hoc arbitration. Nor has it reported under which rules the cases proceeded. This matters, as an institution can administer disputes under different rules,<sup>166</sup> and ad hoc arbitrations may apply institutional rules, as in *Yaung Chi Oo Trading PTE Ltd. v. Myanmar*,<sup>167</sup> where an ad hoc “Tribunal decided to apply, mutatis mutandis, the Arbitration (Additional Facility) Rules of the [ICSID].”<sup>168</sup> By contrast, this research explicitly distinguishes

---

164. Ecuador has apparently decided to pursue the strategy of non-renewal. See Reuters, *Ecuador Says Won't Extend U.S. Investment Treaty*, May 6, 2007, <http://www.reuters.com/article/politicsNews/idUSN0626423520070507> (quoting the Ecuadorian Foreign Minister as saying the U.S.-Ecuador BIT “has caused our country a lot of problems ... [and] doesn't represent our national interests’ ”).

165. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 2.

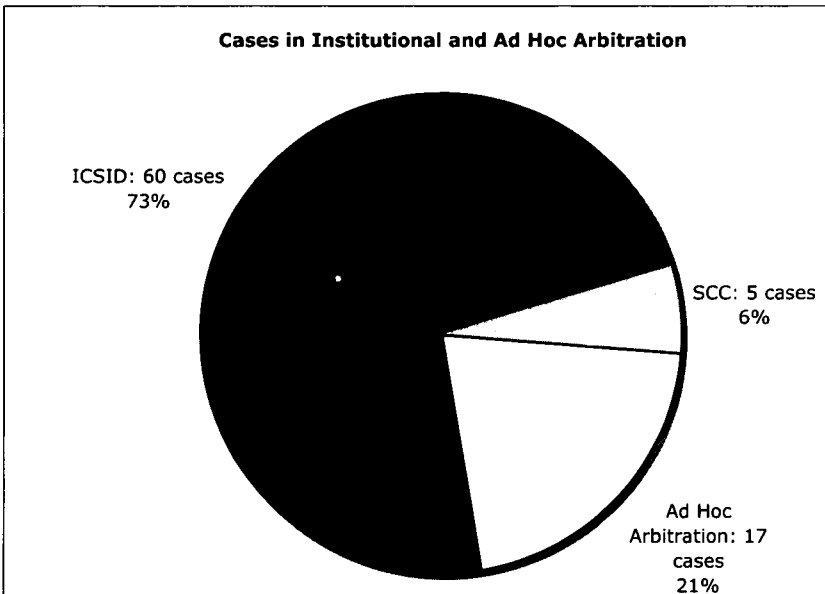
166. ICSID lets cases proceed under either the ICSID or ICSID-Additional Facility Rules. The SCC permits cases to be brought under its rules or the UNCITRAL rules. Arbitration Institute of the Stockholm Chamber of Commerce, <http://www.sccinstitute.com/uk/home/> (last visited Nov. 27, 2007); International Centre for Settlement of Investment Disputes, <http://www.worldbank.org/icsid> (last visited Nov. 27, 2007).

167. *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1 (Mar. 31, 2003), 42 I.L.M. 540 (2003).

168. This was the only case in the population that did so. *Id.* at 540. The International Court of Justice acted as the appointing authority in this case. *Id.*

between (1) institutional versus ad hoc arbitration, and (2) the rules applicable to that arbitration.

Out of the eighty-two cases, sixty-five (79.3%) were institutional<sup>169</sup> and seventeen (20.7%) were ad hoc. Consistent with UNCTAD's findings, there is an apparent preference for institutional arbitration, which is potentially due to the support it provides.<sup>170</sup> A further breakdown indicates there were sixty cases (73.2%) proceeding at ICSID, five cases (6.1%) at the SCC; and the remaining seventeen cases (20.7%) were ad hoc (See Chart 2). In contrast to UNCTAD's findings, there were no cases at the ICC or other arbitral institutions.<sup>171</sup>



*Chart 2: Frequency and percentage of cases in institutional or ad hoc arbitration demonstrating that ICSID cases account for 73% (n=60), Stockholm Chamber of Commerce (SCC) cases account for 6% (n=5) and the remaining 21% (n=17) are ad hoc arbitrations.*

169. The Code Book describes how institutions (like ICSID and LCIA) provide administrative support to ad hoc proceedings (for example, providing a hearing room, financial administration, the provision of a secretary or acting as an appointing authority). For coding purposes, support did not transform ad hoc arbitration into "institutional" because it was not conducted according to institutional rules nor with access to the institutional courts.

170. This must be taken in the context of the limited nature of the data. It is possible that ad hoc arbitrations—where there is no institution listing the arbitrations or publishing extracts of cases—are more likely to be confidential. If correct, the missing ad hoc awards could affect the validity of this statement.

171. This may be in part because the unit of analysis was arbitrations with a publicly available award. UNCTAD's unit of analysis was broader but unverifiable.



Similar to UNCTAD's data, there was a large number of cases resolved at ICSID—whether under the ICSID Convention or ICSID's Additional Facility Rules. In a more specific breakdown of the applicable arbitration rules, out of the eighty-two cases, forty-nine (59.8%) were resolved under ICSID Convention Rules, twelve cases (14.6%) were resolved under ICSID's Additional Facility Rules, and five cases (6.1%) were resolved under SCC Rules.<sup>172</sup> Of the remainder, 14 cases (17.1%) were resolved pursuant to the UNCITRAL Rules while two cases (2.4%) used other rules<sup>173</sup> (See Table 3).

Table 3: *Total Number of Investment Treaties Broken Down by Arbitral Forum*

Forum	Applicable Rules	Number of Cases
ICSID	<i>ICSID Convention Rules</i>	49
	<i>ICSID Additional Facility</i>	12
SCC	<i>SCC Rules</i>	5
Ad Hoc	<i>UNCITRAL Rules</i>	14
	<i>Other Rules</i>	2
Total		82

Future research might analyze why certain arbitral institutions and rules were chosen over others. Investment treaties themselves may limit the institutions where investors can arbitrate. This means that institutions may be underutilized. The ICC, for example, has a body to review awards before they are published to suggest corrections, which provides a structural safeguard to encourage consistency. None of the cases in this population, however, utilized the ICC. There may also be a need for the administrative assistance of tried and tested institutions, particularly those with the experience of managing government respondents. ICSID has institutional expertise and an affiliation with the World Bank that make it

172. These numbers total sixty-one (instead of the sixty cases listed as affiliated with ICSID in the previous section) because *Yaung Chi Oo Trading* was an ad hoc arbitration that used ICSID-AF rules. See *supra* note 167–68 and accompanying text.

173. In these two cases, arbitration rules came from the investment treaty itself. See *Eureko v. Poland, Partial Award* (Aug. 19, 2005), <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf> [hereinafter *Eureko Award*]; *Sedelmayer v. Russian Federation, Arbitration Award* (July 7, 1998), [http://ita.law.uvic.ca/documents/investment\\_sedelmayer\\_v\\_ru.pdf](http://ita.law.uvic.ca/documents/investment_sedelmayer_v_ru.pdf) [hereinafter *Sedelmayer Award*].

an attractive institution to manage disputes.<sup>174</sup> Determining what factors have the most influence over parties' dispute resolution choices provides an opportunity to craft more nuanced disputing systems.

There would also be utility in considering whether there are other differences associated with each type of arbitral forum. For example, it would be useful to consider whether investors or governments were more or less likely to win in one venue or another. It might also be worthwhile to determine whether the awards themselves or arbitration costs were higher with a particular type of institution. Likewise, it may be useful to consider whether particular forums have diversity in their arbitrator pool. In this way, treaty negotiators could obtain information about the utility of each dispute resolution option that would be helpful in drafting treaties. Furthermore, having data will put lawyers in a better position to advise clients about the utility of particular dispute resolution choices and allow clients to make informed decisions.

#### 4. Industries Affected

UNCTAD described investment sectors subject to arbitration and suggested that cases involve "the whole range of investment activities and all kinds of investments, including privatization contracts and State Concessions."<sup>175</sup> UNCTAD reported that "less than half of the cases (42%) involved the services sector, including electricity distribution, telecommunications, debt instruments, water services and waste management" and that 29% of the cases "relate to mining and oil and gas exploration."<sup>176</sup> In a more dramatic statement, two NGOs recently suggested 70% of ICSID cases "involve private investment in public services such as water, electricity, and telecommunications, or investments in natural resources such as oil, gas and mining."<sup>177</sup> Neither UNCTAD<sup>178</sup> nor NGOs<sup>179</sup> have provided information about the origin, coding or analysis

---

174. See generally CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001).

175. UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 4.

176. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 3.

177. IPS & FWW Press Release, *supra* note 138. The report suggests that 42% of cases involve "the services sector (water, electricity, telecommunications, and waste management)" and 29% are "related to oil, gas and mining." See ANDERSON & GRUSKY, *supra* note 6, at ix.

178. In UNCTAD's online database that became public around January 2007, <http://www.unctad.org/iiia-dbcases/search.aspx>, the ability to search by industry does not exist. When running a simple search, it is not clear how the "Sector" or "Industry" variables were constructed and coded. After this paper was accepted for publication, UNCTAD informed the author that it will be providing a new database with enhanced searchability and other functions.

179. The Anderson & Gursky report neither details the data or coding methodology that supported its results. ANDERSON & GRUSKY, *supra* note 6. To the extent that it focuses on ICSID cases only, there are two problems. First, by ignoring investment treaty cases arising

of their data. This study analyzed data about industry that came from the awards and used a code book to make coding determinations.<sup>180</sup>

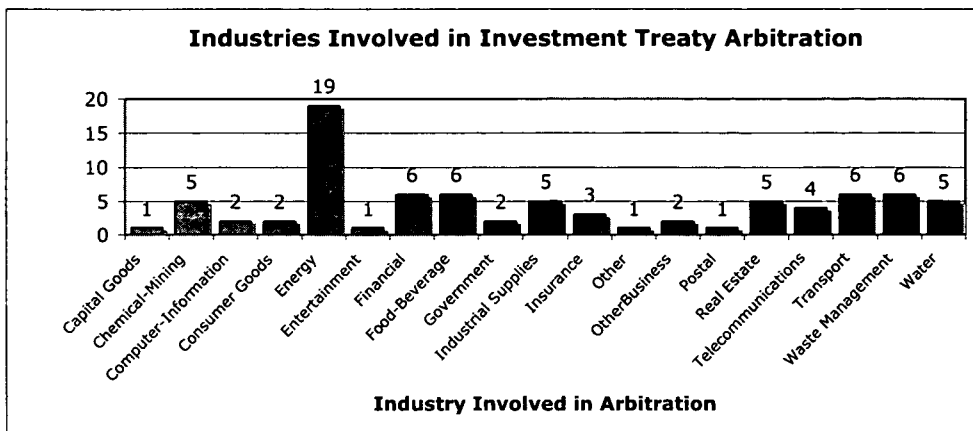
Overall, nineteen different industries were involved in investment treaty arbitration. Disputes involving industries arguably providing “public services” accounted for (1) 23.2% (n=19) of cases in the energy sector, (2) 7.3% (n=6) related to waste management, (3) 6.1% (n=5) related to water disputes, (4) 6.1% (n=5) of cases related to chemical or mining investment, and (5) 4.9% (n=4) related to telecommunications. This total of 47.6% contrasts slightly with the data from UNCTAD and the NGOs.<sup>181</sup> Similar to UNCTAD’s conclusions, the data from this research indicated that the most heavily arbitrated sector was energy (n=19). Other popular sectors—with six cases (7.3%) each—were the financial sector, food and beverage sector, and transportation. There were also five cases (6.1%) related to real estate transactions (See Chart 3).

---

external to ICSID, it omits relevant data. Second, by bringing in ICSID cases that do not involve investment treaty claims, it includes irrelevant data.

180. During conversations with staff at ICSID and other World Bank offices, there was not a readily available system for classifying investment types. Since nothing was available publicly, the Code Book created bespoke, detailed coding rules. The author recognizes that these investment categories have not been established in the literature or subject to analysis to confirm its measurement validity. The author welcomes analysis of this kind and/or information from UNCTAD and ICSID about how they classify industries so that a reliable coding strategy could be constructed.

181. This may, however, be more of a function of the methodology and coding approaches. Without transparent access to their data and method, it cannot be confirmed.



*Chart 3: Frequency breakdown of different industries involved in treaty arbitration cases. There were nineteen (23.17%) cases in the energy industry. Six cases (7.32%) arose in the Financial, Food-Beverage, Transport and Waste Management industries. There were also five cases (6.10%) in each of the following industries: Chemical-Mining, Industrial Supplies, Real Estate, and Water. There were four cases (4.88%) in the Telecommunications and three cases (3.66%) in the Insurance industry. There were two cases (2.44%) in Computer-Information, Consumer Goods, Government Services, and Other Business. There was one case (1.22%) each in Capital Goods, Entertainment, Postal, and Other. (Mean number of cases per industry  $N = 4.32$ ;  $SD = 4.06$ ;  $N = 82$ .)*

Having identified sectors subject to arbitration, future research might consider what makes these industries susceptible to disputes. It might also consider the effect of investment levels in each sector, investor awareness of treaty rights, the effect of governmental activity in these sectors, and government stability. Such analysis also might generate preliminary data that could be useful to policy makers. Identifying sectors where conflict is likely to arise in the future provides governments negotiating treaties with an opportunity to consider the need for and desirability of crafting specific dispute resolution mechanisms for industries most likely to be affected by conflict.<sup>182</sup>

Given the comparatively high number of claims, one might imagine a specific dispute resolution process for the energy sector. Governments may also use this data to consider the utility of excluding sectors from a grant of investment protection in the process of drafting or renegotiating an investment treaty. The United States has exempted certain sectors from

182. Franck, *supra* note 9.

investment protection.<sup>183</sup> Other countries may wish to adopt this practice. Overall, the general breadth of industries bringing claims suggests that governments may wish to draft broad dispute resolution mechanisms to cover claims that are likely to arise in a variety of industries.

C. *Claim #2: Is There an Increasing Number of Treaty Arbitrations?*

The UNCTAD literature refers to a “litigation explosion” of investment treaty arbitration.<sup>184</sup> One commentator even suggested “there seems to be a new award every week.”<sup>185</sup> While acknowledging that “[t]he total number of treaty-based investment arbitrations is impossible to measure,” UNCTAD observes that the actual number of claims is “very likely larger than what is known.”<sup>186</sup> As of November 2004, UNCTAD reported there were approximately 160 known investment arbitration

183. Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, S. EXEC. REP. NO. 47, 102d Cong. 2d Sess., at 8 (1992), Annex. These sectors include:

[a]ir transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining in the public domain; primary dealerships in United States government securities; and maritime services and maritime-related services.

*Id.*

184. UNCTAD, *Review*, *supra* note 59, at 4–6; UNCTAD, *Research Developments*, *supra* note 24, at 13–15; Stanimir A. Alexandrov, *The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals*, 6 J. WORLD INV. & TRADE 387, 387–88 (2005) (referring to the increasing number of cases as a “baby boom” of investment treaty arbitration); Salacuse, *Explanations*, *supra* note 9; Eloïse Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Trends*, ICSID NEWS, Fall 2001, at 4, 4, <http://www.worldbank.org/icsid/news/n-18-2-4.htm>; *see also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 124 n.11 (2006) (referring to the growth of investment treaty arbitration and noting “ICSID arbitration is only part of the explosion”).

185. Barton Legum, *Investment Treaty Arbitration’s Contribution on International Commercial Arbitration*, DISP. RESOL. J., Aug.–Oct. 2005, at 60, 72 (noting the increase and stating that in early 2000 “the number of awards in investment treaty cases could be measured on one hand”).

186. UNCTAD, *Review*, *supra* note 59, at 5–6. This is due in part to the confidential and non-transparent aspects of many investment treaty dispute resolution mechanisms. This pattern is changing, and there are a variety of reforms that have expanded the transparency of the investment treaty process. *See* 2004 U.S. Model BIT, *supra* note 15, arts. 28–29; Agreement Between Canada and \_\_\_ for the Promotion and Protection of Investments, 31–33, (2004), <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> (Canada’s Model Foreign Investment Promotion and Protection Agreement); ICSID Arbitration Rules, *supra* note 115.

cases.<sup>187</sup> By the end of 2005, UNCTAD identified at least 229 known arbitration cases, two-thirds of which were filed within the last five years.<sup>188</sup> It also reported that twenty-five new claims were filed in the first eleven months of 2006.<sup>189</sup>

UNCTAD explained that its data was “based on extensive research and interviews.”<sup>190</sup> It is not clear how data was collected, coded, and analyzed.<sup>191</sup> The unit of analysis is not entirely clear given different references to cases “filed”<sup>192</sup> and “known” cases.<sup>193</sup> Presumably, because cases can be filed and confidential, these two variables are not necessarily identical, which makes it difficult to determine what was measured. Because the data is not publicly available,<sup>194</sup> it is difficult to replicate the results and assess the validity of the research conclusions.

