

Empiricism and International Law: Insights for Investment Treaty Dispute Resolution

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INTRODUCTION

Recognizing we may be “on the cusp of a golden age of social science empiricism,”¹ legal scholars in the United States have called for increased attention to the empirical dimension of legal scholarship.² Meanwhile, conferences,³ journals,⁴ articles,⁵ and blogs⁶ related to the Empirical Legal Studies (ELS)⁷ “movement”⁸ continue to develop. The

1. John O. McGinnis, *Age of the Empirical*, 137 POL’Y REV. 47 (2006), available at <http://www.hoover.org/publications/policyreview/3402126.html>.

2. N. William Hines, then-president of the Association of American Law Schools (AALS), articulated the need to “focus attention on the empirical dimension of our scholarly research.” N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, at 10, AALS NEWSL., Feb. 2005, available at http://www.aals.org/services_newsletter_presFeb05.php. In 2006, the theme of the AALS annual meeting was also “Empirical Scholarship: What Should We Study and How Should We Study It?” Annual Meeting Program, Association of American Law Schools (Jan. 2006), <http://www.aals.org/am2006/index.html>.

3. The Annual Conference on Empirical Legal Studies, jointly organized by Cornell Law School, New York University School of Law, and the University of Texas School of Law, had its second conference in November 2007. The First Annual Conference was held in October 2006. See First Annual Conference on Empirical Legal Studies, <http://www.utexas.edu/law/conferences/cels2006/> (last visited Mar. 4, 2008); Second Annual Conference on Empirical Legal Studies, <http://www.law.nyu.edu/cels/> (last visited Mar. 4, 2008).

4. The Journal of Empirical Legal Studies, created in 2004, publishes empirical analyses of the legal system. See Journal of Empirical Legal Studies: Aims and Scope, <http://www.blackwellpublishing.com/aims.asp?ref=1740-1453> (last visited Mar. 4, 2008).

5. Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002); Peter H. Schuck, *Why Don’t Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

6. See Empirical Legal Studies, <http://www.elsblog.org> (last visited Mar. 4, 2008); Ratio Juris, <http://ratiojuris.blogspot.com> (last visited Mar. 4, 2008). Some blogs have sections dedicated to Empirical Legal Studies. See Conglomerate Blog, http://www.theconglomerate.org/empirical_legal_studies/index.html (last visited Mar. 4, 2008); Concurring Opinions, http://www.concurringopinions.com/archives/empirical_analysis_of_law/ (last visited Mar. 4, 2008). Other blogs include postings that discuss empirical legal analysis. See Posting of Mark Graber to Balkinization, <http://balkin.blogspot.com/2005/12/empirical-legal-studies.html> (Dec. 1, 2005, 9:01 EST) (“Empirical legal studies is hot.”); Posting of Jim Chen to Jurisdynamics, <http://jurisdynamics.blogspot.com/2006/10/incognito.html> (Oct. 31, 2006, 2:54 EST) (noting “the rise of empirical legal studies”).

7. For the purposes of this Essay, ELS is the application of social science research methods—

technological advances of recent years,⁹ the value of making informed policy choices,¹⁰ and the benefits of creating grounded legal doctrine,¹¹ facilitate the renewed interest¹² in empirical perspectives and methodologies.¹³

This Essay adopts Professor Russell Korobkin's definition of empiricism as a methodological approach that involves an effort to "analyze a

whether involving the use of qualitative, quantitative, or mixed methods—to gather, describe and analyze data to draw inferences. See *infra* note 14, defining empiricism, and Part II, outlining how to use quantitative, qualitative, and mixed-methods empirical approaches. The use of the term ELS in journals, blogs, and listservs suggests the term has become part of the legal academy's vernacular. See Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 142 (2006) ("ELS recently and dramatically has expanded in law reviews, at conferences, and among leading law faculties."); Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 512 (2007).

8. See Posting of William Henderson to Empirical Legal Studies (Dec. 5, 2007, 9:52 EST), http://www.elsblog.org/the_empirical_legal_studi/2007/12/els-bibliograph.html ("The ELS 'movement' has turned an important corner.").

