

Incorporating legal expertise into political science studies of international law, with
special reference to bilateral investment treaties

Jason Webb Yackee*

Abstract: This article was originally prepared for a workshop on the “Political Economy of Bilateral Investment Treaties” organized by the London School of Economics. The workshop brought together a group of prominent international legal experts and political scientists. The Workshop organizers asked participants to “discuss research approaches and results, methodological challenges, and possibilities for future collaboration” on the empirical study of bilateral investment treaties (BITs). In the article I point out that most discussions of the increasingly empirical and interdisciplinary nature of legal research (of BITs and other legal phenomena) seems to run in the direction of urging law professors to become more like quantitatively minded social scientists. In contrast to that common advice, I suggest that law professors—even those not trained in modern statistical methods—will sometimes, and maybe often, have the capacity to contribute in meaningful ways to truly interdisciplinary research projects without turning themselves into “quants”. They can do so by helping social scientists inexperienced in the law build and test models that reflect a more persuasive understanding of law as legal actors perceive and live it. I illustrate the argument by discussing a recent empirical study of BITs by two non-lawyer political scientists.

* © 2013 JWY. Jason Webb Yackee, Assistant Professor, University of Wisconsin Law School. I may be contacted at jason.yackee@alumni.duke.edu. I received helpful input from participants in the University of Wisconsin Law School Junior Faculty Seminar; the London School of Economics Workshop on the Political Economy of Investment Treaties; the 2013 symposium of the Santa Clara Journal of International Law; and the International Law and International Relations Colloquium of Cornell University. Professors Alex Huneus and Howard Erlanger provided especially helpful advice. I accept full responsibility for the dreadfully boring title.

1. Introduction

After years of urging, legal scholarship is becoming increasingly empirical.¹ And, in a welcome development, political science scholarship is becoming more interested in law. The latter is especially true in the subfield of political science devoted to international relations, and in the sub-sub-field of international political economy.² While the empirical turn in legal scholarship has been praised by some (and particularly by members of the “empirical legal studies” movement),³ it has also elicited certain critiques, both from within and without, with the most scathing coming from the latter.⁴ These critiques take as their implicit starting point the legal academy’s law’s lack of a native scientific method of empirical inquiry.⁵ That lack of a native scientific method means that legal scholars must borrow methods from the social sciences. The problem is that the typical law professor isn’t trained in the

¹ Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research*, 39 J. LEGAL EDUC. 323, 324 (1989) (arguing that since Holmes’ “The Path of the Law” legal scholars have been admonished to engage in more empirical research); Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 581 (1983) (urging law professors to become more engaged in the production of empirical research on the costs and benefits of legal and policy reforms). Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000) (providing evidence for an increase in empirical legal research); Thomas S. Ulen, *A Noble Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875 (2002) (same). By “empirical” I mean research about law that “makes factual claims about states of the world, particularly causal relationships within the world, that are explicitly founded on direct observations of the world or inferences from observations”. Gregory Mitchell, *Essay: Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. LAW REV. 167, 197-199 (2004) (defining “empirical research” as quoted). In contrast, “non-empirical research does not pretend that its claims about the world are founded on anything other than imagination, supposition, or logic.” *Id.*

² [Cite Slaughter et al; cite IO special issue]

³ Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006) (praising empirical legal studies as “arguably the next big thing in legal intellectual thought”); Theodore Eisenberg, *The Origins, Nature, And Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713 (2011) (describing the history of the empirical legal studies movement);

⁴ Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (providing the seminal scathing critique).

⁵ Perhaps the discipline of law does contain its own native “method”, which we can call in shorthand “traditional doctrinal analysis”, but that method is, at best, only weakly empirical and probably not “scientific” in the modern sense. Cf. Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 199 n. 97 (2011) (“Traditional doctrinal analysis of judicial opinions is similar to qualitative empirical research in the sense that it closely studies the content of opinions for the judges’ reasoning and decision-making pattern. Qualitative empirical research, however, is distinct from traditional doctrinal analysis because [the former] randomly samples judicial opinions to obtain a representative pool, determines in advance the particular research inquiries and measures for coding the content, and reaches conclusions based on objective standards.”)

statistical methods or theories and practices of research design that are essential to the modern political scientist's conception of self. That lack of training, combined with a lack of peer review in the law-review-submission process, has produced charges that virtually all empirical studies in law reviews fundamentally violate basic norms of acceptable empirical research and are inferentially worthless.⁶

There are a number of plausible solutions to this problem, if it is one.⁷ Law reviews might implement a system of peer review, for example.⁸ Or aspiring law professors might obtain social science Ph.D.s, and current law professors might go back to school for summer-session methods training.⁹

One other common suggestion, and the one that is the focus of this article, is for legal scholars to “collaborate” with social scientists.¹⁰ But such calls seem typically one-sided. The benefits of collaboration are presumed to flow in a single direction—from the methodologically well-trained social scientist to the methodologically naïve or illiterate legal scholar. The primary aim of collaboration is to improve the empirical scholarship of *legal* academics, and not (mutually or instead) to improve the law-related empirical scholarship of non-lawyer social scientists.

In this article I do not directly respond to the claim that much of the empirical law review literature is methodologically suspect. It might indeed be.

⁶ Epstein & King, *supra* note XX. See also Mitchell, *supra* note 1, at 171-172; Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for “Empirical Legal Studies”*, 71 LAW & CONTEMP. PROB. 17, 26 (2008) (“most criticism of empirical research by law professors is based on quality. . . . Most of this critique is aimed at law reviews and the unique conventions of law-review publishing”).

⁷ Indeed, Epstein and King's critique engendered a number of spirited counter-critiques, published in the same issue of the Chicago Law Review.

⁸ Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in Law*, 53 J. LEGAL EDUC. 311 (2003) (advocating that law reviews incorporate a peer-review process); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1351-1357 (2002) (discussing a variety of solutions to the problems allegedly afflicting legal scholarship).

⁹ Craig Allen Nard, *Empirical Legal Scholarship*, 30 WAKE FOREST L. REV. 347, 365-368 (1995) (making similar suggestions).

¹⁰ Nard, *supra* note XX, at 367 (advocating for collaboration); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 817 (1999) (suggesting same); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 828-829 (1991); Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353 (2008).