---

187. UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 1 (claiming that as at November 2005 there were 219 known treaty-based investor-state arbitrations); UNCTAD, *Disputes on the Rise*, *supra* note 59, at 1 (discussing the increase in investment treaty arbitration).

188. Press Release, Institution UNCTAD Reviews Investor-State Dispute Settlement Cases and Draws Implications for Developing Countries (Feb. 5, 2006), <http://www.unctad.org/Templates/webflyer.asp?docid=6967&intItemID=1528&lang=1> (observing that the “cumulative number of known treaty-based cases [increased] to at least 229 through the end of the 2005 ([although] the number stood at 219 at the time of printing of [UNCTAD’s] report”); see also UNCTAD, *Review*, *supra* note 59, at 4; ANDERSON & GRUSKY, *supra* note 6, at ix (stating “lawsuits have exploded worldwide” and citing UNCTAD data in support of assertion).

189. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 2. Although the methodology was not explained, the publication did indicate the draft was prepared by Federico Ortino who was affiliated with the British Institute of International and Comparative Law. *Id.*

190. UNCTAD, *Review*, *supra* note 59, at 6. It is also unclear who did the research that UNCTAD published. An editor of an NGO-sponsored online newsletter, Luke Eric Peterson, stated he was the author of the study. See Luke Eric Peterson, *UNCTAD Study Provides New Data on Incidence of Investment Treaty Arbitration*, INV. TREATY NEWS, Jan. 12, 2006, available at [http://www.iisd.org/pdf/2006/itn\\_jan12\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf); see also UNCTAD, *Disputes on the Rise*, *supra* note 59, at 1 n.1 (suggesting the note “is based on a note prepared by L. Peterson. The final version benefited from comments from C. Schreuer and T. Wälde.”); UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 1 n.\* (suggesting research was “undertaken by Luke Eric Peterson, Global Arbitration Tracking & Expertise. The final version benefited from comments from Bertram Boie, Anna Joubin-Bret and Joachim Karl.”). A later version suggests Federico Ortino of the British Institute of International and Comparative Law’s Investment Treaty Forum prepared the draft. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 2 n.\*. While it is possible that Mr. Peterson did the early studies and Mr. Ortino simply updated them, it would be useful to disclose this and how the methodology differed, if at all.

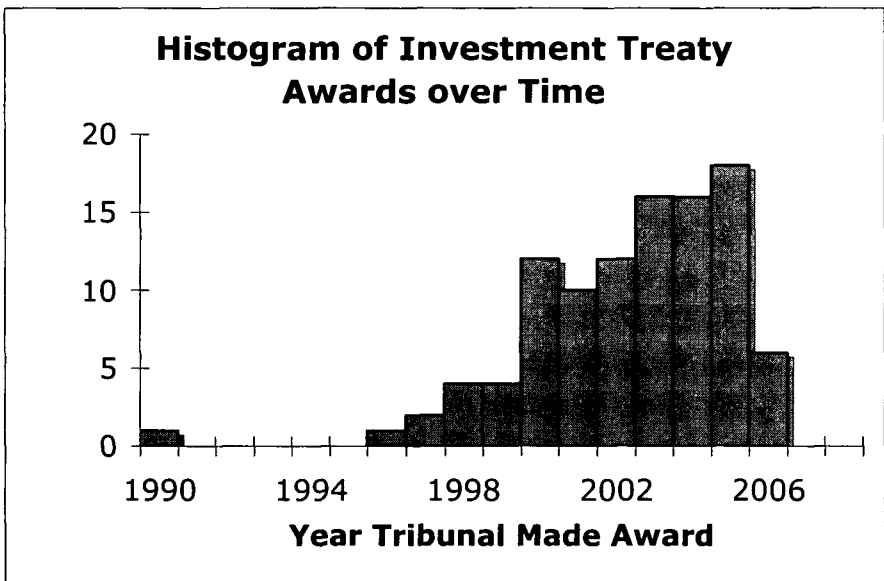
191. UNCTAD’s publications suggest the data does not “include cases where a party signaled its intention to submit a claim to arbitration, but has not yet actually commenced the arbitration.” UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 2; see also UNCTAD, *Disputes on the Rise*, *supra* note 59, at 2 (indicating notices of intent are not counted); UNCTAD, *Disputes*, *supra* note 59, at 5–6. Beyond this, little is known about the methodology.

192. UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 1.

193. UNCTAD, 2005 IIA Monitor No. 4, *supra* note 59, at 1–3.

194. After the initial draft of this paper was written, UNCTAD released a new database with information about investment treaty claims. It is unclear whether all or a portion of these cases form the data upon which UNCTAD’s conclusions are based. Although the database is difficult

The data in this study supports the assertion that there has been an increase in the use of investment treaty arbitration. Using the date the award was issued, over time, there was an increase in the number of arbitration awards generally and the number of final arbitration awards. Whereas there was only one award in both 1990 and 1996, the number of awards grew to twelve in 2000—more than a fivefold increase. By 2003 and 2004, there were sixteen awards each year. There were sixteen new awards in 2005, and during the first five months of 2006 there were six awards (See Chart 4).



*Chart 4: Histogram depicting the number of publicly available investment treaty arbitration awards (before June 1, 2006) and providing the frequency of the number of awards rendered each year based upon the year a tribunal rendered the award (Mean=2002; SD=2.66; N=102).*

The data reveals that there was an increase in awards finally resolving treaty claims. With only one final award in 1990, another in 1996, and another in 1997, it was not until 2000 that the number of final awards climbed to seven. It reached a peak of ten in 2003. In 2004 and 2005, the numbers tapered off slightly to seven final awards each year. In the first five months of 2006, there were three final awards.

These numbers were smaller than those in UNCTAD's study, in part because the unit of analysis was different. Nevertheless, the data suggests that investment treaty arbitration has increased over time. The question of whether this increase is an "explosion" is largely a function of perspective. When comparing the number of awards today to the number of awards twenty-five years ago, there has been a marked increase. If, however, one considers the proliferation of investment treaties and increased levels of investment, this increase is perhaps less striking.

When the number of investment treaties quintupled during the 1990s,<sup>195</sup> there were few arbitration awards. It is possible that, when they entered the treaties, host governments may not have appreciated that there was a realistic probability of being subjected to suit for their conduct. This may account for suggestions that governments were shocked by the use of investment treaty arbitration and its magnitude.<sup>196</sup>

Although an increase in awards does not necessarily mean there has been an escalation in investment treaty conflict,<sup>197</sup> it does suggest that investors can and will utilize the dispute resolution provisions in treaties to bring claims. In other words, having been given a new set of substantive rights, investors have not been afraid to test their limits in the dispute resolution process. If nothing else, the data indicates that governments should be aware that signing a treaty with dispute resolution rights creates a real (i.e., not imaginary or theoretical) risk of arbitration. Given that investors can and do utilize such rights, governments should think critically about what types of dispute resolution are in their long-term interests. They may also wish to consider whether investment levels arguably generated by the treaties are worth the cost.<sup>198</sup>

---

195. U.N. Conference on Trade and Dev., *Bilateral Investment Treaties in the Mid-1990s*, 10, U.N. Doc. UNCTAD/ITE/IIT/7 (1998) (explaining that the 1990s saw a rise in the number of treaties "from 385 at the end of the 1980s to 1,857 at the end of the 1990s"); see also Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?*, 94 AM. SOC'Y INT'L L. PROC. 41, 42 (2000) ("In the 1990's, there was a veritable explosion in the number of BITs.").

196. Jeffrey Atik, *NAFTA Repenser Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 215, 216 (2003) (suggesting that the nature of arbitration claims and awards have made "more than a little buyer's remorse evident").

197. See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81) (discussing how conflict can escalate to a formal dispute).

198. This might include an analysis of increased investment levels from countries where there are and are not investment treaties. It might also compare the value of investments made versus the financial exposure from arbitration.



D. *Claim #3: Do Investors Win More Often than Governments?*

Knowing there is a real risk that investors will use investment treaty arbitration, the question shifts to how to quantify that risk and understand its significance. One critical element of the dispute resolution risk is the likelihood that a party will win the dispute.

The literature demonstrates considerable disagreement over who wins and loses treaty arbitration. Some commentators suggest investors are primarily successful and that “host States cannot be winners in investment arbitration.”<sup>199</sup> Similarly, there are claims that “Poorer Nations Pay Dearly for Investment Deals”<sup>200</sup> and “Investors’ Odds of Winning are High.”<sup>201</sup> Even Evo Morales, President of Bolivia, said, in connection with Bolivia’s withdrawal from the World Bank and ICSID: “ ‘Governments from Latin America and I think all over the world never win the cases. The transnationals always win.’ ”<sup>202</sup> The implication is that under the current process of resolving disputes, the deck is stacked against host governments. That state of affairs is contrary to democratic values and undermines the credibility of arbitration and investment treaties.<sup>203</sup>

Other commentators disagree. Some suggest that “[r]ight or wrong, the winner wins. If it is the state, it is the state; if it is the investor, it is the investor.”<sup>204</sup> These commentators fail to define what the baseline is for

199. Nathalie Bernasconi-Osterwalder, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?*, 6 J. WORLD INV. & TRADE 69, 69 (2005).

200. Emad Mekay, *Poorer Nations Pay Dearly for Investment Deals*, GLOBAL POL’Y F., Nov. 29, 2004, <http://www.globalpolicy.igc.org/soecon/trade/unctad/2004/1129invest.htm> (“[T]rade and investment disputes involving dozens of millions of dollars are growing worldwide and threaten to undermine the meaning of many economic treaties.”).

201. ANDERSON & GRUSKY, *supra* note 6, at ix. *But see* Roberto Dañino, Sec’y-Gen., ICSID, Opening Remarks at Symposium in Paris, France: Making the Most of International Investment Agreements: Common Agenda (Dec. 12, 2005), <http://www.worldbank.org/icsid/highlights/address-rd-004.htm> (suggesting winners and losers of ICSID arbitration cases are “equally divided, almost exactly 50/50 . . .”).

202. *See* Mazoch, *supra* note 7 (referring to newspaper articles quoting President Morales).

203. *See generally* ANDERSON & GRUSKY, *supra* note 6, at viii (suggesting that democratic values are undermined when investment arbitration favors investors). Public Citizen reviewed a set of cases, provided data about win-loss records, discussed a few cases where investors received awards without explaining whether they were representative, and concluded the “findings demonstrate that NAFTA’s model of extensive foreign investor privileges and their private enforcement outside of the domestic court system should not be replicated.” *See* PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-STATE CASES: LESSONS FOR THE CENTRAL AMERICA FREE TRADE AGREEMENT vii (2005), [http://www.citizen.org/documents/NAFTA\\_Report\\_Final.pdf](http://www.citizen.org/documents/NAFTA_Report_Final.pdf); *see also id.* at xvi (suggesting “the NAFTA arbitration defense bill for U.S. taxpayers may quickly reach over \$30 million” without providing evidence to support the inference).

204. Bohuslav Klein, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?*, 6 J. WORLD INV. & TRADE 65, 67 (2005).

assessing “right” and “wrong.” Given that the underlying records are often not publicly available and the inconsistency in the case law about the meaning of fundamental legal principles,<sup>205</sup> it is difficult to make reliable predictions about the legally “correct” result *ex ante*. Still others rely on anecdotal information or gestalt “studies” to suggest that governments and investors are equally likely to win cases.<sup>206</sup> Some commentators have been more methodical in their approach to analyzing party success,<sup>207</sup> albeit in the context of NAFTA arbitrations.

This research evaluates these claims by analyzing awards that finally resolved investment claims and considering the financial implications of the results.

### 1. The Winners and Losers of Investment Treaty Arbitration

Out of the fifty-two awards finally resolving treaty claims, there were twenty awards (38.5%) where investors won and tribunals awarded damages. By contrast, there were thirty awards (57.7%) where governments paid investors nothing.<sup>208</sup> There were also two awards embodying settlement agreements. In one of the settlements, the government agreed to pay the investor nearly US\$3 million.<sup>209</sup> In the other settlements, there was no money exchanged, but the government agreed to examine its broadcast spectrum, reconsider a radio-broadcasting license, and provide “three locations for the beauty salon”<sup>210</sup> (See Chart 5).

---

205. See Franck, *supra* note 2, at 1558, 1661–12 (stating that the case law is inconsistent).

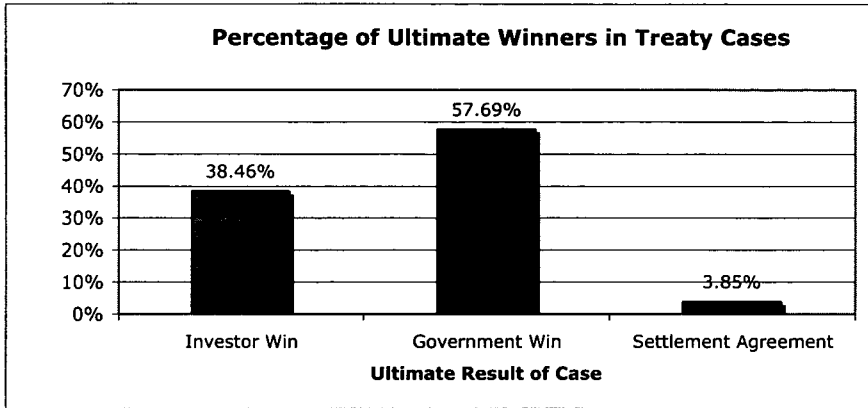
206. Daniel M. Price, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?*, 6 J. WORLD INVESTMENT & TRADE 73, 74–75 (2005); see also UNCTAD, *Disputes on the Rise*, *supra* note 59, at 4 (“Nor do all claims brought by businesses succeed. Indeed, a significant number of cases are won by States.”); UNCTAD, *Review*, *supra* note 59, at 9–10 (referring to various claims where investors succeeded and then commenting that “not all claims lead to the requested awards”).

207. See Coe, *supra* note 60, at 1400–01 (reporting on NAFTA investment arbitration and commenting “the docket to date makes plain that the probability of non-recovery, or less than expected recovery, is high”); see also Alvarez & Park, *supra* note 60, at 401 (providing a “score card” of NAFTA proceedings).

208. In *Lauder v. Czech Republic*, the tribunal found a breach of the treaty but did not award damages. Because no cash was awarded, this was coded as a respondent “win.” In all other cases, the government won at either the jurisdictional or merits phase.

209. Goetz Award, *supra* note 80, at 527 (agreeing to pay US\$2,989,636); see also Eloise Obadia, *Introductory Note: Antoine Goetz and others v. Burundi*, 15 ICSID REV.-FOREIGN INV. L.J. 454, 456 (2000).

210. Lemire Award, *supra* note 48, at 535–36 (summarizing the case settlement).



*Chart 5: Percentage of Ultimate Winners and Losers in Investment Treaty Cases categorizing ultimate outcome by (1) cases where the tribunal awarded an investor damages for a treaty violation (n=20), (2) cases where the tribunal did not make an award of damages against a government for an alleged treaty violation (n=30), and (3) cases resolved through a final award embodying a settlement agreement (n=2).*

Both governments and investors were successful. The percentage of ultimate winners does not appear to be meaningfully different for investors and governments. For governments thinking about whether to include arbitration in their dispute resolution mechanism, this may suggest that the arbitration process itself does not necessarily disfavor them. It should encourage them to consider arbitration as a viable dispute resolution option.<sup>211</sup> For investors, it suggests that it is also possible to win. As they were less likely to win than governments, investors may wish to consider carefully under what circumstances they will initiate arbitration.