9. GLENN REYNOLDS, *AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS* (2006); see also McGinnis, *supra* note 1, at 49 ("One University of Chicago social scientist is said to have taken the entire summer to run a regression on a mainframe computer 40 years ago. Now researchers can run scores of regressions on their laptops in a few hours.").

10. See Conference, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007) (including articles from the Yale Journal of International Law Fifth Annual Young Scholars Conference, "The 'New' New Haven School: International Law—Past, Present & Future," focusing on interdisciplinary research in international law and relations).

11. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 909–13 (2002). But see Guglielmo Verdirame, "The Divided West": *International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553, 561 (2007) (suggesting that empiricism is viewed "with indifference, or as futile by most European international lawyers").

12. In the international legal context, for example, some international law positivists were interested in "focusing on an empirical analysis of the practice of states." BOLESŁAW A. BOCZEK, *INTERNATIONAL LAW: A DICTIONARY* 23 (2005); see also Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313 (1908); Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 403 n.3 (2002) ("Ulrich Fastenrath, for example, develops a typology of positivism in international law that covers empirical positivism, with its recognitional, sociological and psychological branches...and...logical positivism...and the approach to rules represented by Hart's rule of recognition."); Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOC. INQUIRY 975, 975–76 (2006) (discussing the historical antecedents of legal realism and suggesting that the new legal realists can add additional methodologies such as "transnational and multi-sited ethnographic research that tracks the flows of people, ideas, laws, and institutions across national boundaries"); Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* (Colin B. Picker et al. eds., forthcoming 2008) (on file with author); *infra* notes 33 and 42.

13. See, e.g., Ulen, *supra* note 11.

set of data for more than anecdotal purposes.”¹⁴ Empirical methodologies can provide opportunities to make more informed policy choices and offer additional information about international law matters.¹⁵ There have, however, been challenges in using empiricism to explore international law phenomena.¹⁶ While international lawyers are adept at supporting normative arguments from inferences in existing empirical social science literature,¹⁷ there appears to be a perception (perhaps not shared by all, given existing quantitative¹⁸ and qualitative¹⁹ research)

14. See Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1035 (2002) (observing “[e]mpiricism is often understood by legal scholars to refer exclusively to statistical or quantitative analysis” but suggesting empiricism does not depend on “whether or not the analysis is quantitative and even if the data set is not a particularly systematic or a clearly representative subset of the population in which the author is ultimately interested”); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994); Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT’L 291, 292 (2006); Hines, *supra* note 2, at 10. Part II of this Essay sketches the boundaries of this definition in greater detail.

15. This Essay argues empirical methodologies play a key, but not exclusive, role. This may begin to address the concern articulated by Joel Trachtman: “[T]here is no agreement on the theory and methodology of international law. This lack of consensus challenges the very legitimacy of international law as an academic field.” Joel P. Trachtman, *International Economic Law Research: A Taxonomy*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* (Colin B. Picker et al. eds., forthcoming 2008) (manuscript at 3, on file with author).

16. See, e.g., *infra* Part III.B (discussing challenges related to conducting empirical analysis of international investment dispute resolution).

17. See Laura A. Dickinson, *Toward a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 547, 550–51 (2007) (“Empirical political scientists are right that many international law scholars have traditionally been overly sanguine in simply assuming the efficacy of international law and then busying themselves with textual analyses of the international law instruments themselves.”); see also Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Concepts of International Law*, 19 MICH. J. INT’L L. 345, 370 (1998) (“[S]ocial science in general has already contributed a great deal of useful theory describing and explaining the two-way causal relations between rules and behavior, but much more remains to be done in applying this work to the theory and empirical study of international problems.”); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 655 (1999) (referring to social science literature to argue empirical research demonstrates shortcomings in a theoretical framework); ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004); Verdirame, *supra* note 11, at 558–63, 571.

