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Does Bureaucratic Inertia Matter in Treaty Bargaining? Or, Toward a Greater Use of Qualitative Data in Empirical Legal Inquiries

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In this brief reaction, I offer some comments on Professor Yackee's excellent note, *Do states bargain over investor-state dispute settlement? Or, toward greater collaboration in the study of bilateral investment treaties*.¹ I join his call for more empirical and interdisciplinary research in the field of international investment law and I argue against perpetrating the quantitative/qualitative divide in empirical legal research generally. Qualitative data, when obtained and analyzed in rigorous ways, can be as revealing as quantitative analysis. Interviews and other similar data collection strategies are very relevant and often an important departure point in every empirical inquiry. Hence—when possible—surveys and case studies should be used in complementary ways for improving empirical legal studies in international investment law.

* * *

Professor Yackee is a rising star among the empirical legal community and an established scholar in the field of international investment law, with a delightful and clear style. In his piece reproduced in this volume, Professor Yackee reminds us of the benefits and perils of empiricism in legal scholarship and advocates for greater collaboration between lawyers, legal scholars, and social scientists.²

When it is well done, empirical research may reveal unexpected, often counter-intuitive relationships that challenge the beliefs and assumptions of legal scholars (e.g., the relationship of crime rates and tough laws)³. This type of research may also settle normative arguments that scholars have at times spent years arguing for or against (e.g., the existence of racial discrimination in death penalty convictions),⁴ or reject false claims about causation between two phenomena (e.g., that more guns yield less crime).⁵ However, when done poorly, either by legal scholars without proper methodological training, by social scientists with insufficient understanding of the law or the legal field, or by scholars lacking both, empirical research may lead to wrong and even potentially disastrous prescriptions.⁶ As Alan O. Sykes—a giant in the field of international economic law—once told his class about a seemingly promising empirical paper: some

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1. Jason Yackee, *Do States Bargain Over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, 12 SANTA CLARA J. INT'L L. 277 (2013) [hereinafter Yackee Dispute Settlement Bargain].
 2. Yackee Dispute Settlement Bargain, *supra* note 1, at 277.
 3. John J. Donohue III & Stephen D. Levitt, *The Impact of Legalized Abortion on Crime*, Q. J. ECON. 379-420 (2001) (discussing the correlation between the legalization of abortion and reduced crime rates).
 4. John J. Donohue III, *Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation From 4686 Murders to One Execution* 100 (2013), available at http://works.bepress.com/john_donohue/87.
 5. John J. Donohue III, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 CRIMINOLOGY & PUB. POL'Y 397-410 (2003).
 6. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (providing a critique of empirical legal research).

empirical legal studies may show how knowing a little bit of two disciplines can be a bad combination.

As observed by Professor Yackee, scholars interested in legal questions with different disciplinary backgrounds often do not interact with each other, let alone with lawyers, but they share the goal of deploying empirical evidence to understand legal systems and legal behavior.⁷ Although empirical legal scholars may use different sorts of data, different methods of data collection, and different analytic approaches, they all face the challenges of empirical research design: identifying research questions, selecting appropriate methods for answering those questions, gathering and managing valid data, conducting rigorous analyses, and interpreting the results in a way that is faithful to the evidence.⁸

Professor Yackee reminds us of a very practical way in which those not trained in modern statistical methods have the capacity to contribute in meaningful ways to empirical research without turning themselves into quants. He does so by showing how in creating “measurements,” scholars may hide or decontextualize a phenomenon. Similarly, variables good for regression analysis may also hide the complexity of what is often referred to as the *law in action* (i.e., how rules arise and operate in the real world).⁹

More importantly, Professor Yackee reminds us that the conversation in empirical legal research is not a one-way street: as legal academicians should use the advice of social scientists for good, valid, and replicable empirical legal research, social scientists should likewise refrain from law-related research without understanding the malleability of the law and its instrumental, often strategic use.¹⁰ In other words, interdisciplinary empirical legal research is a two-way or sometimes multiple-way street that leads to better understanding of legal systems, legal behavior, and how law is implicated in our social life, more generally.

I couldn't agree more with this view. Moreover, Professor Yackee's example is convincing and elegant: a dependent variable (the outcome of bilateral investment treaties (BITs) negotiations) constructed by two political scientists without deep understanding of how litigants perceive and assess dispute settlement choices, how elites are involved in negotiation approach treaty drafting, or the historical evolution of international investment dispute settlement system, may surely render meaningless results regarding the basic underlying mechanism of treaty bargains.¹¹ In this basic example, consulting a lawyer at a firm with expertise in the field would have confirmed

7. Yackee Dispute Settlement Bargain, *supra* note 1, at 281-83.

8. See generally DEBORAH R. HENSLER, RESEARCH METHODS FOR POLICY ANALYSIS: A PRIMER FOR LAWYERS, (2001).

9. Stewart Macaulay, *Wisconsin's Legal Tradition, Speaking to Benchers before Receiving Brazeau Professorship* (1994), in 24 Gargoyl, Issue 3, 6-10.