Future analysis might also try to determine whether the Priest-Klein model, which predicts that plaintiffs will win 50% of cases that end in a judgment regardless of the applicable legal standard,<sup>212</sup> should apply as a

211. Governments may elect to provide investors with different dispute resolution options such as mediation, expert determination, or court litigation. Rather than considering what process is most appropriate, debate has primarily centered on whether to permit parties to arbitrate disputes or whether to retain their traditional immunity. *See generally*, Franck, *supra* note 9. In the future, when considering how to manage their costs and benefits most effectively, governments might consider what dispute resolution mechanisms (if any) will allow them to maximize the purported benefits of signing investment treaties while minimizing potential dispute resolution risks.

212. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984) (concluding that plaintiffs will tend to win 50% of cases regardless of the legal standard).

baseline for assessing the acceptability of investment treaty arbitration.<sup>213</sup> The Priest-Klein model is based upon restrictive assumptions that may make it inapposite. The model assumes, for example, that only close cases will go to trial. Inconsistency in current case law and the lack of binding precedent<sup>214</sup> may prevent parties from determining which cases are “close.” Likewise, informational deficiencies, such as lack of access to information about arbitrators<sup>215</sup> or awards,<sup>216</sup> may prevent parties from making accurate assessments of the outcome. There may also be cases where political or reputational sensitivities require adjudication even if it is not a “close” case.<sup>217</sup> Moreover, the domestic civil law cases that the Priest-Klein model was based upon are inevitably different than international investor-state treaty cases. If the assumptions of the Priest-Klein model apply, it would provide a useful baseline against which to compare the current win/loss data and assess the legitimacy of the arbitration process. It would suggest that the rough equivalence in win rates and similarity to the Priest-Klein 50/50 rate suggests the system is not unfairly balanced. Likewise, an analogy to U.S. labor arbitration that demonstrated management won 49.6% of its cases<sup>218</sup> suggests that win rates in investment treaty arbitration are not unreasonable.

---

213. See, e.g., David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1126 (2006) (suggesting the Priest-Klein model does not work for medical malpractice as plaintiffs lose more than 70% of the time).

214. See Franck, *supra* note 2, at 1558, 1611–12 (stating that case law has been inconsistent and discussing the absence of precedent in investment arbitration).

215. Catherine Rogers has recommended the creation of public access to information about international arbitrators to rectify this gap in the marketplace. Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM U. INT'L L. REV. 957, 1009–10 (2005). At present, no such repository exists.

216. While this might relate to access to non-public awards, it may also relate to the lack of access to the underlying record to make an assessment of the decision's correctness. See Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 256–64 (2007) (contending that the underlying case record is difficult to access).

217. See Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 257 (1996) (stating that “differential stakes, differential information, mis-measurement of plaintiff victory, legal standard favoring one side, settlement costs being high relative to litigation costs, high awards, and agency effects” can all affect the utility of the Priest-Klein model); see also Keith N. Hylton, *Information, Litigation, and Common Law Evolution*, 8 AM. L. & ECON. REV. 33, 46 (2006) (suggesting that, if the stakes are higher and/or there is an informational asymmetry, the Priest-Klein model may not apply); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 232 (1999) (suggesting that the assumptions of the Priest-Klein model are unrealistic).

218. See Laura J. Cooper et al., *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, (forthcoming 2007) (on file with the North Carolina Law Review) (finding management won 49.64% of the time, unions won 21.56% of the

Future research should continue to assess these win rates and determine how they change, if at all, over time. It might also consider whether investors from specific countries or groups of countries won or lost. In cases involving only U.S. investors, for example, investors won seven times. Governments won eleven times, and there was one settlement agreement.<sup>219</sup> While it would be inappropriate to conclude U.S. investors lose significantly more than host governments given the small numbers, there was a pattern in that direction.<sup>220</sup> The experience of U.S. investors appeared similar to the general class of investors. Future research may consider whether investors from a particular country are particularly successful or unsuccessful and if differences among countries are statistically significant. Particularized assessment at this level may provide valuable information for specific countries attempting to assess the costs and benefits of arbitration. It may also provide a more nuanced assessment of whether the arbitration process inappropriately favors the developed world.

## 2. Winning and Losing Jurisdiction

There were also interesting patterns about whether investors or governments won at different stages of the arbitration process. Out of the eighty-seven awards dealing with jurisdictional issues, investors successfully established jurisdiction in fifty awards (57.5% of the time). In contrast, governments defeated an investor's jurisdictional arguments and ended the claim in ten awards (11.5%).

In twenty-seven awards (31%) dealing with jurisdictional issues, the parties had mixed success. In other words, some claims were allowed to proceed to the merits while other claims terminated. This meant that a government might prevent one investor from proceeding to the merits, but other investors in the same case might be able to proceed. For example, in *Champion Trading v. Egypt*, there was no jurisdiction over three U.S.-Egyptian dual nationals. Nevertheless, the entities they controlled could continue the arbitration against Egypt.

Investors were largely successful at the jurisdictional phase. Jurisdictional challenges held some strategic benefits for governments and permitted the dismissal of the entire claim in some cases. Partial success might also minimize the scope of the dispute either in terms of claims themselves or parties bringing the claims. This can narrow the range of

---

time, and 28.81% of the cases involved "split decisions" where an arbitrator found just cause for lesser discipline than what management imposed).

219. There were a total of forty-two cases involving U.S. investors. The remaining twenty-three cases did not involve a final determination of treaty claims.

220. The settlement agreement did not involve a monetary transfer.

liability, expand settlement opportunities, and possibly encourage the use of other dispute resolution mechanisms.<sup>221</sup>

### 3. Winning and Losing on the Merits

Although the number of awards addressing merits issues (n=41) was smaller, there were interesting patterns. Unlike at the jurisdictional phase, investors were less likely to be completely successful on the merits. Claimants were successful on all of the causes of action they alleged in only five awards (12.2%). In contrast, governments were slightly more successful at this phase. They eliminated all of the investor's claims in sixteen awards (39%).

Nearly half of the awards (n=20) had mixed success. In other words, in 48.8% of the cases that involved a decision on the merits, an investor recovered on at least one substantive cause of action (i.e., discrimination) but was unsuccessful on another aspect (i.e., expropriation). This scenario was similar to the case of *MTD v. Chile*, where the investor won some, but not all of its claims.<sup>222</sup> It also might involve cases like *Genin v. Estonia* where all of the investor's claims were dismissed, but so were the government's counterclaims.<sup>223</sup> Future research might usefully consider which type of claims and government conduct are correlated with positive, negative, or mixed outcomes. Presumably, such information might help parties calculate their arbitration risk and provide opportunities to create dispute resolution mechanisms that meet parties' needs.<sup>224</sup>

### 4. Winning and Losing at the Damages Stage

Only twenty-one awards addressed damages. The overall pattern was for mixed success, and parties' success was mixed in eighteen of the awards (85.7%). For example, in *S.D. Myers v. Canada*, the investor recovered on the basis of a net income stream, but the tribunal denied the claim for lost opportunity damages.<sup>225</sup>

---

221. See *infra* notes 315–21 and accompanying text (discussing the impact of other dispute resolution mechanisms).

222. *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), 44 I.L.M. 91 (2005), <http://ita.law.uvic.ca/documents/MTD-Award.pdf>.

223. *Genin Award*, *supra* note 31, at 491–92.

224. While it would be useful to assess arbitration data in light of data about other dispute resolution mechanisms, such data does not yet exist. This may be partially a result of how governments craft dispute resolution mechanisms at present. Court litigation may not even be an option, and even where it is, investors have not used them. Franck, *supra* note 11, at 368 n.150. Other processes, like negotiation, may not be required or occur confidentially so that data is not publicly available.

225. *S.D. Myers, Inc. v. Canada*, Second Partial Award, UNCITRAL (Oct. 2002), 100, 161–62, <http://ita.law.uvic.ca/documents/SDMeyers-secondPartialAward.pdf>.

Cases where either investors or governments were completely successful were rare. A host government was completely successful at the damages phase in only one case, *Lauder v. Czech Republic*.<sup>226</sup> There were two cases where the claimant was wholly successful in damage arguments. Both cases shared a common feature: they involved financial instruments. In *Fedax v. Venezuela*, the amount in controversy was not disputed because the value was recorded in promissory notes.<sup>227</sup> Similarly, in *Maffezini v. Spain*, the government did not dispute damages.<sup>228</sup> Future research might consider which arguments were successful and which were unsuccessful in the assessment of damages, the most effective types of data presentation, and the implications for a party having different damage calculations.

### 5. Implications of Winning at Different Stages

Investors were more successful at jurisdictional stages whereas governments were more successful on the merits. This may implicate structural safeguards intended to streamline the arbitration process.

ICSID's new rules provide an expedited mechanism to strike out claims. Arbitration Rule 41 provides that, within thirty days after a tribunal is constituted, "a party may . . . file an objection that 'a claim is manifestly without legal merit.'"<sup>229</sup> The provision was passed to provide governments an earlier opportunity to rid themselves of unmeritorious claims.<sup>230</sup>

It is not clear whether ICSID's revised arbitration rules will have the desired outcome. Since a *party* may object to a *claim*, the text of the rule is not limited solely to governments. Theoretically, a government could file an early objection related to jurisdiction, the merits, or damages. Investors might likewise try to quash governmental counterclaims.<sup>231</sup> It is also

---

226. *Lauder v. Czech Republic*, Award, UNCITRAL (Sept. 9, 2001), <http://ita.law.uvic.ca/documents/LauderAward.pdf>.

227. *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award (Mar. 9, 1998), 37 I.L.M. 1391, 1396, <http://ita.law.uvic.ca/documents/Fedax-1998-Last.pdf>.

228. *Maffezini Award*, *supra* note 89, at 277.

229. ICSID Arbitration Rules, *supra* note 115, at R. 41(5); *see also id.* at R. 41(6) (stating that if a tribunal determines a claim is unmeritorious "it shall render an award to that effect."). This is similar to processes in the new U.S. Model BIT. 2004 U.S. Model BIT, *supra* note 15, art. 28(4)–(6).

230. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration: Discussion Paper*, 4, (Oct. 22, 2004), available at <http://www.worldbank.org/icsid/highlights/improve-arb.pdf> (referring to the possible creation of expedited procedures for dismissal of unmeritorious claims).

231. Although not coded for the purpose of statistical analysis, there were two cases where governments alleged counterclaims. In both instances, tribunals held they lacked jurisdiction over the governmental counterclaims. *Genin Award*, *supra* note 31; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (May 7, 2004), <http://ita.law.uvic.ca/documents/Saluka-DecisiononJurisdiction-counterclaim.pdf>; *see also Sedelmayer Award*, *supra* note 173 (indicating the investor had argued that Russia had

possible that investors' success at the jurisdictional phase may be replicated in the new procedure. If this is the case, the rule could cut against governments who (1) have their counterclaims dismissed and (2) cannot weed out investor claims early on jurisdictional grounds. If, however, Rule 41 is used to speed up the success a government might achieve on the merits, then the rule might achieve its objective. While there were no awards using Rule 41 in this population, future analyses might consider how this provision is being used in practice to determine its efficacy. This may, for example, provide guidance to those countries that consider following the U.S. Model BIT that provides for early decisions on "preliminary question[s]."<sup>232</sup> Likewise, the likelihood of success and failure may affect parties' willingness to use these streamlined procedures instead of relying on a more traditional approach.

#### *E. Claim #4: Do Investors Recover Large Amounts?*

Knowing there is a real risk that investors will use investment treaty arbitration, the question shifts to how to quantify that risk and understand its significance. One aspect of understanding the dispute resolution risk is quantifying the financial implications of pursuing treaty arbitration. This includes, for example, an assessment of the amounts claimed and awarded.<sup>233</sup>

Commentators make broad—often unsubstantiated—claims about the amounts in controversy and investors' ultimate recoveries.<sup>234</sup> Bill Moyers suggested that arbitrators "can force taxpayers to pay billions of dollars in lawsuits."<sup>235</sup> Others have commented that "[e]conomic [t]hreats are [s]ignificant"<sup>236</sup> or that governments "find themselves hauled before arbitration panels and compelled to pay large amounts of compensation for

---

made a de facto counterclaim for damages whereas Russia stated its defense involved arguing for decreased damages).

232. See 2004 U.S. Model BIT, *supra* note 15, art. 28(4) (describing the 2004 U.S. Model BITs procedures for "preliminary questions").

233. While quantifying the financial implications of pursuing treaty arbitration could involve an assessment of the amounts investors actually recovered, such assessment is beyond the scope of the current project.

234. See Richard Newfarmer, *Beyond Merchandise Trade: Services, Investment, Intellectual Property and Labor Mobility*, in INT'L BANK FOR RECONSTRUCTION AND DEV., WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2005, at 97, 107–08 (2005), available at <http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf> (indicating investors making claims under NAFTA have alleged over \$1 trillion in damages but the total damages awarded has been in the order of \$35 million); PUBLIC CITIZEN, RECORD, *supra* note 3, at vii (suggesting that "\$28 billion has been claimed by NAFTA investors").

235. NOW with Bill Moyers: *Trading Democracy* (PBS television broadcast Feb. 1, 2002) [hereinafter *Trading Democracy*], available at [http://www.pbs.org/now/transcript/transcript\\_tdfull.html](http://www.pbs.org/now/transcript/transcript_tdfull.html) (transcript).

236. ANDERSON & GRUSKY, *supra* note 6, at ix.



enacting regulations they had considered in their sovereign domain.”<sup>237</sup> Such criticisms have cast doubt upon the acceptability of arbitration.<sup>238</sup>

Meanwhile, some refer to an individual case to suggest it “illustrates the high cost of violating a[n investment treaty]”<sup>239</sup> as if to suggest that it is representative of other awards.<sup>240</sup> Others refer to a range of damages<sup>241</sup> without indicating whether they are representative. These practices are troubling. For example, in 2005, UNCTAD referred to several cases to indicate “some claims involve large sums”<sup>242</sup> and cited cases to support this assertion. This included the three biggest awards in this study’s population. One of these awards—the US\$133 million CMS award—was apparently referenced twice as if there were two separate US\$133 million awards, even though there was only one.<sup>243</sup> It also referenced a US\$266 million award against Lebanon, which is not publicly available and cannot be verified.<sup>244</sup> It also referred to the US\$824 million award in *CSOB v. Slovak Republic*<sup>245</sup> even though damages were not based on an investment treaty claim.<sup>246</sup> Rather it involved damages for breach of a separately negotiated

237. Newfarmer, *supra* note 234, at 118.

238. See generally ANDERSON & GRUSKY, *supra* note 6, at 29 (concluding that the “current system of international investor protections” is both “flawed and unbalanced”).

239. Amin George Forji, Does Investment Always Foster Development? The Effects of Bilateral Investment Treaties on Developing Countries, [http://www.bilaterals.org/article.php?id\\_article=5998](http://www.bilaterals.org/article.php?id_article=5998) (last visited Nov. 11, 2007).

240. UNCTAD tried to provide balanced information. It observed that “[n]ot all claims lead to the requested awards” and “[v]ery large claims often end up yielding very small awards.” UNCTAD, *Review*, *supra* note 59, at 10. Nevertheless, the next awards they cited to as “small”—*Metalclad* and *S.D. Myers*—were some of the next highest damage awards in the present study. *Id.* at 10; see *infra* notes 255, 257.

241. Franck, *supra* note 11, at 346; see also Price, *supra* note 206, at 74–75 (stating that in the NAFTA context “US\$ 1.24 billion in damages has been claimed; a total of US\$ 23 million in damages has been awarded. US\$ 200 million has been claimed against Mexico; US\$ 18 million has been awarded. US\$180 million has been claimed against Canada; US\$ 4 million has been awarded. US\$ 865 million has been claimed against the United States; US\$ 0 has been awarded.”)

242. UNCTAD, *Review*, *supra* note 59, at 8.

243. *Id.* at 9.

244. The only publicly available information on this award came from one of the parties to the dispute. Press Release, France Telecom, France Telecom: Award of the Arbitration Tribunal on the Dispute with the Republic of Lebanon (Feb. 22, 2005), [http://www.francetelecom.com/en/financials/journalists/press\\_releases/CP\\_old/at00029460/CP\\_LIBAN\\_050222.pdf](http://www.francetelecom.com/en/financials/journalists/press_releases/CP_old/at00029460/CP_LIBAN_050222.pdf) (announcing an award of \$266 million to a subsidiary of France Telecom).