Instead, I suggest in return that political science studies of law might also tend to suffer from their own corollary flaw: a failure to adequately understand the legal phenomena that inform their law-related theories and models. In this comparative flaw-ology we may be comparing logs with specks, but this doesn't mean the speck isn't worth removing. In this case, removing the speck both improves the vision of the law-interested social scientist from which it is removed while also improving the speck-remover's sense of scholarly self-dignity and worth.

Let me be less cryptic. The speck-remover here is the legal expert (often, a legal scholar or law professor, but also possibly a practicing lawyer) who, I believe, will sometimes and perhaps often has something meaningful to contribute to the collaborative research relationship, even absent any methods training.¹¹ The legal expert's contribution is to provide the social scientist untrained in law with an accurate or even "realistic" understanding of what law is, where "is" means how it is perceived, experienced, and understood by those whose professional (and often social) success depends upon its successful navigation. In other words, collaboration need not be a one-way street, in which social scientists interested in law donate their time to helping legal scholars. Empirical research on law-related topics can benefit from expert legal input and advice. While legal scholars may indeed often get the social science methods wrong (as, I suspect, do many social scientists), so too might social scientists studying law get the law wrong.

I'm admittedly not the first to suggest that there might be some real benefits to social scientists in collaborating with legal scholars on empirical studies. Anne-Marie Slaughter and her co-authors argued forcefully several years ago that international law scholars may be particularly well-suited to providing international relations scholars with the sort of "detailed knowledge of law and legal institutions" necessary for the design of realistic and meaningful proposals for reform of international governance institutions.¹²

¹¹ A point also made (briefly) in Frank Cross, Michael Heise, & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002) (observing that social scientists "would benefit from the substantive expertise law professors" offer).

¹² Slaughter et al., *supra* note xx, at 385.

More generally, and much earlier, Ed Rubin advanced a vision of collaboration in which the “legal community” would help social scientists to translate their research into arguments for policy changes that were persuasive to legislators and bureaucrats.¹³ But Rubin’s model downplayed the ability of that community to add collaborative value in the generation of empirical data about law. In his vision, “generating research data is the work of social scientists”, while “determining the meaning of that data for our problems of governance is the work of the legal community”.¹⁴ My own take is that law professors and lawyers more generally, as members of an expert legal community, can indeed play a meaningful role in the sharing of knowledge and the generation of data that can inform law-related social science theories and their empirical testing.

To illustrate my argument, I focus on the subject of international investment law (my own area of legal expertise). I examine a recent article by two political scientists that presents an informal rational choice bargaining model of the reasons why states enter into bilateral investment treaties (BITs) with particular dispute-settlement language. They authors statistically test their model using an original dataset of BIT dispute-settlement provisions. They report that their test confirms their theory.¹⁵ States bargain over BIT dispute settlement language in predictable, rational, and empirically demonstrable ways. As I suggest below, the way in which the authors construct their dependent variable calls into question what, exactly, we can safely take away from their study. Collaboration with international law experts would have likely led to substantively important differences in how the dataset was constructed and, by implication, in the results obtained and reported. But my point is not simply that legal expertise would have helped to construct a better dataset.

¹³ Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 828-829 (1991).

¹⁴ *Id.*

¹⁵ Of course, given the norms of modern political science, it would be quite unusual to see a good peer-reviewed journal publish an article disconfirming the author’s theory or hypotheses. This so-called “file drawer problem” (where empirical studies demonstrating null findings get “filed away” rather than published), as well as a preference for “novel” studies that discourages further studies of the same topic afflicts other fields of academic inquiry too. However, some fields, such as epidemiology, are much more open than the social sciences to the repeated testing of the same substance or treatment on different samples of subjects and using different research designs. Thus we might find 10 published studies of the effects of substance *x* on disease *y*, a number sufficient to allow a statistical meta analysis of the various results.

While legal expertise can certainly do that, input from legal experts as to the “reality” of international law can also feed back into better theory.

2. The legal expert and “data” about law

In a recent working paper, prominent international relations theorists John Mearsheimer and Stephen Walt critique their field as privileging what they call “simplistic hypothesis testing” that favors the application of advanced statistical methods to under-theorized models and conceptually unsuitable data sets. The authors advance a provocative argument for “scientific realism”, in which theories of social phenomena are not valued simply because they are predictively accurate, but because the theory’s underlying causal mechanisms—their “microfoundations”—“accurately reflect reality”. While the authors’ main argument consists of a call for better theorizing, they also recognize the essential link between theory and high-quality empirical tests of theory-generated hypotheses. Good theories (e.g. theories that sufficiently reflect how the world “really works”) are “essential for defining key concepts, operationalizing them, and constructing suitable datasets.” Mearsheimer and Walt’s article has attracted significant criticism on-line, and my point here is not to say that their position is correct, desirable, or otherwise. On the other hand, if we do value “realism” in theory building and testing, then I think there is a strong case to be made that political scientists can do a better job at incorporating legal expertise into the development and testing of more realistic law-related political science theories.

Political scientists can incorporate legal expertise by consulting and collaborating with law professors and practicing lawyers at an early stage in their research program, with the goal of accessing the subjective “data” that legal experts have amassed, by virtue of their formal training and informal socialization, about how the law works in practice, on the ground, and in reality. I put “data” in scare quotes to acknowledge that the “data” I am talking about here is not “hard data” in the sense, say, of the International Monetary Fund’s Direction of Trade Statistics (though it can be made harder with the help of social scientific coding and data

management techniques). Rather, “data” is the legal expert’s informed but personal sense of how other actors (particularly, other legally trained actors) are likely to understand, and thus to act, in the face of particular legal texts, processes, institutions, and arguments. It’s true that these senses will often be based on the legal expert’s folk theories, and informed by his folk empiricism. Both are susceptible to certain pathologies. Folk theories may be loosely formulated, even internally inconsistent. But so may social scientific theories, as Mearsheimer and Walt point out. Folk empirics may reflect mental shortcuts and biases, such as the “availability heuristic”. But it’s also clear that the empirics of non-law-trained social scientists can reflect the author’s own idiosyncratic, subjective, and arguably “wrong” understandings of law, as Michael Byers has suggested in regard to international relations studies of international law.¹⁶

In my view, legal experts, even operating as folk theorists and folk empiricists, are potentially valuable sources of meaningful, accurate data-information—about what law is and how it works. Legal experts should be consulted, or brought in as collaborators, whenever non-law-trained political scientists are engaged in theory-building or theory-testing of law-related phenomena, where the theory, or where the tests, depend on a realistic, expert conceptualization or operationalization of law as either a dependent or explanatory variable. While the legal expert’s assessment should always be taken critically, the non-law-trained political scientist should proceed cautiously whenever the expert indicates that his lay understanding fails to reflect how expert lawyers view the relevant area of law as “really working”.