10. Yackee Dispute Settlement Bargain, *supra* note 1, at 279.

11. *Id.* at 283-87.

that having the option of a number of forums tends to be better than no option; asking a lawyer at the State Department of the United States would have confirmed that alternatives to ICSID are especially important when a country is not a party to the ICSID Convention; and asking a member of ICSID's Secretariat would have helped to confirm that decisions such as Klöeckner,¹² Fedax,¹³ or Mafezzini¹⁴ have changed the way lawyers assess dispute settlement options, or how since Argentina's disputes, or the creation of the Additional Facility, ICSID's value as a dispute resolution forum has been reassessed.¹⁵ The example is wonderful because it illustrates—in very simple and intuitive terms—the important role of lawyers and legal scholars in quantitative empirical research.

Perhaps where I take a small departure from Professor Yackee's main point is by suggesting that empirical legal studies be defined more broadly. Quants are only part of the empirical legal community with whom lawyers and legal scholars can and should attempt to collaborate. *Qualitative* empirical research is as valuable as *quantitative* research, and provides possibilities for giving rich context to legal behavior. Qualitative descriptive research methods lend themselves to narrative analyses rather than statistical analysis, are well suited to studies that chronicle the design and implementation of new programs or negotiations (e.g., legislative histories, process evaluations or treaty bargains), and investigate the dynamics of decision-making, conflict resolution, and litigation. It is in this area where lawyers and legal scholars, often passionate about legal minutia, constantly aware of the strategic use of the law, observant of details, may contribute more frequently and perhaps more effectively with empirical scholarship.

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12. Klöeckner v. Republic of Cameroon: *Decision of the Ad Hoc Committee*, 1 ICSID REV. FOREIGN INV. L. J. 89 (1986) (annulling the awards for reasons seen by many experts as second-guessing the reasoning of the tribunal that decided the cases).
 13. Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶ 29 (July 11, 1997) (determining that, for the purpose of both the BIT and the Convention, some promissory notes purchased by the investor qualified as an investment).
 14. Maffezini v. Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶ 64 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) (confirming that investors, by reference to a most favored nation [MFN] clause, might rely on more favorable dispute settlement provisions contained in other BITs when compatible with the *ejusdem generis* principle. In this particular case, Spain had objected to the Tribunal's jurisdiction because the investor had failed to submit the case to the domestic courts in Spain for a period of eighteen months before bringing an investment claim as set forth in the Argentine-Spain BIT. The Tribunal agreed that the claimant did not have to first submit their claims to domestic courts based on the MFN clause in a different treaty, the Spain-Chile BIT.)
 15. See Piero Bernardini, *ICSID Versus Non-ICSID Investment Treaty Arbitration*, in LIBER AMICORUM BERNARDO CREMADES, 159 (Miguel Ángel Fernández-Ballesteros and David Arias, eds., 2010) available at http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (noting that the limited review and full compliance of the awards, in the past considered an advantage of the system, are no longer so evident).

In my view, a narrow definition of empirical research may reflect a general trend in our contemporary culture to often regard quantitative data as inherently more objective than qualitative data, hence a tendency to define quantitative data as “empirical,” and qualitative data as not. This is a true trend in legal academia.¹⁶ However, the results of qualitative empirical research are valuable, and when done well, can be equally revealing.

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The value of qualitative data could be illustrated with the following example. As described by Professor Yackee, Professors “Allee and Peinhardt code the strength of ISDS provisions (their dependent variable) by noting the dispute settlement 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.”¹⁷ From this, it is clear that the authors of the paper started with a theory in mind, with—perhaps—minor (or no) input from those involved in negotiating BITs (i.e., government representatives and negotiators) from “powerful capital exporters” or “weaker capital importers” countries.¹⁸ This input could be easily obtained through interviews and should have preceded any “Big Data” collection (e.g., categorizing outcomes of treaty negotiations). This simple exercise could be key to specify the model (a theory about what is causing what), which—at the same time—could impact the assessment of the data needed to create the analyzed variables.