245. UNCTAD, *Review*, *supra* note 59, at 9; cf. ANDERSON & GRUSKY, *supra* note 6, at ix.

246. The case started with claims under both an investment treaty and a commercial agreement; the tribunal held there was jurisdiction under the commercial agreement but not under the treaty. *Ceskoslovenska, Jurisdiction*, *supra* note 68, at 283 (upholding jurisdiction on the basis of activities meeting the treaty’s definition of “investment” but undertaken pursuant to a Consolidation Agreement).

commercial agreement governed by national law.<sup>247</sup> Others have failed to distinguish between disputes arising under international treaties and commercial contracts arising under domestic law.<sup>248</sup>

Some scholars offer more considered commentary. In his analysis of NAFTA disputes, Professor Jack Coe observed that investors “alleged extensive damages.”<sup>249</sup> He then observed that expropriation claims have only led to one compensable taking and two cases had small awards for violations of “fair and equitable treatment.”<sup>250</sup> Barton Legum’s analysis of NAFTA awards similarly suggested, “the total amount of damages asserted in the claims decided [prior to 2004] amount[ed] to a little over US\$1.2 billion, yet the total recovery by claimants was US\$23 million. The total recovery amounts to a little under two cents on the dollar.”<sup>251</sup> Unfortunately, neither Coe nor Legum’s work considered the larger body of investment treaties.

The question then becomes: what are the financial implications of pursuing investment treaty arbitration?

### 1. Amounts Claimed

Out of the eighty-two cases in the present study, only forty-four quantified an investor’s claimed damages either fully or partially. The lowest amount claimed was in *Maffezini v. Spain* for approximately US\$155,314 (ESP 30 million)<sup>252</sup> whereas the highest amount claimed was in *Generation Ukraine v. Ukraine* for US\$9.4 billion.<sup>253</sup> Overall, the

---

247. *Ceskoslovenska Obchodni Banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004), <http://ita.law.uvic.ca/documents/Cesk-Slovakia-AwardDec2004.pdf> (awarding damages of both US\$10 million and almost 25 billion Slovak crowns for respondent’s violations).

248. Noah D. Rubins, *The Allocation of Costs and Attorney’s Fees in Investor-State Arbitration*, 18 ICSID REV.-FOREIGN INV. L.J. 109, 125 (2003) (referring to data published by the International Chamber of Commerce to suggest that 58% of commercial arbitrations initiated under its rules in 1999 were worth more than US\$1 million but for “ICSID cases filed in 1997, the average claim size was about US\$110 million”); Salacuse, *ADR*, *supra* note 9, at 11 (suggesting “the average award in an ordinary international commercial arbitration is less than a million dollars, [but] an award in an investor state arbitration is usually many times that”). These commentators may have only meant to refer to investor-state arbitration and not investment treaty arbitration.

249. Coe, *supra* note 60, at 1400.

250. *Id.* at 1401.

251. Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV.-FOREIGN INV. L.J. 344, 346–47 (2004).

252. *Maffezini Award*, *supra* note 89, at 277 (awarding 30 million pesetas plus interest).

253. *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), 44 I.L.M. 404, para. 1.1 (2005), <http://ita.law.uvic.ca/documents/GenerationUkraine.pdf>.

average amount of damages claimed in those forty-four cases was approximately US\$343.4 million.<sup>254</sup>

The size of these claimed damages may be in part responsible for public concern about the role of investment treaty arbitration, particularly for governments with more limited capital reserves. If a tribunal were to award an investor the full value of its claim, theoretically there might be fewer financial resources available to meet other critical domestic priorities.

## 2. Amounts Awarded

There were fifty-two cases in which tribunals made awards that resulted in a damages determination (if any) for treaty-based claims.<sup>255</sup> Out of these cases, there were thirty-one instances in which investors were awarded nothing.<sup>256</sup> In the remaining twenty-one instances, tribunals awarded damages.<sup>257</sup> In other words, tribunals awarded investors damages in fewer than half of the cases.

The average amount of damages awarded by tribunals was approximately US\$10.4 million.<sup>258</sup> This average may not be dissimilar from other international law adjudications. For example, a recent decision by the Inter-American Court of Human Rights required Colombia to pay US\$7.8 million to relatives of twelve judicial workers killed in a massacre by army-backed paramilitaries.<sup>259</sup> Aside from cases that resulted in damages of US\$0, the lowest damage award where an investor received something was approximately US\$24,603 (310,000 Moldovan Lei) in *Iurii Bogdanov v. Moldova*.<sup>260</sup> The highest award was in *CME v. Czech*

---

254. The median damages claimed were US\$59,028,304; the mode was US\$50 million.

255. Given the missing data (i.e., not every case contained an award quantifying and/or awarding damages), cases with quantified and awarded damages were not always the same. Out of fifty-two awards finally resolving treaty claims, thirty-one quantified claimed damages.

256. This figure includes the settlement from *Lemire v. Ukraine* where no cash changed hands. See *Lemire Award*, *supra* note 48, at 335–36.

257. This figure includes the settlement in *Goetz v. Burundi* where the government paid the investor nearly US\$3 million. See *Obadia*, *supra* note 209.

258. The median and mode for damages awarded was zero.

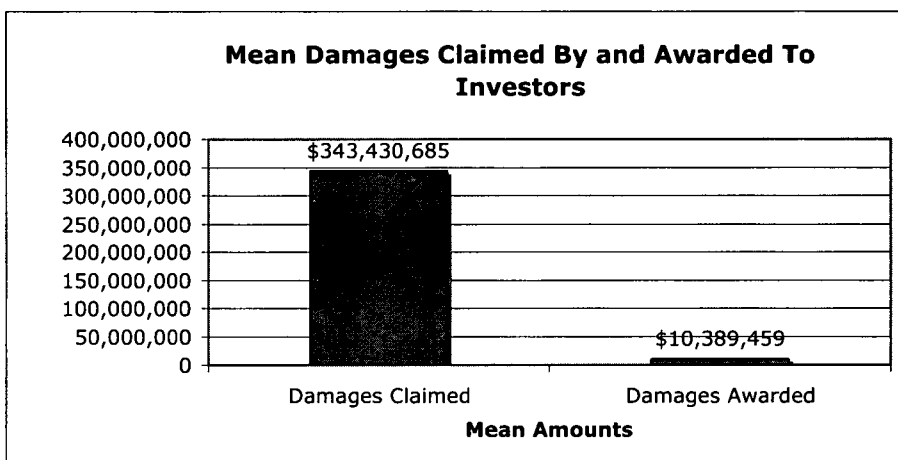
259. Associated Press, *Colombia Ordered to Pay US\$7.8 Million in Massacre of 12 Judicial Workers by Paramilitaries*, INT'L HERALD TRIB. (Paris), June 8, 2007, available at <http://www.iht.com/articles/ap/2007/06/09/america/LA-GEN-Colombia-Massacre-Ruling.php>.

This case may not be representative of other international law adjudications involving individuals and states.

260. *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award (Sept. 22, 2005), <http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf>.

*Republic*,<sup>261</sup> where the investor secured a substantive award of US\$269,814,000.

A striking finding was the difference between the average amounts claimed and awarded. The difference between the average amounts claimed and awarded was approximately US\$333 million (See Chart 6). If the outlier, *Generation Ukraine v. Ukraine*,<sup>262</sup> is removed, the difference is statistically significant.<sup>263</sup>



*Chart 6: Bar chart reflecting the mean damages claimed by investors—US\$343,430,684.88 (n=44; SD=1,509,734,385)—for cases where investors quantified claimed damages and the mean damages awarded by tribunals—US\$10,389,459.10 (n=52; SD=10,389,460)—in awards finally resolving treaty claims.*

261. *CME Czech Rep. B.V. v. Czech Republic*, U.N. Comm'n on Int't Trade Law, Final Award (Mar. 14, 2003), para. 620, [http://ita.law.uvic.ca/documents/CME-2003-Final\\_002.pdf](http://ita.law.uvic.ca/documents/CME-2003-Final_002.pdf) [hereinafter *CME Award*].

262. *Generation Ukraine* had the highest damages claimed; and, given that it was approximately US\$500 million higher than the next largest number, a box plot revealed that it was a distinctive number in the overall distribution of damages claimed. When this outlier for claimed damages is included, the confidence intervals for the two populations (namely amount claimed and amount received) do overlap; but, because of the small number of cases and the broad nature of the distribution, this does not necessarily detract from the substantive difference between the two figures.

263. Having done a standard deviation of the two populations of Amount Claimed versus Amount Received, the confidence intervals (at the 95% level) for the populations do not overlap.

Other comparisons exhibit a similar pattern.<sup>264</sup> For the twenty-one awards where tribunals awarded cash to an investor, the average award was US\$25,583,916. This is a US\$317.9 million difference between the amount claimed and awarded.<sup>265</sup> Moreover, when considering the thirty-one cases for which there was data about both damages claimed and awarded, the difference was even larger: the average amount claimed was approximately US\$404 million while the average amount awarded was approximately US\$17 million—a difference of US\$387 million.<sup>266</sup> This phenomenon might be best demonstrated by reference to two cases. In *Methanex v. United States*, a Canadian investor made a claim for nearly US\$1 billion but was awarded nothing.<sup>267</sup> The gap was less stark in *Feldman v. Mexico*<sup>268</sup> where a U.S. investor alleged damages in the order of US\$50 million but was awarded approximately US\$9.5 million.<sup>269</sup>

As an average is a particularly blunt statistical instrument, it is helpful to look at damage awards categorically. In contrast to suggestions that tribunals award large sums, tribunals only awarded more than US\$10 million in four cases.<sup>270</sup> There were four cases where investors were awarded between US\$5–10 million.<sup>271</sup> There were also thirteen investors awarded between US\$5 million and US\$1<sup>272</sup> (See Chart 7). In the

264. Although the unit of analysis and research methodology is not clear, recent research from a second source also suggests there is a gap between amounts claimed and received. This preliminary work, which the author received two months after this Article was accepted for publication, references gaps in three different substantive actions (i.e., expropriation, discrimination, and unfair and inequitable treatment). See RICHARD E. WALCK, CURRENT STATISTICS ON INVESTMENT TREATY ARBITRATION (2007), available at <http://gfallc.com/practiceareas.html>.

265. When comparing differences in the medians and modes of damages claimed versus awarded, there was at least a US\$50 million difference. See *supra* notes 254, 258.

266. The median amounts alleged and received were in the order of US\$38 million and US\$155,000 respectively. Similarly, the mode amount alleged was US\$50 million while the mode amount recovered was US\$0.

267. *Methanex Award*, *supra* note 33.

268. This case was selected as the mode of damages claimed was US\$50 million and the medial was close to US\$60 million. *Supra* note 254.

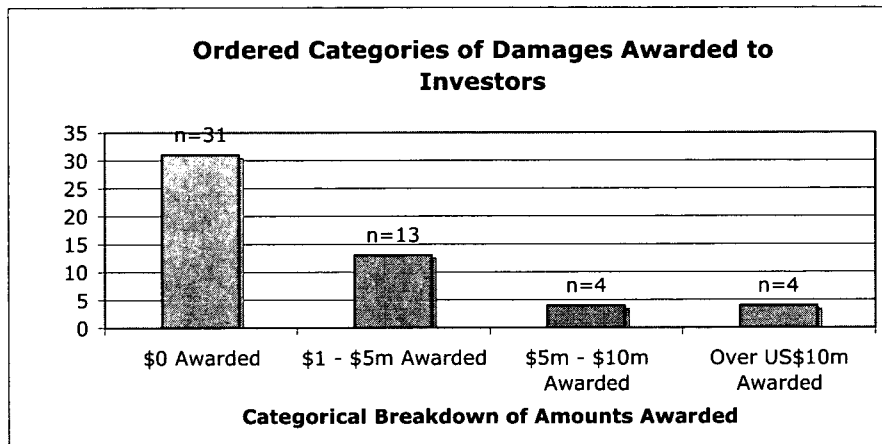
269. *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), 18 ICSID REV.-FOREIGN INVESTMENT L.J. 488 (2003), 42 I.L.M. 625 (2003), [http://ita.law.uvic.ca/documents/feldman\\_mexico-award-english.pdf](http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf).

270. See *Metalclad Award*, *supra* note 34 (US\$16,685,000), *CME Award*, *supra* note 261, *Occidental v. Ecuador* (US\$71,533,549); *CMS Gas Transmission Company v. Argentina* (US\$133,200,000).

271. *American Manufacturing and Trading, Inc. v. Zaire* (US\$9,000,000); *Wena Hotel Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 42 I.L.M. 896 (US\$8,061,896.55); *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile* (US\$5,871,322.42); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (US\$5,533,017.12).

272. *S.D. Myers, Inc. v. Canada* (US\$3,844,443); *Goetz Award*, *supra* note 80 (US\$2,989,636); *Nykomb Synergistics Technology Holding AB v. Latvia* (US\$2,967,139); *Swembalt AB v. Latvia* (US\$ 2,506,258); *Sedelmayer Award*, *supra* note 173, at 118

remainder of the cases, investors did not receive damages. This suggests that the majority of investors received nothing. When investors did win, they did not win big.



*Chart 7: Ordered categories of the U.S. dollar value of awards finally resolving arbitration (n=52), grouping the breakdown of damages awarded to investors for (1) cases awarding investors \$0 (n=31), (2) cases awarding investors between \$1 to \$5 million (n=13), (3) cases awarding investors between \$5 million and \$10 million (n=4), and (4) cases awarding investors over \$10 million (n=4).*

While care should be taken when generalizing about categories with small numbers, there appeared to be some patterns. For example, the risk of government liability and the possibility of investor recovery may not be as large as previously thought,<sup>273</sup> and damages tended to be grouped around three main ranges. First, there was a group of cases where investors received nothing. Second, there was another group of cases where tribunals awarded less than US\$17 million (n=18).<sup>274</sup> Third, there were

(US\$2,350,000); Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (US\$2,190,430); Petrobart v. Kyrgyz Republic (US\$1,130,859); Feldman v. Mexico (US\$927,814); Fedax N.V. v. Venezuela (US\$598,950); Asian Products Ltd. v. Sri Lanka (US\$460,000); Pope & Talbot Inc. v. Canada (US\$407,646); Maffezini Award, *supra* note 89 (US\$55,314); Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova (US\$24,603).

273. See *supra* notes 234–237 and accompanying text (observing that commentators often make broad claims about investors' ultimate recoveries); cf. Legum, *supra* note 251, at 344, 347–48 (explaining treaty arbitration “creates exposure to liability for the respondent States, [but] the level of exposure has been relatively modest in the experience of the NAFTA States”).

274. In more than half the final cases (n=31), tribunals did not make an award against the government. In another large segment (n=17), tribunals awarded investors less than US\$10 million. There was also one award that was just under US\$17 million.

three cases where tribunals awarded more than US\$70 million, and the average of those three awards was US\$158.2 million.<sup>275</sup> The data suggests that most tribunals were inclined to make awards that were on the smaller side (namely US\$10 million or lower), while a few others made higher awards (in the order of US\$75 or 150 million).<sup>276</sup>

It is critical to recall that damages depend upon the nature of the cause of action and facts of each case. As a result, these damage patterns and the gap between amounts claimed and awarded may be idiosyncratic. It is possible that particular causes of actions—such as expropriation—may be less likely to be successful but may have a larger claim for damages. In contrast, claims for fair and equitable treatment may lead to an award in an investor's favor on the merits but a smaller damage award.<sup>277</sup> As inferences should be drawn from this data with care in light of its limitation, the data provides the best available picture of the potential scope of claimed and actual government liability.

---

275. A histogram of the damages awarded indicates that damages are most heavily distributed around zero. There are other data points around the US\$5 million, US\$15 million and US\$250 million.