The key to my vision of the potentially positive role of legal expertise in empirical political science studies of law is the recognition that lawyers are members of what Owen Fiss has called an interpretive “community” that speaks a

¹⁶ Michael Byers, Response: *Taking the Law Out of International Law: A Critique of the “Iterative Perspective”*, 38 HARV. INT’L L.J. 201 (1997) (asserting that international relations scholars who study treaties have a history of “mishandling or ignoring ... concepts...that...appear[] basic to an international lawyer” but that “might seem irrelevant or impenetrable to someone from another discipline”).

common language consisting of a special “grammar”.¹⁷ The members of the legal community win their admittance through a formal and informal education that inculcates and embeds a norm of respect for the “rule of law”, which we can define as respect for the procedural and substantive rules of conduct as interpreted and accepted by the professional legal community.¹⁸ That respect may sometimes be in “bad faith”, as Duncan Kennedy has argued,¹⁹ but even “crits” like Kennedy and Fiss, whose work often emphasizes the inherent plasticity of law, recognize that community norms and shared understandings of what is permitted by law, and what is not, in many cases can act as real (even if partial) constraints on the behavior of judges and other legal actors.

Put a bit differently, empirical social-scientific studies of law, or that use law, are in a very real sense dependent upon the juristic legal conceptions around which members of the legal community coordinate their actions.²⁰ To empirically study the law usually means borrowing the meaning of law as understood by those who use it on a daily basis. As Cotterrell notes, “the intellectual situation seems parallel to that in criminology. ‘Crime’ seems to be what the law saw it is; ‘law’ seems to be what the state and the lawyers say it is.”²¹

¹⁷ Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). As Fiss argues,

Rules are not rules unless they are authoritative, and that authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative. This means, above all else, that the objective quality of interpretation is bounded, limited, or relative. It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules.

Id. at 745.

¹⁸ Fiss, *supra* note XX, at 746-747.

¹⁹ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997).

²⁰ Roger Cotterrell, “Socio-Legal Studies, Law Schools, and Legal and Social Theory”, Queen Mary University of London, School of Law Legal Studies Research paper No. 126/2012.

²¹ *Id.* at 4. It’s also possible that social science can itself “cause” law, if the legal community adopts social scientific arguments as to what the law is, or should be. *Cf.* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 777 (1986) (“Legal economists have a tendency to claim too much; they are notoriously imperial. ... On the other hand, [their] claims...may turn out to be true after all. This will happen if lawyers come to believe in the claims, and if judges and administrators actually *use* economics to solve

The idea here is not that, because I'm a lawyer, I have an individual license to authoritatively declare "up" to mean "down". Rather, what Cotterrell has in mind, I think, is the notion that the legal community tends to focus or coordinate around particular, shared understandings of what the law "is", with a sort of equilibrium achieved iteratively through the workings and interactions of individual legal actors and legal institutions, constrained by the professions' shared legal culture, norms, outlooks, appreciations, and the like.²² The grammar of law is this shared understanding (which can also be viewed in a Holmesian sense as a prediction of how *other* members of the legal community will understand the law), where the grammar both observes *and* influences the law.²³

The legal expert's formal training (which embeds certain skills and attitudes) and his repeated social and professional interaction with other members of the legal community, means that the legal expert is in a strong position to describe (predict) the community's understanding of what law means or how law works. And because that community is responsible for making the law work, their understandings act as law itself. This predictive expertise is not easily gained by those outside of the profession, who lack the requisite training and the access to (or patience for) the community's conversations that are often necessary for moving beyond simplistic and even wrong understandings of the law—for example, law as what the law books say it is (excessive formalism) or law as "politics by other means" (excessive cynicism, albeit cynicism that is able to predict Supreme Court decisions with significant accuracy, if not much theory, for what that is worth).²⁴

problems.") Note, however, the determinant position of lawyers here. It is *they* who decide whether a social science understanding of law is transformed into actual law.

²² On law as the solution to a coordination game, see Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009).

²³ On the Holmesian "prediction theory" of law, see Anthony D'Amato, *Realism Explains Nothing*, 1 WASH. U. JURIS. REV. 1 (2009)

²⁴ See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U.L. REV. 251 (1997) (reviewing and critiquing such studies). One of Frank's critiques is that these studies often contain overly simplistic understandings of the "legal model" of judicial decision-making that purely political models are often said to disprove.

While legal experts thus embody specialized knowledge about what the law is and how it works, collaboration with social scientists requires the legal expert to translate that knowledge into the technical apparatus of modern social science. It seems plausible to presume that law *professors*, as a subset of the legal expert community, may be relatively well positioned to play the role of intermediary, serving, in Beth Mertz's term, as "anthropologists" of the legal profession to those not expert in the profession's ways or subject.²⁵ On the other hand, many law professors will have succumbed to the temptations of the profession and failed to maintain significant contacts and involvement with the larger legal community. In those cases, practitioners, rather than law professors may be more expert, or more usefully expert, to the social scientist.

3. An example of the problem

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

To offer some brief background: The BIT phenomenon has attracted significant interdisciplinary and empirical attention, for the obvious reason that there are now roughly 3,000 signed investment treaties, virtually all of which

²⁵ Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 486 n.6 (2007); see also Frank Cross, Michael Heise, & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002) (observing that social scientists "would benefit from the substantive expertise law professors" offer).

contain binding state consents to investor-initiated arbitration. The result has been an explosion of BIT-based litigation, with the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) now having registered nearly as many investor-state arbitrations as the WTO has registered trade disputes.²⁶

Existing empirical studies of BITs can be broken into two basic and distinct lines of research. On the one hand, a number of scholars from a variety of academic disciplines have examined BITs as independent variables, looking at whether the treaties cause increases in foreign direct investment (FDI).²⁷ These studies have been conducted by economists and political scientists. On the other hand, a somewhat smaller number of scholars, operating primarily within the discipline of political science, have examined BITs as dependent variables, attempting to explain such things as why states sign BITs,²⁸ or why states sign BITs with particular provisions.²⁹

I focus here on the second kind of study, a recent article by Professors Allee and Peinhardt, both political scientists, that treats international investment law (BITs) as a dependent variable. Their article, "Delegated Differences", appeared in the 2010 volume of the respected international relations journal *International Studies Quarterly*.³⁰ Allee and Peinhardt are interested in explaining differences in the texts of investment treaties. As is standard in political science research, they present their empirical study in the context of testing a theory, here of state

²⁶ At the date of writing, the ICSID website lists 376 registered disputes. The WTO website lists 434 registered disputes.