18. See, e.g., Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT’L REV. L. & ECON. 295 (1996) (quantifying and statistically analyzing variables that affect the probability of legislative repeal of judicial statutory interpretation); John King Gamble et al., *Human-Centric International Law: A Model and Search for Empirical Indicators*, 14 TUL. J. INT’L & COMP. L. 61 (2005) (empirically analyzing human rights treaties); Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006) (analyzing increases in civil litigation in Japan during the 1990s); Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD.

that they largely have not asked empirical questions or utilized empiri-

205 (2002) (empirically analyzing dispute resolution processes at the WTO); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (presenting the results of empirical research on the effectiveness of human rights treaties); Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185 (2003) (expanding on the author's empirical analysis of human rights treaties); Eric J. Pan, *Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication*, 40 HARV. INT'L L.J. 379 (1999) (using empirical evidence to analyze NAFTA Chapter 19 decisions); Eric A. Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 599 (2005) (finding evidence that ICJ judges favor states that appoint them or who have similar culture and wealth levels but "weak or no evidence that judges are influenced by regional and military alignments"); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005) (analyzing "performance data" for various international tribunals to assess the value of tribunal independence); *see also infra* note 61 and accompanying text (referencing the works of international trade scholars).

19. *See, e.g.*, INTERNATIONAL LAW AND SOCIETY: EMPIRICAL APPROACHES TO HUMAN RIGHTS (Laura A. Dickinson ed., 2007) (gathering empirical literature related to international human rights law); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE (2006) (using an anthropological perspective to analyze human rights); THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL (Mark Goodale & Sally Engle Merry eds., 2007) (drawing on anthropological case studies of human rights work from around the world to analyze human rights in practice); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003) (using a historical and interdisciplinary approach to consider third-world resistance movements); Elena A. Baylis, *Beyond Rights: Legal Process and Ethnic Conflicts*, 25 MICH. J. INT'L L. 529, 535 (2004) (providing a "case study of three recent ethnic conflicts in Ethiopia"); Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1, 7 (2007) (analyzing parallel judicial systems in Kosovo partly on the basis of "interviews with Albanian and Serb judges and lawyers and with members of the international community working on the relevant legal issues"); Heinz Klug, *Constitution-Making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 WIS. INT'L L.J. 269 (2007) (using the South African Constitution as an instructive case study); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005) (conducting interviews with officials and using them to tell three transnational law stories); Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65, 82-100 (2004) (conducting empirical analysis to analyze compliance rates related to international trade finance); Galit Sarfaty, Note, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791, 1801-09 (2005) (analyzing a case study of a World Bank loan to Morocco to consider the Bank's effect on indigenous rights); Galit Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation*, 48 HARV. INT'L L.J. 441, 455-69 (2007) (using ethnographic research of a community to analyze the process of adopting international norms); *see also* MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, HARV. INT'L L.J. (forthcoming 2008) [hereinafter Burke-White, *Domestic Influence*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023923; William Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005) [hereinafter Burke-White, *Complementarity in Practice*].

cal methodologies.²⁰ Legal scholars outside of international law,²¹ and scholars in disciplines other than law who nevertheless have an international focus,²² by contrast, appear to have been more willing to grapple

20. Andrew Hurrell, *Conclusion: International Law and the Changing Constitution of International Society*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 327 (Michael Byers ed., 1999); see also Kenneth W. Abbott, Commentary, *Modern International Relations Theory: A Prospectus in Retrospect and Prospect*, 25 *YALE J. INT'L L.* 273, 276 (2000) [hereinafter Abbott, *Prospectus II*] (Abbott suggests the critical questions that international relations theory would posit involve "How exactly does law affect people's behavior? How, if at all, do legal rules differ from other norms? What conditions determine the effectiveness of international legal rules? What explains variations in legalization and compliance?"). *But see* Verdirame, *supra* note 11, at 558–61 (commenting on the use of empiricism in U.S. legal scholarship but failing to distinguish between scholars conducting primary research and those using inferences from existing research to support their normative arguments).