276. While not subject to the same coding process, a cursory review of awards on the ITA Web site that finally resolved treaty claims between June 1, 2006 and February 25, 2007 suggests a similar pattern. There were three cases where governments paid nothing. *See Telenor Mobile Comm'n's A.S. v. Rep. of Hungary*, ICSID Case No. ARB/04/15, Award at 57 (Sept. 13, 2006), [http://ita.law.uvic.ca/documents/Telenorv.HungaryAward\\_000.pdf](http://ita.law.uvic.ca/documents/Telenorv.HungaryAward_000.pdf) (dismissing case and failing to award damages); *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, at 103 (Aug. 2, 2006), [http://ita.law.uvic.ca/documents/Inceysa\\_Vallisoletana\\_en\\_000.pdf](http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_000.pdf) (dismissing case and failing to award damages); *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 19 ICSID REV.-FOREIGN INV. L.J. 275, 291 (2006), [http://ita.law.uvic.ca/documents/Championaward\\_000.pdf](http://ita.law.uvic.ca/documents/Championaward_000.pdf) (failing to award damages). There was one case awarding an investor less than US\$10 million. *PSEG Global, Inc. v. Turkey*, ICSID Case No. ARB/02/5, Award, at 90, (Jan. 19, 2007), <http://ita.law.uvic.ca/documents/PSEGlobal-Turkey-Award.pdf> (awarding the investor US\$9,061,479.34). Finally, three awards were over US\$75 million and the average of those three awards was approximately US\$153.1 million. *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007), <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf> (awarding investors US\$217,838,439); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award at 103 (Oct. 2, 2006), <http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf> (awarding investors US\$76,200,000); *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award at 158 (July 14, 2006), <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf> (finding liability in the order of US\$165,240,753). It is slightly odd that the average for cases in which tribunals awarded damages was different in comparison to the non-coded cases. This, however, may be understood as a function of the limited nature of the three uncoded awards and the fact that two share a common respondent state—Argentina—that was subjected to a multiple claims in the energy sector as a result of its currency crisis.

277. Global Financial Analytics recently completed some research on this area. They do not describe their methodology, and this prevents an assessment of the validity and reliability of their claims. They nevertheless indicated that 9.5% of expropriation and 12.9% of discrimination claims succeeded; in contrast, 40% of expropriation claims succeeded. *See WALCK, supra* note 264.

The divergence between claimed and awarded damages suggests there are two concerns about the dispute resolution process. First, the divergence may have practical repercussions. Parties may find it difficult to assess the costs and benefits of pursuing arbitration. In addition, when governments assess the costs and benefits of entering into or renewing investment treaties, they may be unable to make reliable assessments of their financial exposure. Second, the divergence suggests that incentives in the arbitration system may need adjustment to promote more streamlined dispute resolution. Assuming that there is utility in aligning claimed and received damages,<sup>278</sup> it may be useful to isolate variables contributing to this gap. For example, it may be useful for governments to put cost-shifting guidelines into investment treaties to reward investors whose claimed damages are in line with the ultimate award or provide deterrence for inflating claimed damages. One might imagine that, because they control the drafting of the terms of the dispute resolution process, governments may wish to provide tribunals with express discretion to shift costs against parties for bringing an unmeritorious claim or motion. Such a procedure might create financial disincentives, akin to Federal Rule of Civil Procedure 11 sanctions, for parties who otherwise might engage in deleterious dispute resolution tactics.

As the scope of available data expands, future research might determine whether there are significantly different damage patterns. Research might consider whether there are markedly different damage assessments for OECD and non-OECD countries. It might also consider particular countries in detail to determine whether certain ones tend to be more or less successful in defending treaty claims.<sup>279</sup> Finally, future research might isolate those factors influencing damage determinations, so stakeholders can make an informed assessment of the potential financial risks and rewards.

Overall, the current format of investment treaty arbitration appears to be a high stakes game for governments and investors. Although governments were more likely to win and to face less liability than originally anticipated, being subjected to arbitrations where investors make large damage demands can create challenges. Particularly for those demands that might exceed a country's financial reserves, it can create

---

278. Such alignment might, for example, promote more efficient dispute resolution processes that are less likely to consume the time and money of parties.

279. Legum's analysis of NAFTA cases suggested that there were differences in liability experienced by Canada, Mexico, and the United States. The United States had never lost a case—the United States was never liable—whereas Mexico and Canada, according to Legum's analysis, were respectively liable for about nine cents and four cents on the dollar. Legum, *supra* note 251, at 347.



difficulties that might make alternative dispute resolution politically infeasible<sup>280</sup> or create unique settlement pressures.<sup>281</sup> Although investors may demand large damages in order to anchor settlement discussions, this may have adverse repercussions.<sup>282</sup> Governments that view the demand as either unreasonable or not in good faith may refuse to negotiate, and arbitrators may approach damage assessments with an increased degree of skepticism. Ultimately, where it is difficult to operationalize risk, determine likely outcomes, and evaluate the financial implications, this can affect the acceptability of the arbitration process.

### 3. Amounts Received

There are inevitably concerns about party compliance with arbitral awards. This issue is beyond the scope of the current project, which does not analyze subsequent proceedings or activities. Issues for future consideration include (1) how much investors actually receive after an award, (2) which investors pay costs for awards rendered against them,<sup>283</sup> and (3) the scope of governmental noncompliance with awards.<sup>284</sup>

280. Governments such as Bolivia and Venezuela, for example, recently suggested they would withdraw from ICSID because of their concerns about the dispute resolution process. Phil Gunson, *Venezuela Is Energizing Plan for Regional Alliance*, MIAMI HERALD, May 1, 2007, at 9A.

281. Where, for example, parties involved in a conflict make extreme opening offers, this can anchor expectations in negotiation and impede rational decisionmaking behavior. See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 23–28 (1992); see also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 139–42 (1994) (suggesting that high claims for damages may anchor parties and “unduly influence people’s expectations and, hence, their decisions about whether to settle . . . [which suggests parties] . . . may fail to reach settlement on some occasions when settlement makes good economic sense”). But see Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 5 (1994) (suggesting that a party who starts “negotiations with a moderate settlement offer, [or] a softer bargaining strategy, is less likely to reach eventual settlement than a [party] who opens with a more extreme position, a harder bargaining strategy”).

282. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 39 (4th ed. 2001) (“[I]f the first set of demands is so extreme as to be seen as unreasonable, the tactic backfires. In such cases, the party who has made the extreme first request is not seen to be bargaining in good faith. Any subsequent retreat from that wholly unrealistic initial position is not viewed as a genuine concession and, thus, is not reciprocated.” (citation omitted)). But see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 788–89 (2001) (“[E]ven extreme, wholly absurd anchors can affect judgment.”); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 747 (2003) (“[S]tudies have shown that even unreasonable, ridiculous anchors still burrow deep into a decision-maker’s thought processes.”).

283. For example, the *Thunderbird* tribunal ordered unsuccessful investors to pay the costs of the Mexican government to the tune of US\$1,252,862.40 (US\$126,313.02 for TCE and US\$1,126,549.38 for PLC). *Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, *Arbitral Award*, at 73 (Jan. 26, 2006), <http://ita.law.uvic.ca/documents/>

There is some anecdotal evidence that governments have honored investment treaty awards. Governments such as Mexico and the Czech Republic, which were subject to two of the largest awards in this population, namely *CME* and *Metalclad*, paid investors. Payment occurred, however, only after litigation in national courts challenging the underlying awards.<sup>285</sup> Research might assess whether these cases were representative.

Such research would be useful because there is evidence that in international commercial arbitration, successful parties did not always receive the awarded amount. Instead, awards were the starting point for renegotiation.<sup>286</sup> Future work in investment treaty arbitration should build

---

ThunderbirdAward.pdf. A U.S. district court recently refused the investor's request to set aside the award. *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80, 85 (D.D.C. 2007).

284. Particular concern has been noted with respect to Argentina. See generally Osvaldo J. Marzoti, *Enforcement of Treaty Awards and National Constitutions (the Argentinean Cases)*, 7 BUS. L. INT'L 226 (2006); Guido Santiago Tawil, *Arbitration in Latin America: Current Trends and Recent Developments*, BOMCHIL GROUP NEWSL., Mar. 2004 (on file with the North Carolina Law Review) ("Argentine top officials have publicly argued the incompatibility of ICSID arbitration with the Argentine Constitution, qualified ICSID arbitration as an immature regime, [and] announced their will to return to the Calvo doctrine abandoned during the 90's . . ."); see also Proyecto De Ley, S.-2.577/05 (Aug. 18, 2005), [http://www1.hcdn.gov.ar/folio-cgi-bin/om\\_isapi.dll?clientID=134672251&advquery=2577-S-05&infobase=dae.nfo&record={4989}&recordswithhits=on&softpage=Document42](http://www1.hcdn.gov.ar/folio-cgi-bin/om_isapi.dll?clientID=134672251&advquery=2577-S-05&infobase=dae.nfo&record={4989}&recordswithhits=on&softpage=Document42) (proposing legislation that questions of economic importance should not be left to international tribunals—"No quedarán sujetas a revisión de jueces o tribunales internacionales cuestiones inherentes a la política económica del gobierno").

285. *CME Celebrated One Year at the Stock Exchange*, Hopodářské Noviny, ECON. NEWS, July 12, 2006, available at <http://www.cetv-net.com/en/press-center/media/6.shtml> (observing that CME's "net profit in 2003 exceptionally included an extra ten billion [Czech] crowns gained in the arbitration with the Czech Republic"); *Mexican Nightmare*, FDI MAGAZINE, Apr. 2, 2002, at 14, [http://www.fdimagazine.com/news/fullstory.php/aid/105/Mexican\\_nightmare.html](http://www.fdimagazine.com/news/fullstory.php/aid/105/Mexican_nightmare.html) (explaining "Mexico gave up its appeal and agreed to pay the \$16[million] in compensation to Metalclad"); *Trading Democracy*, supra note 235 (stating "Mexico paid Metalclad \$16,002,433" in October 2001); see also Luke Eric Peterson, *Cyprus-Based Companies Recoup \$75 Million in BIT Arbitration Over Hungary Airport*, INV. TREATY NEWS, Nov. 2, 2006, at 2, available at [http://www.iisd.org/pdf/2006/itn\\_nov2\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_nov2_2006.pdf) (observing that in *ADC v. Rep. of Hungary*, a case that was not in the population of this study, Hungary agreed to fully pay the investors). The author notes it was easy to find sources describing the damage award. See Peter S. Green, *Prague to Pay Award to Lauder Company*, INT'L HERALD TRIB. (Paris), Mar. 15, 2003, at 11, available at [http://www.iht.com/articles/2003/03/15/lauder\\_ed2\\_.php](http://www.iht.com/articles/2003/03/15/lauder_ed2_.php). It was more difficult to confirm that the award was paid. This was intriguing because having a reputation for honoring international obligations is likely to decrease perceived investment risk. It may, however, be affected by political sensitivities caused by the loss of an international arbitration.

286. Richard W. Naimark & Stephaine [sic] E. Keer, *Post-Award Experience in International Commercial Arbitration*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 270, 270-74 (Christopher R. Drahozal & Richard W. Naimark ed., 2005) (observing that out of their sample, 100 awards were fully or partially complied with and "26 respondents attributed compliance to negotiation after the award").

upon this work.<sup>287</sup> Quantification of the costs of initiating additional proceedings to secure payment of awards and/or likely recovery on the dollar would aid parties when considering their dispute resolution options. Likewise, clarity about the enforceability of legal obligations may also permit investors to make informed decisions about investment risks.<sup>288</sup>

*F. Claim #5: Are Arbitration Costs Substantial?*

Dispute resolution risk is not simply a matter of winning, losing, and possible damages. The true cost of investment treaty conflict requires a quantification of other factors, such as the cost of obtaining a beneficial outcome.<sup>289</sup> Rational actors should consider whether the cost of pursuing investor rights or defending government action is worth the benefit.

Costs matter in part because they “can give rise to significant difficulties at the end of a case”<sup>290</sup> and are “a risk factor to take [] into consideration before using investor-state arbitration.”<sup>291</sup> ICSID’s former secretary-general highlighted the importance of cost when he observed that an “issue of concern has been the growing cost of arbitration. This is particularly true for the “low income” countries, and for small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are.”<sup>292</sup> Others express concerns that “substantial costs make contestation of an arbitral claim an unattractive option for poorer developing countries.”<sup>293</sup> There may also be cost-related difficulties for small investors.<sup>294</sup>

The empirical validity of various claims about the costs of arbitration is uncertain. Professor David Gantz observed: “[C]osts of arbitration are

287. It might also consider payment of damages in civil litigation contexts. See Hyman & Silver, *supra* note 213, at 1122–23; Neil Vidmar et al., *Uncovering the “Invisible” Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 348 (2005).

288. It may also provide pertinent information to political risk insurers who offer insurance for foreign investments.

289. While this project focused on financial costs, there are undoubtedly other variables (such as political, psychological, and social costs) that would provide a more complete picture of the cost of investment treaty dispute resolution. Future research might usefully consider these factors.

290. James Hope & Klaus Reichert, *Costs—The Sting in the Tail*, 1 GLOBAL ARB. REV. 30, 30 (2006).

291. W. Ben Hamida, *Cost Issue in Investor-State Arbitration Decisions Rendered Against the Investor: Synthetic Table*, 2 T.D.M. (2005) (copy on file with the North Carolina Law Review).

292. Dañino, *supra* note 201.

293. Luke Eric Peterson, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT 123, 136 (Lyuba Zarsky ed., 2005), available at [http://nautilus.org/archives/enviro/PetersonFinalFormatted\\_2\\_2.PDF](http://nautilus.org/archives/enviro/PetersonFinalFormatted_2_2.PDF).

294. Coe, *supra* note 60, at 1400–01 (describing arbitration’s “elite” nature).

significant, often several million dollars or more for the secretariat charges, fees to arbitrator and counsel fees. (These were over \$6 million in the NAFTA *Pope & Talbot* case.)<sup>295</sup> Other commentators refer to the alleged \$4 million costs of the investor in the *Metalclad* case.<sup>296</sup> Still others point to the report that the Czech Republic spent US\$10 million on its defense of two claims and budgeted US\$3.3 million in 2004 and US\$13.8 million in 2005 for legal fees.<sup>297</sup> Other commentators focus only on costs of cases decided against investors without considering cases decided against governments.<sup>298</sup> The ability to generalize these claims is unclear.

Some commentators have made general claims about the possible range of costs. Canadian officials suggest that “[c]osts depend on the amount of time needed by the tribunal to hear and decide the case” and assert that an “investor’s 50% share of tribunal costs has ranged between \$500,000 and \$1.5 million.”<sup>299</sup> Similarly, ICSID estimated that the average cost of investor-state arbitration, excluding fees for legal counsel, is around US\$220,000.<sup>300</sup> Referencing a “[p]reliminary” study whose methodology was not disclosed, UNCTAD reported:

---

295. DAVID A. GANTZ, INVESTOR-STATE ARBITRATION UNDER ICSID, THE ICSID ADDITIONAL FACILITY AND THE UNCTAD ARBITRAL RULES 23 (U.S. Vietnam Trade Council Seminar Series, 2004), [http://www.usvtc.org/trade/other/Gantz/Gantz\\_ICSID.pdf](http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf). Gantz observed:

ICSID fees are a minimum of \$15,000 and can be much higher, particularly if there are drawn-out proceedings and multiple hearings. ICSID arbitrators are usually paid at the rate of \$2400 per day (\$300 per hour), but may be negotiated upwards if arbitrators so demand. Travel expenses may be steep, as most of the arbitrators, the parties and counsel will have to travel to the hearings (usually in Washington, D.C. if ICSID is acting as secretariat). The parties may agree to hold hearings elsewhere, but travel costs are likely to be substantial regardless. Legal fees for major law firms who represent investors and host governments range from \$200 to \$500 per hour, but may be negotiable (downward).

*Id.*

296. Peterson, *supra* note 293; J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT’L L. 433, 437 n.18 (2002).

297. UNCTAD, *Review*, *supra* note 59, at 10; *see also* UNCTAD, 2006 IIA Monitor No. 4, *supra* note 59, at 6–7 (referring to two cases related to the allocation of costs and attorney’s fees). Others appear to rely upon a non-random sample of awards to make a point about the larger population. *See, e.g.*, Stephen W. Schill, *Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration*, 7 J. WORLD INV. & TRADE 653, 660–74 (2006).

298. Hamida, *supra* note 291. This piece is an improvement on many other empirical projects as it tries to explain its research methodology. It does not, however, explain how the cases were selected or coded. *Id.*

299. Foreign Affairs and International Trade Canada, Canada’s Foreign Investment Protection and Promotion Agreements (FIPAs), Canada’s FIPA Program: It’s [sic] Purpose, Objective and Content, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en> (last visited Nov. 30, 2007).

300. Ibrahim Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV. 299, 334 (1999).

[R]ecent awards suggests that the average legal costs incurred by governments are \$1-to-\$2 million, including lawyers' fees; the costs for the tribunal, about \$400,000 or more; and the costs for the claimant about the same as for the defendant.<sup>301</sup>

The wide variation in estimates illustrates the need for valid and reliable data on arbitration costs to permit parties to understand the financial consequences of pursuing their rights or a defense. This study considered two different types of costs: the Tribunals' Costs and Expenses ("TCE") and the Parties' Legal Costs ("PLC").