²⁷ The most important empirical BIT studies are cited in Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

²⁸ Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006).

²⁹ Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Settlement Provisions*, 54 INT'L STUDIES Q. 1 (2010).

³⁰ Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Settlement Provisions*, 54 INT'L STUDIES Q. 1 (2010). According to one observer, political scientists dominate the field of "empirical legal studies". Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies"*, 71 LAW & CONTEMP. PROB. 17, 32 (2008) ("many of the law professors most closely associated with the ELS brand are political scientists"). However, sociology maintains a robust sub-field of socio-legal studies, and economists are increasingly interested in questions of "law and development".

behavior (whether to sign a BIT containing particular text) and based upon on an informal rational choice bargaining model.

In thumbnail form, their theory proceeds as follows. Home and host states both want to sign BITs (to protect investors on the one hand, and to promote inward investment on the other). But the ideal-typical home and host states have different preferences as to the content of the BITs they want to sign. Allee and Peinhardt believe, as do I, that the investor-state dispute settlement (ISDS) clauses of BITs are among the most important of the treaty provisions (because they make BIT substantive guarantees enforceable, and thus credible), and they argue that home-host bargaining will take place around ISDS clauses. In particular, home states will want strong ISDS, while host states will want weak ISDS. These predictions are based on the assumptions that host states are very concerned about sacrificing sovereignty to ISDS tribunals, while home states are very concerned about gaining access to ISDS to provide legal protection for their investors.³¹

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

The key to the present discussion is the way in which Allee and Peinhardt conceptualize and operationalize ISDS strength. The authors start from the well-supported observation that the World Bank's International Centre for the

³¹ Incidentally, I am not sure that this bargaining model makes much theoretical sense. If we assume that developing countries sincerely desire more investment, and if we assume that they are convinced that they need to sign investor-friendly BITs in order to attract that investment—because investors demand “strong” BITs as a condition to invest—then why would those developing states take a bargaining position in favor of “weak” BITs that will not attract investment?

Settlement of Investment Disputes (ICSID) seems to be involved in the vast majority of known BIT arbitrations, and that ICSID is plausibly said to enjoy some practical advantages over other arbitral mechanisms, such as ad hoc arbitration under the UNCITRAL Arbitration Rules or institutional arbitration managed by private organizations like the International Chamber of Commerce (ICC). For example, the ICSID Conventions require signatory states to enforce ICSID awards as if they were non-appealable final domestic court judgments. In contrast, awards rendered under an UNCITRAL or ICC process are enforced under the New York Convention, which governs the international enforceability of international commercial arbitration awards more generally and which contains a handful of escape clauses for states that wish to refuse enforcement.

From these observations about ICSID's relative importance and its possible advantages as an ISDS forum, Allee and Peinhardt make the plausible argument that ISDS provisions that contain consents to ICSID arbitration are better (from the home state's and investor's perspective) than are ISDS provisions that do not grant jurisdiction to ICSID. But many BITs contain ISDS provisions that consent to ICSID arbitration and to alternatives such as those mentioned in the previous paragraph. Other BITs contain consents to ICSID alone. Some BITs don't mention ICSID, but do contain consents to alternative fora. And yet other BITs contain no ISDS provisions whatsoever. Allee and Peinhardt propose to rank these four possibilities according to the concept of the amount of "delegation" to ICSID.³² They consider a BIT to contain a "full delegation" of dispute settlement authority to ICSID where the treaty's ISDS clause consents *only* to ICSID. This is, in their view, the "best" BIT (from the home state's perspective).

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

³² Allee & Peinhardt, *supra* note 29, at 15 (describing their ranking scheme).

“partial” rather than a “full” delegation. The delegation is “partial” because “multiple options for dispute settlement opens the door to delay and removes the efficiency gains associated with exclusive delegation to ICSID.”³³ And finally, BITs that fail to contain *any* delegation to ICSID are the weakest. This category seems to include both those BITs that consent to ICC or UNCITRAL arbitration (but not ICSID) as well as those BITs that fail to contain effective, comprehensive ISDS clauses.³⁴ Table 1, below, contains a summary of my understanding of their rank ordering scheme.

<i>Table 1: Allee & Peinhardt’s Dependent Variable: Concept & Operationalization</i>		
<i>Rank Order (Higher=Better)</i>	<i>Concept</i>	<i>Operationalization</i>
2	Full ICSID delegation	Only ICSID arbitration
1	Partial ICSID delegation	ICSID + UNICTRAL &/or other arbitration
0	No delegation to ICSID, but delegation to something else	UNCITRAL &/or other arbitration
0	No delegation to anything	No ISDS

³³ Allee & Peinhardt, *supra* note 29, at 7.

³⁴ I say “seems” because Allee and Peinhardt don’t expressly talk about the possibility of BITs that fail to contain ISDS provisions.

The authors test their theory using an ordered probit model, which is justified given the dependent variable's construction as a rank-ordered concept consisting of three values. They find that a number of their independent variables are statistically significant and signed in the predicted direction. For example, home states that have strong interests in a "full" delegation to ICSID are more likely to enter into BITs with higher-ranked ISDS provisions. And host states that have a greater interest in or need for FDI (measured by such things as their reliance on foreign aid) are also more likely to consent to stronger ISDS provisions. Allee and Peinhardt conclude that for home and host states "the decision to delegate dispute settlement authority to ICSID has been an important one."³⁵

4. The contribution of legal expertise

We can now begin to imagine how an expert in the law of BITs, even one with little or no statistical training, might have contributed meaningfully to the analysis, making it more realistic, or, at least, more convincing to those trained in this specialized area of law.³⁶ I organize the discussion around four basic, general understandings of law that are likely to be shared by most legal experts but that are not necessarily obvious to non-legal experts. I then apply those understandings to the specialized field of expertise dealing with BITs.

A. The Value of ISDS of Any Kind

³⁵ Allee & Peinhardt, *supra* note 29, at 24.