Additional scholarship discusses empirical analyses, or the need for empirical consideration, of international law phenomena. See THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROcity AND RETALIATION IN U.S. TRADE POLICY* (1994) (providing an analysis of U.S. international trade statutes by economists); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 *DUKE L.J.* 983 (2005) [hereinafter Goodman & Jinks, *Challenges*] (advocating for empirical analysis of factors influencing state behavior and diffusion of global norms); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004) [hereinafter Goodman & Jinks, *How to Influence States*] (providing a framework for future empirical analysis); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 *EUR. J. INT'L L.* 171 (2003) (commenting on the empirical analysis of Oona Hathaway); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 337–66 (1997).

21. While it would be difficult to provide comprehensive citations for all areas, there are, for example, rich literatures about empirical approaches to torts, employment discrimination, and antitrust. See, e.g., *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* (Fred S. McChesney & William F. Shugart II eds., 1995) (containing empirical studies of antitrust); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 *J. EMPIRICAL LEGAL STUD.* 429, 440 (2004) (employment discrimination); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093 (1996) (tort law); Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 *ANTITRUST L.J.* 271 (2007) (antitrust); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 *WASH. & LEE L. REV.* 111 (2007) (employment discrimination); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. PA. L. REV.* 1147 (1992) (torts); Gary T. Schwartz, *Empiricism and Tort Law*, 2002 *U. ILL. L. REV.* 1067 (2002) (torts). *But see* Michael S. Jacobs, *Presumptions, Damn Presumptions and Economic Theory: The Role of Empirical Evidence in Hospital Merger Analysis*, 31 *IND. L. REV.* 125, 125 (1992) ("Despite the preeminent role of economic theory in antitrust law, empirical economic evidence has played a relatively small part in both the formation and refinement of economic theory and the judicial resolution of individual disputes.").

22. See, e.g., Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 *THIRD WORLD Q.* 1, 25–32 (2001) (discussing range of empirical research on relationship between legal institutions and country development); Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998) (using data from forty-nine countries to study the link between investor protection laws and economic development). There has been concern that such scholars, with-

with empirical approaches to problem solving and analysis of legal issues.²³

While some might suggest international law scholarship has “become lazy” and is “no longer sufficiently empirical,”²⁴ the development of general empirical scholarship in the legal academy creates opportunities to provide a compelling counter-narrative. Rather than relying on logic or instinct alone, empirical methodologies provide scholars with tools to gain new facts, see existing ideas through a different lens, and engage in a more nuanced analysis of international law phenomena. One need only look to statements made by President Evo Morales of Bolivia in 2007 that transnational corporations always win investment treaty arbitrations, which quantitative data flatly contradicts,²⁵ or the recent reports of arguably uncontextualized or unrepresentative anecdotes by the *Financial Times*,²⁶ to understand the potential value of empiricism.

While empiricism may not lend itself to every aspect of international law analysis, specific areas may be better suited for empirical methodologies than others. There appear to be natural synergies for international investment treaty dispute resolution. With surges in foreign investment and treaties protecting that investment, there is increasing interest in how investment treaties function, whether they achieve their goals, and at what cost.²⁷ Given the implications for public policy, in-

out a background in law, do not capture legal nuances properly. See Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 427 (2007) (noting mischaracterizations in empirical analyses of legal issues that were conducted by non-lawyers); Posting of Gordon Smith to Conglomerate Blog, http://www.theconglomerate.org/2006/04/llsv_revisited.html (Apr. 27, 2006) (noting that the work of La Porta et al. was originally a “sensation” but that “[t]he initial excitement among legal scholars waned quickly when we...found the methodology wanting”); see also Erik Berglöf & Ernst-Ludwig von Thadden, *The Changing Governance Paradigm: Implications for Transition and Developing Countries*, ANN. WORLD BANK CONF. ON DEV. ECON. 135 (1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=183708.

23. See, e.g., EMPIRICAL STUDIES OF STRATEGIC TRADE POLICY 3–8 (Paul Krugman & Alasdair Smith eds., 1994); Sule Ozler & Dani Rodrik, *External Shocks, Politics and Private Investment: Some Theory and Empirical Evidence*, 39 J. DEV. ECON. 141 (1992); see also Allison Marston Danner & Beth Simmons, *Credible Commitments and the International Criminal Court* (2nd Annual Conference on Empirical Legal Studies Paper, June 1, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991128.