The data related to arbitration costs is unfortunately limited. Important data was missing from the text of publicly available awards, and tribunals did not always precisely describe how they dealt with TCE or PLC. For example, a tribunal might state an investor was responsible for paying two-thirds of TCE but fail to quantify the amount.<sup>302</sup> In other awards, the tribunal did not address costs at all.<sup>303</sup> While one must therefore recognize the limitations of the current data, one might hope that in time, tribunals could be encouraged to be more transparent on cost issues.<sup>304</sup>

### 1. TCE: Tribunal's Costs and Expenses

Out of the 102 awards, only fifty contained TCE decisions and only seventeen quantified TCE.<sup>305</sup> Given the small number of awards with TCE data, care should be taken in making inferences.

---

301. UNCTAD, *Disputes on the Rise*, *supra* note 59, at 4; *see* UNCTAD, *Review*, *supra* note 59, at 8.

302. *See* Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, July 7, 2004, at 31, [http://ita.law.uvic.ca/documents/Soufraki\\_000.pdf](http://ita.law.uvic.ca/documents/Soufraki_000.pdf). Similar things happen in the context of the parties' legal costs and expenses. *See* Ethyl Award, *supra* note 89, at 48 (ordering the payment of costs but failing to articulate a specific amount at that phase).

303. In *Fedax*, there was no discussion of costs at all in the jurisdictional decision. *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (July 11, 1997), 37 I.L.M. 1378 (1998), <http://ita.law.uvic.ca/documents/Fedax-1997-Last.pdf>. In another variation, there may be a decision to reserve the issue of costs but without an explanation of why. *PSEG Global Inc. v. Turkey*, ICSID Case No. ARB/02/5, at 54, Decision on Jurisdiction (June 4, 2004), <http://ita.law.uvic.ca/documents/psegdecision.pdf>.

304. Similar to the data regarding damages, it may be possible that there is a difference between amounts tribunals state are due in an award and what is actually received. In the case of TCE, it is possible that tribunals receive the full amount of their requested fees—particularly for those institutional arbitrations where parties must submit advance deposits for arbitrator fees and may even be asked for additional contributions during the course of the proceedings. As such advances are not collected for PLC, parties may be less likely to collect fully upon a tribunal's PLC award.

305. These seventeen awards came from sixteen different cases. One case, *CME v. Czech Republic*, had two awards that each contained a decision on TCE. *CME Award*, *supra* note 261, at 19, 161.

Of the seventeen awards, the total average award tribunals made for their costs and expenses was US\$581,332.70.<sup>306</sup> The smallest amount for TCE was US\$31,088.10 in *Iurii Bogdanov v. Moldova*,<sup>307</sup> whereas the largest was in *Methanex* at US\$1.5 million.<sup>308</sup>

Tribunals tended to issue awards that assessed nearly equivalent TCE contributions for both investors and governments. For the seventeen awards, tribunals made awards that required investors to contribute an average of US\$289,753 to the TCE. Meanwhile, the average government contribution was US\$291,580. The difference between these two figures was not significant.<sup>309</sup>

## 2. PLC: Parties' Legal Costs

Because it was not quantified or was quantified oddly,<sup>310</sup> PLC totals were not collected. Data was gathered, however, about the extent to which tribunals shifted PLC. These results therefore do not fully reflect the legal costs parties experienced in arbitration. It does reflect parties' actual cost-shifting experiences.

Out of the 102 awards, fifty-four awards contained PLC decisions, and forty-one awards did not shift PLC.<sup>311</sup> Instead parties bore their own legal costs. Thirteen awards did shift costs. In six cases, investors contributed to the legal costs of the government; and, in seven cases, the government contributed to the investor's legal costs.

In the thirteen awards shifting PLC, only eleven quantified the amount of the shift,<sup>312</sup> and the average amount shifted was US\$655,407.<sup>313</sup> Unlike TCE, there was a difference in investors' and governments' average contribution to a PLC shift. The average PLC contribution made by investors (n=5) was US\$927,635. The average PLC contribution made by

306. The median was US\$501,370.

307. *Iurii Bogdanov v. Moldova*, Arbitral Award, at 20 (SCC Sept. 22, 2005), <http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf>.

308. *Methanex Award*, *supra* note 33, at 1464.

309. The median investor contribution was US\$203,377, and the mode was US\$0. The median government contribution was US\$141,191, and the mode was US\$0. The difference between these was US\$62,186.

310. *See Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 21, 1990), 30 I.L.M. 577, 626 (ICSID 1991) (awarding a party a portion of its requested legal costs but failing to articulate the amount actually expended or requested).

311. These fifty-four awards originated from fifty-three cases. Only one case, *Wena v. Egypt*, had two awards that each addressed PLC. *Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID June 29, 1999), 41 I.L.M. 881, 886; *Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID Dec. 8, 2000), 41 I.L.M. 896, 910.

312. The two awards shifting PLC but failing to quantify the PLC shift were *Eureko v. Poland*, *Eureko Award*, *supra* note 173, at 88, and *Ethyl v. Canada*, *Ethyl Award*, *supra* note 89, at 51.

313. The median was US\$318,918.

governments (n=6) was US\$428,551. In other words, although the parties made approximately equal contributions to the tribunal's costs, tribunals required investors to contribute nearly twice as much as governments to the opposing party's legal expenses. While small numbers make it difficult to generalize the results, the data suggests that the financial burden on governments in defending the claims may not be as great as thought.

### 3. Future Research

Quantifying the potential costs and benefits of arbitration promotes the ability of stakeholders to make informed decisions about one aspect of possible dispute resolution strategies. Future research should consider other issues beyond the quantification of arbitration costs. It might, for example, look at PLC and TCE determinations in greater detail. It might evaluate whether tribunals referred to legal authority or rationales in making their decisions and what authorities and rationales were most common. It may also consider whether there was a statistically significant relationship between cost shifting and variables discussed in this Article. With a fuller picture of arbitration costs—and how and when tribunals may be inclined to shift costs—parties will be in a better position to make more informed dispute resolution choices. It may also aid governments negotiating investment treaties. Governments might, for example, establish cost-shifting rules in treaties and create guidelines about how tribunals should exercise their discretion. While such information on costs will no doubt be one variable in a broader mix affecting these determinations, the quantification of these factors can aid stakeholders.

#### G. *Claim #6: Are Other Forms of Dispute Resolution Used?*

Arbitration is only one of many dispute resolution choices.<sup>314</sup> There is an emerging literature questioning whether exclusive use of arbitration is the most effective way to resolve investment treaty disputes.<sup>315</sup> Some

---

314. The classic formulation is that the “forum [should] fit the fuss.” Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 50 (1994).

315. See Jack C. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 13, 22 (2005); Franck, *supra* note 9; Barton Legum, *The Difficulties of Conciliation on Investment Treaty Cases: A Comment on Professor Jack C. Coe's Towards a Complementary Use of Conciliation in Investor-State Disputes A Preliminary Sketch*, 21 MEALEY'S INT'L ARB. REP. 72 (2006); Ucheora Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, 22 NEWS FROM ICSID, 12, 12 (2005), available at [http://www.worldbank.org/icsid/news/news\\_2-.pdf](http://www.worldbank.org/icsid/news/news_2-.pdf); Noah Rubins, *Comments to Jack C. Coe Jr.'s Article on Conciliation*, 21 MEALEY'S INT'L ARB. REP. 23 (2006); Salacuse, *Explanations*, *supra* note 9; Thomas Wälde, *Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective*, 1 TRANSNAT'L DISP.

commentators suggest investment arbitration has “rarely led to settlement,” and early settlements or claim abandonment is unusual.<sup>316</sup> They argue that once a conflict escalates to a formal arbitration request, there is no turning back.<sup>317</sup> Governments dig in their heels and refuse to settle, lest there be future political fallout.<sup>318</sup> In contrast, there are news stories about investment arbitration settlements, such as disputes between Nomura and the Czech Republic, K+ Venture partners and the Czech Republic, and Baltic Rail Services and Estonia.<sup>319</sup> ICSID’s 2004 stakeholder survey demonstrates that stakeholders recognize the utility of settlement.<sup>320</sup>

Unfortunately, there has been little empirical enquiry into the claims of arbitration’s presumed superiority, let alone a coherent explanation of why other dispute resolution systems are less desirable. Research from ICSID suggests that “[c]onciliation is very widely viewed as a useful mechanism for the settlement of disputes at least in some cases, especially by member governments,” but there was no analysis of the use of ICSID’s conciliation facility.<sup>321</sup> In the future, it would be useful to study conflict resolution practices more systematically and perhaps survey disputants to determine what was efficient and ineffective about their dispute resolution experiences. In the interim, this research provides information related to dispute settlement practices in connection with arbitration awards.

---

MGMT. 2, 2 (2004), available at <http://www.dundee.ac.uk/cepmlp/journal/html/Vol13/article1-.pdf> (on file with the North Carolina Law Review).

316. Coe, *supra* note 60, at 1400.

317. See Coe, *supra* note 315, at 24; Legum, *supra* note 315, at 74 (noting “the best chance to resolve a dispute between a foreign investor and a government agency is likely *before* the investment dispute becomes a dispute under an investment *treaty*”).

318. Franck, *supra* note 9 (manuscript at 72–73, on file with the North Carolina Law Review).

319. These three settlements occurred between November 30, 2006 and January 26, 2007. *Czech Republic Settles K+ Claim*, GLOBAL ARB. REV., Jan. 26, 2007, available at [http://www.global-arbitrationreview.com/news/news\\_item.cfm?item\\_id=3675](http://www.global-arbitrationreview.com/news/news_item.cfm?item_id=3675); *Estonia Ends Railway Dispute*, GLOBAL ARB. REV., Jan. 26, 2007, available at [http://www.global-arbitrationreview.com/news/news\\_item.cfm?item\\_id=3677](http://www.global-arbitrationreview.com/news/news_item.cfm?item_id=3677); *Nomura and Czech Republic Drop Claims*, GLOBAL ARB. REV., Dec. 1, 2006, available at [http://www.globalarbitrationreview.com/news/news\\_item.cfm?item\\_id=3622](http://www.globalarbitrationreview.com/news/news_item.cfm?item_id=3622); see also ICSID, List of Concluded Cases, ICSID Case No. ARB/06/6, <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Nov. 11, 2007) [hereinafter ICSID, Concluded Cases] (observing the existence of a settlement in *Rail World LLC v. Estonia*) (all on file with the North Carolina Law Review). It is unclear, however, whether these three examples are representative of a larger pattern.

320. ICSID, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: STAKEHOLDER SURVEY 15 (2004), <http://www.worldbank.org/icsid/highlights/icsid-client-survey-100904.pdf> [hereinafter ICSID Stakeholder Survey] (suggesting 29% of cases settled or were discontinued). The survey does not distinguish, however, between claims under investment treaties and commercial cases arising under domestic law.

321. *Id.* at 16 (reporting that 54% of all survey respondent’s indicated they “consider conciliation a useful mechanism for settlement of investment disputes,” and that 79% of governments made that statement).



### 1. Awards Embodying Settlement Agreements

There is evidence that investor treaty claims can be settled. One need look no further than awards embodying the parties' settlement agreement.

In the population of eighty-two cases, there were two awards embodying settlement agreements: *Lemire v. Ukraine* and *Goetz v. Burundi*.<sup>322</sup> There was also a case that was part of the population—*IBM v. Ecuador*—that involved an award embodying a settlement,<sup>323</sup> but because that settlement was not publicly available as at June 1, 2006,<sup>324</sup> it was omitted from the population.

These three cases have an interesting commonality. Settlement in all three cases was preceded by a critical decision by the arbitral tribunal. In *Lemire v. Ukraine*, the award describes a tribunal decision to join jurisdiction to the merits of the dispute.<sup>325</sup> Within a month of that decision, the investor initiated settlement discussions; and, approximately five months later, the parties reached settlement.<sup>326</sup> In *Goetz v. Burundi*, the tribunal issued a decision addressing liability and applicable law. Approximately three and a half months later, the parties settled.<sup>327</sup> In *IBM*, seven months after the investor won the jurisdictional phase, the tribunal rendered an award embodying a settlement agreement.<sup>328</sup>

These findings suggest that parties should not discount other dispute resolution opportunities that might lead to settlement. It also suggests that much like the practice of “litigotiation”—where litigation is used to increase strategic leverage in the negotiation process<sup>329</sup>—strategic use of arbitration can create opportunities to engage in nonbinding dispute resolution. In comparison to the total number of cases, the number of settlement agreements seems low. Research compiled by Professor Coe suggests that settlement procedures in the international and domestic commercial contexts can have “high” settlement rates, sometimes in the order of 80%.<sup>330</sup> By contrast, the finding that only two out of fifty-two

322. *Lemire Award*, *supra* note 48, *Goetz Award*, *supra* note 80, at 454, 456.

323. *IBM, Jurisdiction*, *supra* note 79, at 3.

324. ICSID, *Concluded Cases*, *supra* note 319 (referring to an “award embodying the parties' settlement rendered on July 22, 2004”).

325. *Lemire Award*, *supra* note 48, at 532.

326. *Id.* at 535.

327. *Obadia*, *supra* note 209, at 454–55.

328. *IBM, Jurisdiction*, *supra* note 79; ICSID, *Concluded Cases*, *supra* note 319.

329. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (coining the term “litigotiation”); see also Gary Goodpaster, *Lawsuits as Negotiations*, 8 NEGOTIATION J. 221 (1992) (exploring the interplay between litigation and negotiation); Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 835 (2004); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 789 (2001).

330. Coe, *supra* note 315, at 18 n.57.

awards (3.85%) finally resolve treaty claims with settlements appears lower. This may be in part because the populations of study are different. This research did not analyze disputes that were settled prior to the initiation of arbitration and instead analyzed public awards. These two factors may affect the external validity as it prevents analysis of confidential settlements<sup>331</sup> that occur either before or after the initiation of arbitration. Despite these limitations, the data is a useful to start.

## 2. Case Disposition

Instead of focusing on settlement agreements in awards, this section considers settlement by the cases' ultimate disposition. It compares the population with publicly available information from the Internet (including the ICSID Web site)<sup>332</sup> as of June 1, 2006.

The eighty-two cases had three different types of dispositions, some of which were final and some of which were not yet final. Final dispositions were most common. In particular, cases were most frequently disposed of through a final and binding award (fifty-three in total<sup>333</sup>).<sup>334</sup> Six cases were either settled or discontinued. For those nonfinal dispositions, there were twenty-three cases that were still ongoing<sup>335</sup> (See Chart 8).

---

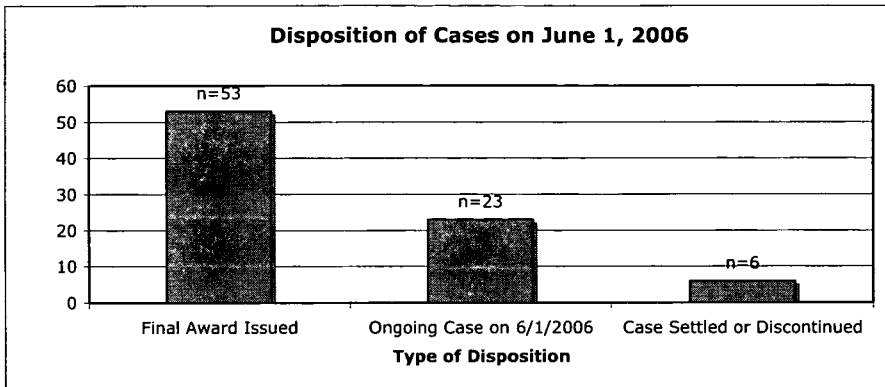
331. Recent research suggests that, contrary to conventional wisdom, making settlements confidential may actually inhibit settlement opportunities. See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 872 (2007).

332. ICSID, ICSID Cases, <http://www.worldbank.org/icsid/cases/cases.htm> (last visited Nov. 11, 2007).

333. This includes fifty-two awards finally resolving investment treaty claims as well as the final award that embodied a settlement in *IBM v. Ecuador*, *supra* note 77.

334. This study did not track later activity such as annulment or set-aside proceedings in national courts. See *supra* note 94 and accompanying text.