³⁶ It's always possible for political scientists to refuse to care whether lawyers think their law-related theories and findings are persuasive or not. But where we are interested in explaining how states as collective abstracts understand and experience law, it seems to me pretty relevant to have an accurate understanding of how the lawyers who advise and constitute the state see the law; their lawyer's view of the law becomes the state's view, in a sense. To not care about their views is to devalue realism as something that political science theories should reflect. This devaluation may be acceptable, depending on one's view of what the point of the research enterprise is. As Measheimer and Walt note in the working paper cited above, an instrumental view of the nature of social science research is concerned solely with predictive accuracy, and not with whether the underlying theory or causal mechanisms are realistic or accurate. Measheimer and Walt reject a pure instrumental view, but even if we don't reject it, it seems likely that realistic theories are more likely to lead, eventually, to more accurate predictions.

Let's start at the bottom of Table 1. Lawyers are trained to appreciate that rights unaccompanied by remedies are often of dubious value to the rights-holder. In that vein, and as I have argued elsewhere, BITs that contain no ISDS provisions are probably of very little theoretical or practical value as host state credible commitment devices.³⁷ A BIT that promises investors favorable substantive treatment, in vague terms, but that doesn't give the investor the right to access international arbitration to interpret and apply those terms in an authoritative and enforceable way offers foreign investors little to no international legal protection against opportunistic host state behavior. Equating BITs with no ISDS with BITs that provide access to non-ICSID ISDS seems a bit curious. This is especially so because arbitral alternatives to ICSID (pure ad hoc arbitration, non-institutional arbitration under the UNCITRAL Rules, institutional arbitration under the ICC) have historically proven to be a valuable addition to the foreign investor's legal arsenal. Indeed, in the 1960s and 1970s ad hoc contract-based arbitration produced numerous important awards supporting the international legal principles of *pacta sunt servanda* and of meaningful compensation in the event of expropriation.³⁸ As a starting point, the legal expert would probably suggest that BITs with no ISDS are likely to be significantly worse for investors than are BITs with an ISDS provision consenting to ad hoc arbitration.

B. The Importance of Context

Move up Table 1, to the distinction between "partial" and "full" ICSID delegations. Lawyers are trained to be sensitive to the importance of context. For example, contextual differences between a client's situation and the situation described in a reported court opinion can provide the lawyer with a persuasive argument that an otherwise binding precedent can and should be distinguished

³⁷ Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOKLYN INT'L L. J. 405 (2008).

³⁸ Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L. J. 1550 (2009).

from the client's case, meaning that the precedent need not be followed. An estate planning lawyer would probably be committing legal malpractice by offering a client estate planning advice without conducting a detailed interview designed to uncover the specifics of the client's financial situation. Death sentences are overturned where defense lawyers have failed to conduct an appropriately thorough investigation into the unique circumstances of the defendant's past that might serve as mitigating facts.

In the world of ISDS, it is possibly or even probably true that ICSID arbitration will be the preferred arbitral mechanism for most investors. But it is not necessarily the preferred arbitral mechanism for all investors. This is because context matters. ICSID represents a particular matrix of trade-offs, and before ranking the desirability of different arbitral options we need to understand what the arbitral consumer's preferences actually are. For example, while investment-treaty awards are arguably more readily enforced under ICSID than under the New York Convention—itself an empirically undemonstrated fact—ICSID arbitrations are also typically subject to greater demands of “transparency”, including the now-mandatory publication of excerpts of decisions. The investor who wishes his dispute to stand a good chance of remaining confidential might reasonably prefer UNCITRAL to ICSID.

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

Even if we accept that ICSID provides high-quality decisions, that quality comes at a price. Literally. The average cost of an ICSID arbitration (including lawyer’s fees) for a party is around **[\$1 million]**.³⁹ And it takes, on average, **[four to five years]** for an ICSID arbitration to wend its way through the full legal process.⁴⁰ Arbitral alternatives may be both cheaper and quicker than ICSID, potentially decisive criteria for aggrieved investors who don’t enjoy a significant legal war chest of money or time.

The viability of a BIT-based consent to ICSID also depends on the willingness of the host state to remain a party to the ICSID Convention. A host state that withdraws from the Convention (as Venezuela, Bolivia, and Ecuador have recently done) makes an investor’s access to ICSID via a BIT-based consent uncertain at best.⁴¹ Investors that are particularly worried about the possibility of denunciation would greatly welcome the availability of alternative fora, the investor’s access to which cannot be defeated in such a manner by unilateral state action since there is no institution from which formal withdrawal is possible.

These points are really just a way of saying that lawyers and their clients typically value options, and from a legal perspective it probably doesn’t make much sense to suggest that fewer options are necessarily better than more options, especially when the “more options” category contains all of the options residing in the “fewer options” category. An ISDS clause that provides for ICSID arbitration, and *only* for ICSID arbitration, may be perfectly fine for most investors. It’s a belt that suffices to hold up most pairs of pants. But some investors will find themselves in a situation in which they rationally prefer suspenders to belts, or they discover that

³⁹ Note to reader: the average cost data needs to be verified against ICSID data. I believe my claim to be accurate.

⁴⁰ Note to reader: the average time-to-completion data needs to be verified against ICSID data. I believe my claim to be accurate.

⁴¹ An important and contested legal issue is whether a state’s withdrawal under ICSID Convention Article 71 extinguishes a state’s consent to ICSID’s jurisdiction that reside in BITs that themselves haven’t yet been denounced—or that have been denounced but which remain in effect as to covered investments through BIT-based continuation-of-coverage clauses. See Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 L. & BUS. REV. AM. 409, 429-430 (2010) (discussing some of the legal uncertainties related to withdrawal from ICSID).

their belt has burst. Giving investors the option of wearing suspenders—if they wish—hardly detracts from their preference for wearing belts in most cases.