Perhaps due to the methodological training of Allee and Peinhardt (i.e., political science) the authors seem to be concerned with a question of geopolitical power, or bargaining power.¹⁹ However, let’s assume that the Mexican Chief Negotiator during the interviews mentions that after NAFTA the same ISDS provisions (again, their dependent variable) are often replicated for “convenience.” The Chief Negotiator explains to the interviewee that for the *Dirección General de Consultoría Jurídica de Negociaciones* (Mexican BITs negotiators) it is easier to specialize in one type of treaty model. In other words, whether Mexican negotiators are on the “offensive side” (trying to protect Mexican investors abroad) or the “defensive side” (preventing the sacrificing of sovereignty to ISDS tribunals) the institution has made a policy choice. She also explains that after

16. See, e.g., Jeff Frank Strnad, *Should Legal Empiricists Go Bayesian?* 9 AM. L. ECON. REV. 195 (2007) (arguing that empirical legal studies can benefit substantially from Bayesian methodologies).

17. Yackee Dispute Settlement Bargain, *supra* note 1, at 279 (citing Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Settlement Provisions*, 54 INT’L STUDIES Q. 1 (2010)).

18. Yackee Dispute Settlement Bargain, *supra* note 1, at 284.

19. *Id.* at 285.

NAFTA in 1993,²⁰ the same provisions were included in the Mexico-Columbia-Venezuela FTA (G3) in 1994²¹ and, among many others, the Japan-Mexico FTA in 2004.²² The researchers then could assess this key fact and, if the question of bargaining power remains of interest, try to include it in the model (for instance, by controlling how prior or extremely relevant negotiations may affect prospective outcomes). If that was the case, the researcher could specify a model that is less concerned with bargaining power and more concerned with diffusion, or how some dispute settlement options spread over a network of treaties.

This is not to say that the research of Allee and Peinhardt is not valuable. It is very much so. However, it could be even more valuable if in addition to the laborious statistical analysis could be complemented with a case study of an *actual* treaty negotiation (or law in action). It is probably true that bargaining power has something to say about treaty outcomes, but how and when is not clear. It is in this that lawyers not trained in quantitative methods also could help to improve the ways in which methodologically sophisticated social scientists translate legal phenomena into the numerical categories and values that make statistical analysis possible.

While some empiricists may have a preference for some methodological approaches, all have the duty not to perpetuate the quantitative/qualitative divide. The decision whether to rely on qualitative or quantitative data in an empirical analysis should be based primarily on the nature of the questions asked and the analysis intended. And when appropriate, a combination of methodologies may be the most powerful. As Lawrence Friedman, a pioneer in the field of legal studies once told me: “Qualitative analysis without quantitative evidence tends to be entertaining anecdotes; quantitative analysis without qualitative data is often blind.”²³

Therefore, whether assisting quants in creative adequate variables or measurements that reflect the complexity of the law in action, or designing and executing case studies to understand a social phenomenon in context without losing sight of the details and nuances that the more standardized survey approach neglects, law professors should embrace, and not shy away from empiricism. This is, I believe, an important note to motivate more to join the empirical community.

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20. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 694 (1993).
 21. Tratado de Libre Comercio Colombia-México (ACE No. 33) [Free Trade Agreement between the United Mexican States for Mexico, Colombia and Venezuela], art. 17-18, June 13, 1994, <http://www.sice.oas.org/Trade/go3/G3INDICE.ASP#Denuncia>.
 22. Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, art. 79, Sept. 17, 2004, *available at* <http://www.mofa.go.jp/region/latin/mexico/agreement/>.
 23. Interview with Lawrence Friedman, Marion Rice Kirkwood Professor of Law, Stanford, CA, (Feb. 1, 2013).

I want to conclude by joining Professor Yackee in his call for more empirical and interdisciplinary research in our field. As well pointed in his paper, two lines of research dominate the empirical studies in international investment law.²⁴ On the one hand, studies that use BITs as independent variables, most commonly, looking at whether the treaties cause increases in foreign direct investment. On the other hand BITs as dependent variables, or research attempting to explain why states sign BITs.²⁵ This is, I argue, the result of a limited understanding of the goals of modern international investment law.

To increase the possibilities for empirical investigations in the field I've argued elsewhere that we should understand three different historical motivations for investor-state arbitration and BITs, or modern international investment law: specialization of international investment dispute settlement, de-politicization of inter-state relations, and stabilization of economic policy. These three sources are concerned with specific long and short-term outcomes, are susceptible to critiques posed by diverse theoretical approaches to international law, and therefore, compel scholars to perform new and different empirical assessments. Understanding these three sources can substantially progress and also shift the focus to new empirical questions in the field.²⁶

24. Yackee Dispute Settlement Bargain, *supra* note 1, at 283-84.

25. Yackee Dispute Settlement Bargain, *supra* note 1, at 284.

26. For a deeper discussion, see Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 *FORDHAM INT'L L.J.* 465 (2013).