335. Some cases that were on-going as of June 1, 2006 have resulted in awards. See, e.g., *supra* note 276 (referring to cases where there are now damage determinations).



*Chart 8: Disposition of all cases in the population (N=82) as on June 1, 2006 showing cases (1) subject to a final award, including awards incorporating settlement agreements (n=53), (2) part of an ongoing case that was not complete at the time (n=23), or (3) settled or discontinued (n=6).*

This suggests that other dispute resolution methods—whether negotiation, mediation, or abandonment of the conflict—can end a dispute after initiating arbitration. Nevertheless, six cases out of eighty-two results in a termination rate of 7.32%. This is still lower than the settlement rates obtained in the dispute resolution contexts previously mentioned.<sup>336</sup>

It is unclear how these cases were settled and what prompted cases to be discontinued. Further research might analyze discontinued disputes to isolate factors affecting parties' dispute resolution decisions and satisfaction with the results. It may be possible, for example, that likelihood of settlement is adversely affected by the uncertainty in the dispute resolution process. To the extent that inconsistent case law makes it difficult to estimate the likelihood of success and damage awards, this can inhibit effective settlement. Likewise—considering that average arbitration costs can be a key proportion of the average arbitration award<sup>337</sup>—not being able to reasonably predict arbitration costs and/or how the tribunals will shift costs (if at all) creates challenges in estimating the cost of pursuing arbitration. As such, it may be difficult to create a business case for settlement—particularly where governments have not

336. See *Coe*, *supra* note 315, at 18 n.57.

337. Recall that the average TCE is US\$581,332.70 and average PLC shifts is US\$655,406.99. Should parties be unable to predict how tribunals will shift costs, there can be difficulties. This US\$1,236,739.69 uncertainty, particularly when the average damage award was US\$10,389,459, may make it difficult to use settlement strategies effectively. See *supra* notes 306–313 and accompanying text.

allocated funds and may need to go through the political process to finalize settlement.

#### H. Claim #7: Are Arbitrators a “Pale, Male, and Stale”<sup>338</sup> “Mafia”<sup>339</sup>?

A final area of confusion in investment treaty arbitration is who the arbitrators are. Beyond an obligation to be independent and impartial,<sup>340</sup> there are generally no minimum qualifications that an arbitrator must have to be appointed.<sup>341</sup> Parties are thus generally free to select arbitrators of their choosing.<sup>342</sup>

---

338. See Michael D. Goldhaber, *Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, AM. LAW: FOCUS EUR., Summer 2004, available at <http://www.americanlawyer.com/focuseurope/arbitration04.html> (“[A]rbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah François-Poncet of Salans, the usual suspects are ‘pale, male, and stale.’”).

339. For the purposes of this Article, the term “mafia” refers to a relatively closed group of individuals adjudicating international arbitrations. It is not intended to suggest arbitrators are engaged in a criminal enterprise. The term “mafia” was chosen because commentators and arbitrators refer to the “arbitration mafia.” See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 10 (1996); see also William W. Park, *National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT’L L. 616, 623–24 (1988) (book review) (“[A] junior arbitrator may defer to a more senior member of the international arbitration mafia in the hope of being recommended in another case.”); Tom Canning, *International Arbitrators: Conflicts of Interest and Bias*, DLA PIPER, Apr. 2006, <http://www.dlapiper.com/files/Publication/ac5ad590-0185-45ed-b344-a591e460c7e6/Presentation/PublicationAttachment/36414f3f-b2e8-4bea-8f77-21462393c83c/InterArbitrationNewsletterapr06.htm> (referring to the “relatively small pool of regularly appointed international arbitrators (often referred to as the ‘arbitration mafia’)”); Cameron Timmis, *Firm Grip on Disputes*, GAZETTE (London), Mar. 16, 2006, at 18, 18, available at <http://www.lawgazette.co.uk/features/view=feature.law?FEATUREID=272151> (“Because of the confidentiality of most international arbitration work, it has always had a certain mystique—indeed, its leading exponents have long been tagged the ‘arbitration mafia.’”); Neil Kaplan, *The Good, The Bad and the Ugly*, available at <http://www.cannonway.com/web/page.php?page=109> (last visited Nov. 11, 2007) (“We must embrace more well-qualified and fiercely independent arbitrators from developing countries into the arbitration [mafia].”).

340. See ICSID Convention *supra* note 47, arts. 14(1), 40(2) (requiring an exercise of “independent judgment”); ICSID, Additional Facility Rules, sched. C, art. 8 (2006) [hereinafter ICSID/AF Rules], available at <http://www.worldbank.org/icsid/facility/facility.htm> (requiring an exercise of “independent judgment”); UNCITRAL Arbitration Rules, *supra* note 47, arts. 6(4), 9 (permitting challenges to arbitrators where there are “justifiable doubts as to the arbitrators impartiality or independence”); SCC Rules, *supra* note 89, art. 14 (requiring arbitrators to be “impartial and independent”); Int’l Chamber of Commerce, Rules of Arbitration, art. 7 (1997) [hereinafter ICC Rules], available at [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf) (requiring arbitrator “independence”); see also Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 KAN. L. REV. 1301, 1314–15 (2006) (noting that subjective arbitration discretion has been reduced by implementation of objectives, standards, and increased transparency); Richard C. Rueben, *Confidentiality in Arbitration: Beyond the Myth*, 54 KAN. L. REV. 1255, 1276 (2006) (explaining “real and perceived impartiality of the arbitrator is widely recognized as a core value of the process”).

341. Many rules for investment treaty arbitration establish the procedure for arbitrator appointment and challenge but do not articulate substantive, baseline qualifications. See UNCITRAL Arbitration Rules, *supra* note 47, arts. 6–11; SCC Rules, *supra* note 89, arts. 13–16;

Arbitrators make decisions of international significance but are not necessarily accountable to the public, and they may not even be accountable to the parties that appoint them.<sup>343</sup> This potential accountability gap raises concerns about the system's legitimacy when there is a gap in the demographics of those making the decisions and those affected by them.<sup>344</sup> Public Citizen, for example, has urged citizens to "oppose these outrageous 'investor-to-state' provisions in trade and investment agreements."<sup>345</sup>

Some have called international arbitrators a "mafia or a club."<sup>346</sup> Others express concern "that ICSID arbitrators are predominantly nationals from developed countries, the implication being that they may be more favorably inclined towards investors."<sup>347</sup> Others have observed that the number of women in arbitration is so small that they are "an anomaly" and that there is not even a term in some languages to describe female arbitrators. In the words of a prominent female arbitrator: "Lawyers are

---

ICC Rules, *supra* note 340, arts. 7, 9. ICSID is a notable exception. Both ICSID Convention and Additional Facility arbitration require arbitrators to be persons of "high moral character and recognized competence in the fields of law, commerce, industry or finance." ICSID Convention, *supra* note 47, arts. 14(1) and 40(2); ICSID/AF Rules, *supra* note 340, art. 8.

342. See *supra* note 341 and accompanying text (discussing methods of arbitrator appointment). But see Emilia Onyema, *Empirically Determined Factors in Appointing Arbitrators in International Commercial Arbitration*, 73 ARB. 199, 200-04 (2007) (suggesting that in some institutional arbitrations there are institutions that retain discretion to approve a party nomination).

343. Arbitrators are responsible for rendering an award. In some, but not all, jurisdictions, arbitrators may not be liable for misconduct. See generally Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1 (2000); Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151 (2004).

344. *Trading Democracy*, *supra* note 235 (suggesting that arbitrators are "a three-man tribunal, drawn mostly from a select pool of experts" and suggesting this is an "exclusive court for capital. American citizens not admitted.").

345. See, e.g., Public Citizen, Global Trade Watch: Promoting Democracy by Challenging Corporate Globalization, [http://www.citizen.org/trade/nafta/CH\\_\\_11/articles.cfm?ID=6687](http://www.citizen.org/trade/nafta/CH__11/articles.cfm?ID=6687) (last visited Nov. 11, 2007).

346. DEZALAY & GARTH, *supra* note 339, at 10 (internal quotation marks omitted); see also Rogers, *supra* note 215, at 968 (stating that the "market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate").

347. Dañino, *supra* note 201. Dañino would likely take issue with the substantive validity of this urban legend given his suggestion that the implication that arbitrators favor investors "is baseless since the fact is that the outcomes of ICSID arbitrations are equally divided, almost exactly 50/50, in awards for investors and for States." *Id.* There are suggestions, however, that this western orientation is also present in the context of international commercial arbitration. See Dr. K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, 15-7 MEALEY'S INT'L ARB. REP. 10 (2000), available at LEXIS.com (noting that "[t]he majority in a multi-member international arbitral tribunal is always white," and interpreting a British arbitrator's commentary as improperly suggesting that, "arbitrators from the developing countries and women simply do not or cannot satisfy the selection criteria" for arbitrators).

sometimes embarrassed, and they don't know what to call me . . . Do they say, 'Madame la présidente' or 'Madame le présidente?'<sup>348</sup>

Others disagree. They assert that these "characterizations 'lack a solid evidentiary basis.'"<sup>349</sup> Meanwhile, ICSID has described its efforts to "enlarge and diversify the pool of arbitrators."<sup>350</sup> In 2004, arbitrators were appointed from twenty-eight different countries and more than half of these had their first ICSID appointment. In 2005, twenty of sixty-eight appointees were from developing countries and four were women.<sup>351</sup> Although focusing on ICSID arbitration,<sup>352</sup> a recent project found that over 60% of arbitrators had received only a single appointment. There was, however, a group of fifteen "elite" individuals with eight or more appointments. One article reported a mix of nationalities but noted, "nationals of developed states are proportionately over-represented by number of ICSID nominations."<sup>353</sup> They also observed that women comprised "a mere fourteen of the 279 arbitrators who have heard claims."<sup>354</sup>

This research found that out of 102 awards, 100 awards had three-member tribunals, and sole arbitrators rendered two awards. In the 102 awards from the eighty-two different cases, there were 145 different arbitrators. Some, but by no means a majority of arbitrators, served in multiple cases. This begins to rebut the claim that arbitration is a "mafia." The substantive impact of repeat appointments should be analyzed thoroughly in the future.

### 1. Arbitrator Nationality

The nationality of the arbitrators was determined by the arbitrator nationality described in the awards, the ICSID Web site, or a Google

---

348. Goldhaber, *supra* note 338; see also DEZALAY & GARTH, *supra* note 339, at 33–36 (describing the "grand old men" who "played a central role in the emergence and the recognition of arbitration"); see also Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, in THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 229–41 (Geoffrey M. Beresford Hartwell ed., 1996) (describing the lack of women but their increasing presence in international commercial arbitration).

349. Jan Paulsson, *Ethics, Elitism, Eligibility*, J. INT'L ARB., Dec. 1997, at 13, 19; see also Naimark & Keer, *supra* note 286, at 156 (citing the Paulsson article).

350. Dañino, *supra* note 201.

351. *Id.*

352. The article stated that it was "taken from the ICSID website on 21 September 2006." Rubins et al., *supra* note 51, at 11–12. It did not explain how data was coded. Considering data from the ICSID Web site excludes data from the SCC and ad hoc arbitrations.

353. *Id.*

354. *Id.*

search.<sup>355</sup> The 145 arbitrators who decided these cases came from forty different countries.<sup>356</sup> The largest number of arbitrators from a single country (n=27, 18.6%) was from the United States. The next largest number of arbitrators (n=14, 9.7%) was from the United Kingdom. The third most represented country was Mexico with eleven (7.6%) arbitrators. Other countries with larger numbers of arbitrators were Canada (n=8), France (n=8), Germany (n=6), Sweden (n=6), Italy (n=5), Switzerland (n=5), Ecuador (n=5), Australia (n=4), and Spain (n=4).<sup>357</sup>

Overall, 109 arbitrators (75% of the population) came from OECD countries. This is consistent with the assertion that there are large numbers of arbitrators from Western countries.

This may in part be explainable, as parties may have an inclination to appoint arbitrators who are likely to understand and be sympathetic to their legal, cultural, and political traditions. For countries like the United States, which find themselves the subject and object of treaty claims, the large number of U.S. arbitrators may not be surprising. Likewise, although there were no Mexican investors bringing claims, the number of claims against Mexico may partially explain the relatively large number of Mexican arbitrators.

This inclination of appointing nationals cannot explain all of the data. For instance, there was one arbitrator from Senegal, which the United Nations has defined as an LDC,<sup>358</sup> but Senegal has not been a respondent in treaty arbitration.<sup>359</sup> There are other countries that appear to experience this "overrepresentation" of nationals acting as arbitrators. Australia and Uruguay were notable in that they had multiple arbitrators deciding cases,

---

355. Only one coder coded this data. See *supra* note 96. For this coding, the author ran Google searches looking for a curriculum vitae, professional biography or equivalent information on Web sites such as ICSID or the International Arbitration Institute, <http://www.iaiparis.com/> (last visited Nov. 27, 2007). Where the nationality was stated, the data was recorded. In the case of any uncertainty, nationality was not coded. This accounts for the eight arbitrators whose nationality could not be identified. See *infra* note 356. Future studies should keep a verifiable record of how nationality data was identified and coded. Defining a person's nationality can be difficult because arbitrators can be dual nationals, born one place, live in another, practice in another, and have law degrees from different countries.

356. There were eight arbitrators whose nationality could not be identified from publicly available materials.

357. There were also arbitrators from the Czech Republic (n=2), Egypt (n=2), Venezuela (n=2), Algeria (n=1), Chile (n=1), and Poland (n=1).

358. See *supra* note 129 (placing Senegal on the list of Least Developed Countries).

359. In that case, ICSID was responsible for recommending and appointing Judge Kéba Mbaye. American Manufacturing and Trading, Inc. v. Rep. of Zaire, ICSID Case No. ARB/93/1, Award Feb. 21, 1997, 36 I.L.M. 1531, 1536, [http://ita.law.uvic.ca/documents/American\\_Manufacturing.pdf](http://ita.law.uvic.ca/documents/American_Manufacturing.pdf). It may be that the role of an arbitral institution or appointing authority can affect arbitrator nationality.

but neither their investors nor governments were involved in a case.<sup>360</sup> Similarly, certain countries were involved in a small number of cases but nevertheless produced a large numbers of arbitrators. The United Kingdom, for example, only had 5% of the population of investors and was not subjected to arbitration. Nevertheless, 10% (14 out of 145) of the arbitrators came from the United Kingdom. France, Germany, Sweden, and Switzerland also had a larger number of arbitrators than cases. With the exception of Uruguay, non-OECD countries did not experience overrepresentation.

Likewise, there were also countries that may be underrepresented. United States investors account for 42% of all total investors in the cases, and the United States was a respondent in 5% of the cases. Only 18% of arbitrators were from the United States. Argentina appears to be another outlier as it was involved in fifteen cases (18%) as respondent and had one Argentinean investor. Only one of the 145 arbitrators came from Argentina. With three cases brought against them but no Pakistani arbitrators, Pakistan also experienced a similar phenomenon (See Appendix 1).

While there appeared to be some breadth in the pool of arbitrators, this data suggests that the depth was uncertain. It appears that 75% of the arbitrator pool was from OECD countries even though approximately 70% of the disputes were against non-OECD governments.<sup>361</sup> To the extent that the adjudicators are unrepresentative, some may believe that this casts doubt upon the legitimacy of the dispute resolution process.

Lest the data be misinterpreted, it is important to note certain things. First, an arbitrator from a single country can be appointed in multiple cases. For example, while it is not yet clear whether this is a representative example, the single arbitrator from Chile was in nine cases.<sup>362</sup> If this were a common occurrence, it would expand the influence of repeat arbitrators from a particular country. Second, because parties typically choose arbitrators, this may alleviate some concerns that arbitrators are not representative adjudicators. Governments like Argentina and Pakistan had

---

360. There was also one arbitrator from each of the following countries: Austria, Brazil, Colombia, Costa Rica, Denmark, Finland, Ghana, Guatemala, Israel, Lebanon, New Zealand, Senegal, and Thailand. None of these countries were respondents or had investors who had used treaty arbitration nor had been respondent governments.

361. The data that 75% of the arbitrator pool comes from OECD countries may seem of less concern when one recalls that nearly 89% of investors came from OECD countries.