C. The Concept of Delegation

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

In the IIL context, state parties have similar opportunities to limit the subject-matter scope of their delegations to ICSID or other fora. They may, for example, define the concept of “investment” as used in their BITs narrowly rather than broadly. ICSID’s jurisdiction is limited to “investments” under Article 25 of the ICSID Convention, and ICSID tribunals will typically look at how the state parties to a BIT have defined investment in their investment treaties. A state might also expressly exclude certain classes of disputes, such as disputes over tax matters, as does Article 21 of the 2004 Model U.S. BIT. Or it may wish to maintain its sovereignty to implement prudential financial regulations, as provided in Article 20 of the 2004 U.S. model. Or it may wish to carve out an exception for decisions related to whether a treaty violation was necessary to protect the host state’s

essential security interests, as in Article 18 of the same model treaty. As yet another example, BITs involving Communist countries traditionally limited their ISDS provisions to disputes over the treaty's expropriation provision, excluding disputes over the meaning of other treaty provisions, like the guarantee of "fair and equitable treatment". States may also use the ICSID Convention itself to limit the subject-matter scope of their delegations. Article 25(4) of the Convention allows states to notify ICSID as to the kinds of disputes that they do not wish to submit to ICSID jurisdiction, as Ecuador recently did.

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

D. The Use of Model Clauses

Lawyers appreciate that many facially important contract drafting decisions are profoundly influenced by the use of model forms and clauses, which are often plugged into contract documents in a rather mechanical and unreflective way.⁴² Even where there is some measure of bargaining over the inclusion or exclusion of a particular kind of clause, there may be no bargaining about the actual text of the clause that ends up being included, the model text taken as a given. There may not even be much bargaining about the inclusion of the clause in its model form at all.

BIT negotiations are no stranger to the phenomenon of the model clause. Most capital exporting states develop model investment treaties that serve as the beginning, and perhaps more or less the end, of most BIT negotiations. ISDS clauses are themselves "modeled" within model BITs. So, for example, the Swiss model in

⁴² See generally Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI.-KENT L. REV. 59 (2001).

effect in the mid-1990s contains an ISDS clause that provides ICSID as the only ISDS option.⁴³ The United Kingdom model from the same period contains “alternative” ISDS clauses, from which the negotiating partner might choose. The first names only ICSID; the second possible clause names ICSID, ICC, and UNICTRAL arbitration.⁴⁴ The 1991 German model also contains alternative ISDS clauses, the first specifying only ICSID, the second specifying only ad hoc arbitration. The United States’ 1994 and 2004 models contain just one ISDS clause, providing access to ICSID and UNCITRAL arbitration. Model BITs by capital importing states are more unusual, but not unheard of. For example, Chile developed a model BIT in 1994 that contains an ICSID-only ISDS clause.

This is not to deny that in some cases the decision to include *any* ISDS clause has been controversial. Australia, for example, insisted that the United States delete ISDS from the investment chapter of the US-Australia Free Trade Agreement.⁴⁵ Some host states may also occasionally insist on weakening model ISDS text by, for example, requiring longer waiting periods between a dispute’s crystallization and the investor’s right to access arbitration.⁴⁶ The question, though, is whether there is meaningful and regular bargaining over ISDS content along the rank-ordered dimension identified by Allee and Peinhardt. In that regard, the variation in model treaty practice discussed above poses some interesting empirical head-scratchers. For example, why would we expect Switzerland, a small and relatively weak capital-exporting state, to embed in its model a “full” delegation to ICSID (e.g. ICSID-only arbitration), while the United States, certainly the materially most powerful capital-exporting country over the period of study, would handicap its initial bargaining

⁴³ The Swiss model is reprinted in UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S* (1998).

⁴⁴ *Id.*

⁴⁵ As described in Ann Capling & Kim Richard Nossal, *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*, 19 *GOVERNANCE* 151 (172).

⁴⁶ An example, cited by Allee and Peinhardt, is the 1985 BIT between the US and Turkey. Turkey inserted a one-year waiting period in the ISDS, among other changes from the US model. The BIT nonetheless gives the investor the right to access ICSID arbitration. In contrast, the BIT with the Democratic Republic of Congo, signed around the same time, contains a waiting period of six months.

position by putting forward a weaker “partial” model clause? Such puzzlers pose an important challenge to the notion that less is more, at least as far as ISDS is concerned.

E. Putting legal expert’s input into action

Table 2, below, shows a “lawyer’s view” of Allee and Peinhardt’s dependent variable. Whether it’s the best view is debatable. But I think that most experts in the field of IIL would probably consider the legal expert’s view to be more intuitively plausible than the view provided in Table 1.

What are the main differences? First, I would consider an ISDS clause that grants the investor access to both ICSID *and* other fora to be qualitatively better, from the investor’s perspective, than one that grants access only to ICSID. Let’s rank those clauses as “2”. Second, it is at least arguable that an ICSID-only clause is better than a clause that provides only non-ICSID options, like UNICTRAL or ICC arbitration. I say “at least arguable” because the case that ICSID is necessarily and significantly better than the leading alternatives is not so clear. As I suggested above, ICSID alternatives may offer some investors certain advantages (in terms of confidentiality, finality, cost, and so on), and ICSID’s general superiority has itself never been empirically demonstrated. But let’s accept Allee and Peinhardt’s arguments on this point, and rank an ICSID-only clause as “1” and a non-ICSID clause as “0”. Finally, most if not all IIL lawyers would view BITs that contain no ISDS clause (or that limit its scope of application to a very narrow subset of disputes) as significantly inferior to all others. Let’s rank those BITs as conceptually irrelevant with a “.”

<i>Table 2: The Law Professor’s View</i>		
Rank Order (Higher=Better)	Concept	Operationalization

2	Multiple fora (including ICSID)	ICSID + other for a
1	ICSID only	ICSID arbitration
0	Single or multiple fora (No ICSID)	UNCITRAL &/or ICC arbitration
. (Excluded from analysis)	No fora	No investor-state arbitration

5. A reconsidered analysis

In this section I demonstrate empirically what should be pretty intuitive: recoding a dependent variable along the lines that I have done above can, and normally should, dramatically change the results of the statistical analysis. My contribution here is to present results from what I call a “reconsideration” of Allee and Peinhardt’s original model. What I present is *not* a “replication” narrowly construed. I use a different sample and different variables, and I rely on my own coding of ISDS clause. (I elaborate on my understanding of replication in Appendix 1). I have not asked Allee and Peinhardt for their data, so the reader should not assume that they have refused to allow me to “replicate” their analysis, though I am probably less doctrinaire than others about the “duty” to share datasets.