362. Prof. Francisco Orrego Vicuña was an arbitrator in *Fedax N.V. v. Venezuela*, *Camuzzi Int'l S.A. v. Argentina* [English], *Maffezini v. Spain*, *Enron Corp. v. Argentina*, *PSEG Global, Inc. v. Turkey*, *Occidental Exploration & Prod. Co. v. Ecuador*, *CMS Gas Transmission Co. v. Argentina*, *Joy Mining Mach. Ltd. v. Egypt*, and *Sempre Energy v. Argentina*.



opportunities to appoint their own nationals as arbitrators, for example, but failed to do so.

It may be that arbitrator selection is not about the utility of appointing locals instead of foreigners. Factors such as arbitrator nationality may be of little concern.<sup>363</sup> Rather, appointment may be more about the market for arbitrator expertise and experience.<sup>364</sup> That having been said, the arbitrator marketplace may not be functioning effectively. There may be structural, educational, social, and financial barriers that prevent arbitrators from gaining the expertise and experience necessary to receive an appointment in a case that involves novel issues of international and investment law with allegations of significant government liability. One recent analysis of international commercial arbitration, for example, identified arbitrator “reputation” as the top factor in appointment and indicated that information on reputation was obtained “from informal contacts, personal knowledge [and] recommendation of outside counsel.”<sup>365</sup> For parties who are not repeat players or otherwise lack the ability to hire elite international law firms with unique expertise about arbitrator reputation, there may be informational gaps. This phenomenon could lead to market malfunction.<sup>366</sup>

Future research should analyze nationality in greater detail. For example, it would be helpful to consider whether governments from non-OECD countries are appointing arbitrators from OECD or non-OECD countries. It also might enquire into what factors affect arbitrator appointment and barriers to entering the arbitrator marketplace. Likewise, it might consider whether the ultimate result depends on whether the chair of the tribunal comes from an OECD or a non-OECD country.

---

363. The concept of “nationality” itself may be a social construct as arbitrators may be “nationals” of one country in a strict sense but may have allegiances to other jurisdictions. See *supra* note 355 and accompanying text. For example, although Pakistan did not appoint a Pakistani arbitrator, it has appointed an English barrister with ties to Pakistan who was involved in drafting the 1996 English Arbitration Act. See *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), 3, <http://ita.law.uvic.ca/documents/impregilo-decision.pdf>; Toby Landou, Essex Court Chambers, <http://www.essexcourt.net/barrister?b=48> (last visited Nov. 27, 2007).

364. One survey of participants in international commercial arbitration asked what factors affected their choice of arbitrators. The top five responses were (1) reputation of the arbitrator, (2) expertise in the subject matter of the dispute, (3) recommendations of external counsel, (4) knowledge of the relevant language, and (5) knowledge of the law applicable to the dispute. Onyema, *supra* note 342, at 205.

365. *Id.*

366. For a discussion of conflicts of interest and difficulties related to the void of public information about arbitrators, see generally Rogers, *supra* note 215; Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53 (2005); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341 (2002).

Future research might provide insights into the impact, if any, that nationality has on the arbitration process and its systemic acceptability. Should there be sufficient data, it may be possible to determine which arbitrators (or groups of arbitrators from particular countries) have made certain decisions, whether procedural or substantive, in the past. Although past behavior may not be a reliable indicator of future conduct, this information may be of utility to stakeholders who are interested in information about appointments. In any event, given ICSID's recent efforts to expand the pool of arbitrators in those cases where it controls appointment, future research may find greater diversification of arbitral tribunals.

## 2. Arbitrator Gender

Women were a tiny fraction of arbitrators in investment treaty arbitration. There were five women (3.5%) in the population of 145 investment treaty arbitrators.

This lack of women appears to be meaningful.<sup>367</sup> In comparison, 30% of practicing lawyers and 15% of the federal judiciary in the United States are women.<sup>368</sup> Even in countries such as Malawi, women were better represented in adjudication. Four out of twenty-four justices of the Malawi High Court and Supreme Court of Appeal were women, and there were fifteen women among the country's 153 magistrates.<sup>369</sup> Even though Malawi has been criticized for its lack of women in the judiciary, women had greater representation there than in investment treaty arbitration.

Given their small number in the population, it is possible to identify each woman easily and determine the scope of involvement in the arbitration process. Gabrielle Kaufman-Kohler arbitrated four cases. Sandra Rico was on two tribunals. Carolyn Lamm, Guidetta Moss, and Tatiana de Maekelt were each on a single case. Although one of the sole arbitrators was a woman, there were no tribunals with two or more women.

---

367. There is unfortunately not a single database that defines the worldwide population of potential arbitrators. This research therefore considers women in various national judiciaries to serve as a proximate baseline for comparison.

368. Deborah Rhode's study reflects that women account for only about 15% of law firm partners, 10% of law school deans and general counsels, 5% of managing partners at large firms, and a mere 15% of all federal judges. DEBORAH L. RHODE, ABA COMMISSION ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 5 (2001), available at <http://womenlaw.stanford.edu/aba.unfinished.agenda.pdf>; Leah V. Durant, *Gender Bias and the Legal Profession: A Discussion of Why There Are Still So Few Women on the Bench*, 4 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 181, 181 (2004).

369. Siri Gloppen & Fidelis Edge Kanyongolo, *Courts and the Poor in Malawi: Economic Marginalization, Vulnerability, and the Law*, 5 INT'L J. CONST. L. 258, 289 (2007).

In total, the five women appeared in only nine cases and were present in 11% of all awards<sup>370</sup> (See Chart 9).

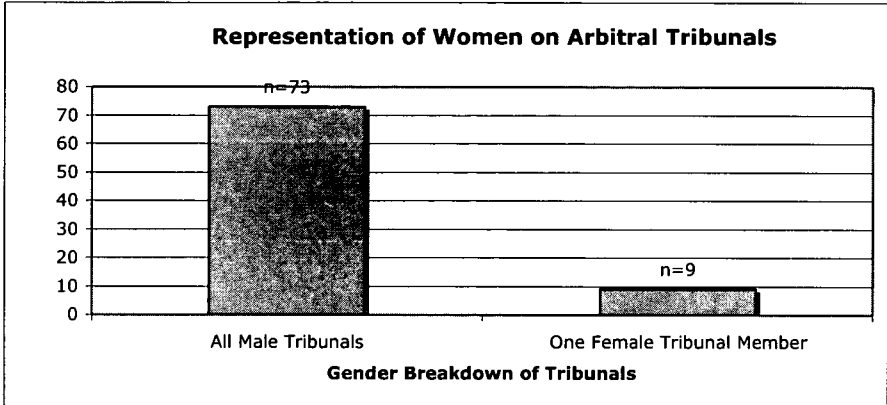


Chart 9: Breakdown of cases in investment treaty arbitration ( $N = 82$ ) where tribunals had either one female member ( $n = 9$ ) or were composed exclusively of men ( $n = 73$ ).

Not unlike the problems with the arbitrator pool with respect to issues of nationality, the data reflects a lack of depth in the population of female arbitrators. Beyond the concerns about the arbitrator marketplace identified related to nationality, there are special issues as regards the gender of tribunals. While half of U.S. law school graduates may be female,<sup>371</sup> this may not be true for all countries. Moreover, to the extent that there are qualified women, they may be sitting as judges<sup>372</sup> or partners in private practice,<sup>373</sup> and conflicts of interest may inhibit them from sitting as arbitrators. This may be why at least three of the women (Kaufmann-Kohler, de Maekelt, and Moss) have academic appointments, where they are less likely to have direct or imputed professional conflicts of interest.<sup>374</sup>

370. After June 1, 2006, there was an award from a tribunal with two female arbitrators. See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (June 16, 2006), <http://ita.law.uvic.ca/documents/JandeNuljurisdiction061606.pdf> (rendering award by Gabrielle Kaufmann-Kohler, Brigitte Stern and Pierre Mayer).

371. RHODE, *supra* note 368, at 5.

372. Roslyn Higgins, for example, is the President of the International Court of Justice and an eminently qualified international law jurist.

373. For example, Lucy Reed, Judith Gill, and Juliet Blanch are eminently qualified international law and arbitration specialists. The author is unaware, however, of any of these women being appointed as arbitrators in investment treaty cases.

374. Brigitte Stern, an arbitrator in cases with awards issued after June 1, 2006, has also had an academic appointment. Future analysis might also consider whether there is a meaningful difference in the academic credentials of male and female arbitrators.

In the future, it would be useful to consider the role women play more systematically. It would, unfortunately, be difficult to do regressions, as the numbers of women are so small that results cannot achieve statistical significance. Should the number of women increase over time, one might usefully conduct studies that consider potential gender differences on issues such as party success, amount of awards, and treatment of costs. Such research might be of interest to parties considering arbitrator appointments and to stakeholders that are interested in the integrity of the process of resolving investment disputes. It may be that gender is not a statistically significant variable that contributes to the outcome of arbitration. One might imagine, for example, that decisions of arbitrators may have more to do with their personal experiences, legal and business background, or judicial philosophy and less with a factor like gender. As a result, it would be useful to isolate and control the effect of gender to eliminate it as a statistical confound.

#### A PRELIMINARY SYNTHESIS AND RECOMMENDATION FOR FURTHER ANALYSIS

It is important to remember that investment treaty arbitration is still a relatively new phenomenon, and the data in this Article scratches the surface of information about investment treaty dispute resolution. The results of this limited study suggest both tentative conclusions and areas for further exploration. Scholars will only be able to assess the value of these tentative conclusions with replication and convergence of research.

Recognizing the limitations, the initial descriptive quantitative data from public awards suggest investment treaty arbitration appears to be functioning relatively well. There is, nevertheless, room for improvement.

Arbitration disputes arose in only forty-nine of 1,700 treaties in force,<sup>375</sup> which suggests that the treaties could be used in the future. Less than 5% of all investment treaties were arbitrated. This suggests that there was a potential for more arbitrations that did not materialize—whether because of the lack of investment, the lack of allegedly inappropriate government conduct, or the availability of other effective dispute resolution mechanisms. Overall, there was an increase in awards over time, particularly in the last decade. Given the increases in foreign investment and the number of investment treaties, the actual number of cases was still reasonably small.

There seemed to be some equilibrium in how arbitration was used by the developed and developing worlds. While claimants tended to be

---

375. *Supra* note 25.

investors from OECD or “high income” countries, some investors from the developing world also used investment treaty arbitration. A smaller portion of OECD governments were subjected to claims, but they were still a meaningful component of the population. Meanwhile, the lion’s share of the claims tended to be against “upper middle income” countries. The small number of cases against LDCs and “low income” countries suggested that the dispute resolution risk for the most vulnerable developing countries may not be overwhelming.

The reasonably equivalent investor and state win rates was relatively promising. Investors could and did recover but typically did so without exposing governments to massive liability.<sup>376</sup> Nevertheless, the data took on a different flavor when considering the gap between investors’ claimed damages and actual awards. Further analysis of the causes of and implications for this gap is warranted. Such analysis might consider whether structural safeguards could improve the system to address concerns related to this gap.

There are other areas of potential improvement. There may be room to improve how investment treaty disputes are resolved. Processes other than arbitration might be used to resolve investment treaty claims, potentially on terms that are more beneficial to both parties. More information would be necessary to determine how and when to use other methods effectively. Another area of potential improvement relates to the appointment of arbitrators. While there was breadth in the overall arbitrator pool, there may be concerns about the lack of diversity with respect to nationality and gender. Gaps between the decision makers and those affected by the decisions, whether real or perceived, have implications for procedural justice and the integrity of the dispute resolution system.

Given the preliminary nature of this synthesis, more empirical work is necessary to expand upon and assess the validity and reliability of these assessments. This would put stakeholders in a better position to make informed decisions about fundamental issues—whether it involves how to negotiate an investment treaty, designing a dispute resolution system, or effectively using existing dispute resolution mechanisms.

Empiricism can and should inform the evaluation and management of investment treaties and related conflict. We are on the first step of a long journey to understanding and improving the management of investment treaty conflict, and future scholarship should build on this initial work. Vital information can permit policy makers to make more informed choices about crafting dispute resolution systems, and stakeholders to make

---

376. Argentina, however, may be an exception to this general proposition.

informed choices about how to manage their conflict. At some point, there may even be sufficient data to make empirically based arguments about operationalizing the costs of entering into an investment treaty or the legitimacy of the investment treaty network.

Additional and deeper types of empirical analysis should be utilized. It might, for example, take the form of the more detailed analysis suggested in this Article. It might also involve deeper statistical analysis of the data already presented, or it may simply involve expanding the scope of variables to consider, for example, what factors are most likely to implicate a tribunal's determinations about cost allocation. Beyond this, future analysis of investment treaty conflict might also involve other methodological approaches beyond the analysis of awards. It might require the use of interviews,<sup>377</sup> surveys, or questionnaires<sup>378</sup> to measure how parties use other dispute resolution mechanisms to resolve conflicts, what factors are associated with successful or unsuccessful use of the process, and party satisfaction with the process. Scholars might also draw upon the expanding empirical literature about how judges reach their decisions.<sup>379</sup> This may provide a critical opportunity to conduct experiments with arbitrators to determine what factors influence their decisionmaking and reveal unconscious biases affecting the arbitration process. It would also provide an opportunity to analyze decisionmaking in a controlled setting with greater internal validity without waiting for a catastrophic economic event.

Overall, should we be willing to utilize it, empirical legal scholarship can promote the creation of international law institutions and theories that are guided by actual experience instead of speculation. This can, in turn, promote systemic accountability and responsiveness to stakeholders. While the use of such empirical data and its analytical inferences is ultimately a matter of choice and political will, the availability of data and analysis has the capacity to promote the legitimacy of an international law process that affects the daily lives of investors, governments, and taxpayers. Given what is at stake—namely sovereignty, financial resources, and sustainable economic development—it is well worth the effort.

---

377. Dezalay and Garth's landmark research was based upon interviews of almost 300 participants in international arbitration. DEZALAY & GARTH, *supra* note 339, at ix.

378. International commercial arbitration studies have used questionnaires to survey corporate attitudes and practices. See generally Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525 (2004).

379. See generally Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

*Appendix 1: Number of Cases Where Nationals of a Government Arbitrated an Investment Treaty Claim Against Another Government vs. Number of Cases Where the Government Was a Respondent State vs. Number of State's Nationals Appointed as Arbitrators on a Tribunal Issuing at Least One Award*

Country	Cases Brought by National Against Other Government	Cases as Respondent	Number of Nationals Appointed as Arbitrators
Albania	0	1	0
Algeria	0	1	1
Argentina	1	15	1
Australia*	0	0	4
Austria*	0	0	1
Belgium*	2	0	2
Bolivia	0	1	0
Brazil	0	0	1
Bulgaria	0	1	0
Burundi	0	1	0
Canada*	6	4	8
Chile	1	2	1
Colombia	0	0	1
Costa Rica	0	0	1
Cyprus	1	0	0
Czech Republic*	1	4	2
Denmark*	0	0	1
Ecuador	0	3	5
Egypt	0	4	2
Estonia	0	1	0
Finland*	0	0	1
France*	3	0	8
Germany*	2	0	6
Ghana	0	0	1
Greece*	2	0	1
Guatemala	0	0	1
Israel	0	0	1
Italy*	6	0	5
Jordan	0	1	1
Kazakhstan	0	1	0
Kyrgyzstan	0	1	0
Latvia	0	2	0
Lebanon	0	0	1
Lithuania	1	0	0

Luxembourg*	2	0	0
Malaysia	1	1	0
Mexico*	0	9	11
Moldova	0	2	0
Morocco	0	2	0
Myanmar	0	1	0
Netherlands*	5	0	1
New Zealand*	0	0	1
Pakistan	0	3	0
Paraguay	0	1	0
Peru	1	1	0
Philippines	0	1	1
Poland*	0	1	1
Romania	0	1	0
Russia	1	1	1
Senegal	0	0	1
Singapore	1	0	0
Slovakia*	0	1	0
Spain*	4	1	4
Sri Lanka	0	2	1
Sweden*	2	0	6
Switzerland*	2	0	5
Thailand	0	0	1
Turkey*	1	1	0
Ukraine	0	3	0
United Arab Emirates	0	1	0
United Kingdom*	5	0	14
United States*	32	4	27
Uruguay	0	0	3
Venezuela	0	1	2
Zaire (now Congo)	0	1	0
Totals	83 <sup>380</sup>	82	137 <sup>381</sup>

Note: \* = Member States from the OECD.

380. This accounts for the one case where investors of two different nationalities brought separate claims in a single case. *See supra* note 160.

381. The nationality of eight arbitrators could not be determined.