My reasons for presenting a reconsideration, rather than a strict replication, are practical rather than theoretical. First, I had independently collected data on dispute settlement provisions in BITs as part of my dissertation research, some years ago, prior to the publishing of Allee and Peinhardt’s article. Second, to use

Allee and Peinhardt's data to examine the impact of my reconceptualization of the DV, I would likely need to revisit their original coding decisions. Their data as used in their published article would not, by itself, allow me to easily recode their DV along the lines presented above. And third, my main aim here is really not to "prove" that they have done something "wrong", in the sense of verifying the stability of their particular results. Rather, it is to show that a legally sensitive approach to variable construction can indeed impact the conclusions we draw from empirical studies of international legal phenomena.

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

To conduct my analysis, I coded two aspects of the dispute-settlement provisions of all publicly available BITs between 18 top capital-exporting states and

their treaty partners.⁴⁷ The first aspect was the focus of my earlier study: does the BIT guarantee the investor access to investor-initiated international arbitration for a wide variety of treaty-related disputes with the host state?⁴⁸

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

I recorded whether each BIT contained an effective, comprehensive ISDS provision naming any of the following arbitral fora: ICSID; UNCITRAL; ICC; Swedish Chamber of Commerce (SCC); non-UNCITRAL (or pure) ad hoc; the ICSID Additional Facility; and "other". For this paper, I then created two versions of a dependent variable. The first reflects Table 1, above, and is an analogue, I think, to Allee and Peinhardt's dependent variable; the second reflects Table 2. In both cases, I have excluded BITs that do not contain an effective, comprehensive ISDS clause.⁴⁹ However, in the paper's Appendix 2 provide results for a model that recodes the dependent variable to include no-ISDS BITs.

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

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

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

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

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

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

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

Following Allee and Peinhardt, I include a suite of independent variables that are analogous to those in their original model.

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

- (1) A measure of home state FDI outflows as a percent of home state GDP. This variable reflects Allee and Peinhardt’s argument that home states that have a large number of corporations engaged in FDI will face stronger domestic political pressure to negotiate strong ISDS provisions. This measure comes from the World Bank’s World Development Indicators (WDI).⁵¹ The WDI

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

⁵¹ Allee and Peinhardt also include measures of the home country’s embrace of “rule of law” principles, but their rule of law variable is insignificant in their analyses. I have elected not to include such a variable here, as the

dataset does not contain FDI outflow data for Belgium, so Belgium is excluded from my empirical analysis.

- (2) A dummy variable indicating whether the host state was a post-World War II colony of the home state. Allee and Peinhardt argue that ex-colonial masters will have an incentive to be more lenient in ISDS negotiations with their ex-colonies. It should be pointed out, however, that outside of Great Britain and France, none of the home states in my sample had significant post-war colonial empires.⁵²
- (3) The durability of the host state's Polity IV (democracy) rating. The durability indicator measures the number of years since a major change in the state's Polity rating. Allee and Peinhardt suggest that home states will view more durable regimes as less likely to take actions harmful to investors, and will thus be less likely to insist on strong ISDS. The Polity measure of democracy is widely used in political science.
- (4) The host state's Polity IV democracy rating. More democratic countries may be viewed as having stronger preferences for the rule of law, or as otherwise being better able to credibly commit to treating investors favorably. Allee and Peinhardt argue that home states will see less need to insist on strong ISDS when a host state respects the rule of law.

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

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

capital exporting countries in my sample have uniformly high rule of law scores; the values of the scores vary very little year-to-year; and rule of law data has been collected by the World Bank only since 1996.

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

have less objective need for the additional FDI that a strong ISDS clause might promote).

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

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

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

Finally, I also include

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

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

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

I estimate the model using ordered probit, with robust standard errors (clustered around home countries).⁵³ Clustering around home countries helps control for the possibility that there are home-country-specific differences in ISDS preferences or negotiating behavior. More concretely, we can think of clustering as controlling for the fact that home countries base their negotiations on very different model ISDS clauses. Table 3 provides results for the Allee and Peinhardt version of the dependent variable. Table 4 provides results for the reconsidered dependent variable.

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

As a first observation, note that Table 3 demonstrates relatively unimpressive evidence in support of Allee and Peinhardt's theory. The first four variables, all designed to measure home state preferences for strong ISDS, are statistically insignificant. Of the two variables measuring host state preferences, only Host GDP Growth is significant, but it is wrongly signed. The positive coefficient suggests that better-performing host states are more likely to accept strong ISDS clauses, in conflict with Allee and Peinhardt's theory. Finally, note that the two variables I've added—whether the host state had signed the ICSID Convention prior to signing the BIT, and the year counter, are both highly statistically significant. Host states that have not signed the ICSID Convention are less likely to accept strong ISDS, and, over time, ISDS provisions have become weaker.

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

In terms of the basic question that Allee and Peinhardt ask—whether there is evidence that states systematically bargain over ISDS provisions in ways that accord with their theory—the results here are disappointing. The model whose results are displayed in Table 3 performs unimpressively, with most variables failing to achieve statistical significance. The results for Table 4 are internally inconsistent, and, moreover, illustrate the sensitivity of the model to our lawyerly recasting of the dependent variable.

6. Conclusion

Too often law professors, and legal experts more generally, believe that they are unable to evaluate or contribute to statistical analyses of legal phenomena because they don't understand the underlying statistical theory or mathematical operations. Statistics mystify, and mystification means that the mystified object must be accepted or rejected as a matter of faith rather than as a result of careful, reasoned legal analysis. For many law professors, statistics are either lies or gospel. But as I suggest in this paper, legal experts need not be trained in the latest statistical methods to play a meaningful and constructive role in empirical debates about legal phenomena. That role can be critical, but it can also be collaborative. Working with the non-lawyer social scientist, the legal expert can use his legal expertise—his sense of how the law really works—to evaluate and to suggest improvements in the ways in which methodologically sophisticated social scientists translate legal phenomena into the numerical categories and values that make statistical analysis possible. The result, hopefully, will be more conceptually sound, accurate studies of legal phenomena that nonetheless provide persuasive empirical support for useful, generalizable theories.

* * *

Appendix 1: Reconsideration as “replication, broadly construed”

Replication in the narrow and more common sense means that Scholar A should make it possible, and even easy, for Scholar B to reproduce Scholar A's empirical results using identical methods, models, and data. This means, for example, that Scholar A should post his datasets on-line, and should explain as clearly as possible in his articles how he manipulated and processed the data to produce his reported results. Through replication, narrowly construed, Scholar B can demonstrate that Scholar A made some basic mathematical or statistical mistake, or that Scholar A's results change when a particular variable is added or deleted, or when a different estimation strategy is used. This latter understanding is what might be called "verification".

Replication broadly construed is more ambitious. It calls on the community of scholars interested in a particular empirical question or debate to engage in the open and regular *reconsideration* of current empirical understandings and beliefs, rather than on having the individual scholar to make it possible to reverse-engineer what has already been done. By reconsideration I mean the re-testing of received theories and empirical evidence using potentially different data, different models, and different methods. Through this kind of replication-as-reconsideration the scholarly community can triangulate its way to a better understanding of the causes and effects of international law.⁵⁴

An emphasis on encouraging replication-as-reconsideration is especially important given the well-known biases in social scientific circles toward the

⁵⁴ My distinction between replication narrowly versus broadly construed follows the distinctions discussed in Mitchell, *supra* note 1, at 188 n. 59 (quoting Paul S. Herrnsen, *Replication, Verification, Secondary Analysis, and Data Collection in Political Science*, 28 PS: POL. SCI. & POL. 452, 452 (1995)):

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

publishing of novel findings that confirm rather than reject the author's theory.⁵⁵ The bias toward novelty and theory confirmation means that first-published, theory-confirming studies tend to get locked in as the scholarly community's understanding of what it now "knows" about the phenomenon in question. In fact, empirical studies don't provide knowledge; they provide evidence, and Study 1's evidence that x causes y will typically be incomplete and imperfect—and more so than the typical author is likely to admit, given the professional incentives to prove with slam-dunk authority the validity of his novel theory. But relying on a single study as evidence that x causes y is a bit like relying on a single eyewitness to identify a masked bank robber. One witness is better than none, even if most prosecutors would feel better with two or three—as long as they agree on what they saw.

We can view the debate about whether BITs succeed in promoting FDI as consisting of an atypically large set of reconsiderations. While initial empirical studies indicated that BITs cause massive inflows of FDI (strongly supporting the particular authors' theory), other studies, using different samples, data, and methods, cast doubt on the validity of those findings. The large number of competing studies, including some that disconfirm theoretical expectations, is unusual, and is the result, most likely, of the fact that the question of whether BITs work cuts across several disciplines. Thus we have studies published in student-edited law reviews and in peer-reviewed journals devoted to political science; development studies; law-and-society; and economics. The legal academy also maintains a robust edited-volume tradition, providing another outlet for empirical BIT studies. Student-edited law reviews and edited volumes are also more likely to publish second-wave and theory-disconfirming studies than are peer-reviewed journals (where considerations of novelty and theory-confirmation serve as imposing gatekeepers).

⁵⁵ The so-called "file drawer problem" (where empirical studies demonstrating null findings get "filed away" rather than published) afflicts other fields of academic inquiry. However, some fields, such as epidemiology, are much more open than the social sciences to the repeated testing of the same substance or treatment on different samples of subjects and using different research designs. Thus we might find 10 published studies of the effects of substance x on disease y , a number sufficient to allow a statistical meta analysis of the various results.

Reconsideration certainly has an important epistemological downside. A single, well-done study that shows that x causes y provides the reader with a measure of certainty upon which he can confidently base his actions. Two well-done studies that show collectively and in contradiction that x causes y and that x doesn't cause y make confident action much more difficult to undertake. The "do BITs work" debate illustrates the danger. We have evidence that BITs work, and we have evidence that they don't work. What is a policymaker considering entering a BIT supposed to do?

The question of how policymakers should weigh conflicting evidence is beyond the scope of this paper, but the example indicates the tendency of replication to counteract the decisional certainty that can result from actions based on causal relationships identified by single studies. More studies of the same question will often raise as many questions as they answer, but one hopes that over time, conflicting strands of evidence will cumulate and converge toward some reasonably solid consensus of what we (probably) know or don't know.

* * *

Appendix 2: Additional model results

In Table 5, below, I re-run the replication model whose results were illustrated in Table 3. The difference is that the Table 5 model modifies the dependent variable to include BITs that do not contain a comprehensive, effective ISDS clause. I code these treaties as "0" (zero), the same coding given to BITs containing comprehensive, effective ISDS clauses that provide investors with access only to non-ICSID fora. As noted in the main text, I understand Allee and Peinhardt as possibly considering BITs without ISDS to be theoretically similar to BITs with non-ICSID ISDS. There are two basic points to take away from the appended Table.

First, note that the inclusion of no-ISDS BITs impacts reported results in important ways. For example, host GDP growth is no longer significant. Be aware,

however, that recasting the dependent variable also necessarily expands the size of the sample, so we are not quite comparing apples to apples. On the other hand, there is nothing inherently invidious about comparing apples to oranges. The whole point of comparison is to permit us to understand and appreciate differences in the qualities of the objects of study.

Second, note that the results for Model 5's version of the replication specification remain very different from Table 4's results, which use my "lawyer's version" of the dependent variable.

Table 5: *Determinants of ISDS Strength, Allee & Peinhardt Construction of Dependent Variable, Including BITs without Comprehensive ISDS Clauses*

```
Ordered probit regression           Number of obs =      686
                                   Wald chi2(8) =      .
                                   Prob > chi2 =      .
Log pseudolikelihood = -656.31517  Pseudo R2 =      0.0727
```

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

depvar_replication2	Robust		z	P> z	[95% Conf. Interval]	
	Coef.	Std. Err.				
home_fdi_outflows	.0330694	.0295471	1.12	0.263	-.0248418	.0909806
host_polity2	.0124236	.0063864	1.95	0.052	-.0000936	.0249407
host_polity_durability	-.0048054	.003069	-1.57	0.117	-.0108205	.0012097
host_colony	.3622085	.1388588	2.61	0.009	.0900502	.6343667
host_gdp_growth	.0002135	.0047715	0.04	0.964	-.0091384	.0095654
host_ibrd_credits	.0597887	.0892721	0.67	0.503	-.1151814	.2347587
icsid_signed	.8511882	.1136825	7.49	0.000	.6283747	1.074002
diff_gdp	2.91e-14	3.63e-14	0.80	0.422	-4.19e-14	1.00e-13
year_counter	-.0053587	.0246848	-0.22	0.828	-.0537401	.0430227
/cut1	-.3833588	.4612807			-1.287452	.5207347
/cut2	1.061721	.4668711			.1466705	1.976771