24. David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 493 (2001) (reviewing ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999)).

25. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 3 (2007).

26. See *infra* notes 143–48 and accompanying text.

27. See, e.g., Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337 (2007) (gathering literature

ternational relations, and allocation of domestic financial resources,²⁸ concentrating energy on empirical assessment of international investment law is not misplaced and perhaps is even necessary.²⁹

This Essay considers the efficacy of using empirical methodologies to gain insights about the resolution of investment treaty disputes and international investment law. Part I considers the historical tensions between international law and empiricism and recent moves towards reintegration. Part II explores what form empiricism might take and argues for a broad understanding of potential empirical methodologies. Part III analyzes how to develop an empirical approach in light of the costs and benefits and proposes five steps to facilitate the creation of an empirical research agenda for international investment treaty dispute resolution. While recognizing that empiricism is not a panacea, the Essay suggests that the benefits of making empiricism part of the methodological landscape of investment treaty dispute resolution scholarship are worth the costs. Empiricism offers a chance to obtain accurate information about investment disputes, correct misperceptions about existing dispute resolution processes, permits considered analysis of legal issues affecting the public, and facilitates informed decisions about the negotiation and revision of investment treaties. Commentators might therefore consider whether there are appropriate opportunities to infuse their scholarship with empirical methodologies and use the steps proposed in this Essay to generate information that can form part of a dialogue to promote a more informed discourse on international investment law.

I. EMPIRICISM AND INTERNATIONAL LAW

Legal scholarship has been criticized as being divorced from empirical reality.³⁰ While the trend appears to be changing,³¹ there is evidence

that assesses whether investment treaties achieve their purported benefits); Franck, *supra* note 25 (engaging in preliminary analysis of costs of investment treaty dispute resolution).

28. See PUBLIC CITIZEN, NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005 (Feb. 2005), available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf> [hereinafter PUBLIC CITIZEN, RECORD]; see also Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL. 47, 49 (2005).

29. See Dickinson, *supra* note 17, at 551 (“[E]mpirical approaches to international law are necessary.”).

30. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810–12 (1999).

31. Keck, *supra* note 7, at 512 (“[T]he so-called empirical legal studies (ELS) movement has risen from obscurity to prominence in just a few short years.”); Robert C. Ellickson, *Trends in*

that empirical methodologies are still relatively rare in legal scholarship.³² The claim that empiricism can enhance legal scholarship is not new.³³ International law, however, has tensions that have perhaps inhibited its development, particularly in investment law and dispute resolution.³⁴

A. *The Historical Context*

It has been suggested that “[m]ost academic inquiries into international law lack empirical foundations” and are “principally normative or theoretical, not descriptive.”³⁵ This observation may originate from certain aspects of international law.³⁶

There have, for example, been historical tensions between international relations (IR) scholars and their international law (IL) counterparts. While it was not always the case,³⁷ from “the 1960s to the 1990s, a chasm opened between the study of international relations and the study of international law.”³⁸ David Bederman explains:

Legal Scholarship: A Statistical Study, 29 J. LEGAL STUD. 517 (2000); Heise, *supra* note 5, at 824–25; Heise, *supra* note 30, at 812.

32. Heise, *supra* note 5, at 824 (“[E]mpirical legal scholarship remains the overwhelming exception to a general rule favoring nonempirical research...”); Richard H. McAdams & Thomas S. Ulen, Symposium: Empirical and Experimental Methods in Law, *Introduction*, 2002 U. ILL. L. REV. 791, 791 (2002); *cf.* Verdirame, *supra* note 11, at 558 (arguing that “[m]uch contemporary American scholarship on international law, regardless of its political orientation, makes extensive use of scientific and empirical methods,” but providing selective evidence to support that proposition); Ellickson, *supra* note 31, at 528 (presenting data that indicate “law professors have become more inclined to produce (although not to consume) quantitative analyses”).

33. Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920) (“[T]he man of the future is the man of statistics and the master of economics.”); RICHARD A. POSNER, *OVERCOMING LAW* 210 (1995); Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 577 (1983); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Heise, *supra* note 30, at 811; Schuck, *supra* note 5, at 324.

34. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT’L L.J. 138, 140 (2007).

35. Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1252 (2004).

36. The author acknowledges that this discussion relates to the U.S. legal academy’s international law scholarship. A more transnational approach to this issue may provide additional nuances. *See, e.g., infra* note 67 and accompanying text.

37. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 93 n.379 (2002) (providing a historical analysis of international law and relations and referencing the work of James Lorimer who believed “international law...was a necessary aspect of international relations”). The author thanks Tom Ginsburg for recommending this book.

38. Stephen D. Krasner, *International Law and International Relations: Together, Apart, To-*

International law and international relations are bickering spouses in a paradigmatic dysfunctional family....It is hard to believe that until World War Two they were unified fields of study, a happy family of contented scholars....Like blissful newlyweds, international law academics and international relations (IR) theorists engaged in a common program of research and shared the same epistemic sense of the world...[but] to say that international law and international relations have had a messy divorce would be a charitable understatement....[T]he strong empiricism and quantitative methods of IR were off-putting for almost all international lawyers. On the other side of the ledger, IR theorists thought international law academics were living in a fool's paradise. For many years—in the 1960s, 1970s, and 1980s—international law academics and international relations theorists quite literally did not converse with each other.³⁹

Scholars have even gone so far as to explain that the “estrangement has been so complete as to be truly remarkable.”⁴⁰ The work of IR scholars, such as Kenneth Waltz, typified this gap. Under Waltz’s neo-realist approach to international relations, “international law played essentially no role.”⁴¹ The New Haven School’s dynamic approach to international law and interest in empirically analyzing decision-making provided a counterweight.⁴² As Anne-Marie Slaughter observed, rather than appreciating common interests and a “cohabit[ation of] the same conceptual space,”⁴³ the disciplines grew apart.

Another reason for this historical disaggregation may have been the different methodological approaches and substantive views of IR and IL scholars. Political scientists and IR scholars were committed to social

gether?, 1 CHI. J. INT’L L. 93, 98 (2000); see also ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 4 (1999) (discussing political science’s historical distrust of international law).

39. Bederman, *supra* note 24, at 469–70; see also Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 AM. SOC’Y INT’L L. PROC. 167, 167 (1992) (“International law (IL) and international relations (IR) theory have been estranged for many years.”).

40. Abbott, *supra* note 39, at 167.

41. Krasner, *supra* note 38, at 94. Under Waltz’s theories, the international system was anarchical. “There were no authoritative decision-making structures, no mechanism for resolving conflict about how the law should be decided. If there were rules at all, they would be set by powerful states, and these rules would change if the distribution of power changed.” *Id.*

42. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 306–07 (2007). Other pedagogical approaches, such as legal realism and the law and society movement, echoed some of the themes from the New Haven School. See Shaffer, *supra* note 12.

43. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 503 (1995).

science research that empirically described and evaluated claims about the actual behavior of international actors. By contrast, IL scholars tended to focus less on description and positivism.⁴⁴ Instead, they directed energy towards normative projects to establish or demonstrate the existence of international rules.⁴⁵ Ultimately, the task of political scientists was primarily to explain current reality and “hint at what might be,” whereas international law scholars did not elucidate “what is” and preferred to focus on “what might be.”⁴⁶

There were unfortunate but perhaps unsurprising consequences of the self-imposed isolation. When IR scholars no longer shared the same intellectual sphere as their IL counterparts, their scholarship (often using empirical methodologies) also departed. This perhaps contributed to a decreased focus on using and developing empirical methodologies in international law. Likewise, the gap perhaps prevented IR scholars from benefiting from IL scholars’ nuanced understanding of international institutions and legal rules that might otherwise infuse their research.⁴⁷ Efforts to bridge the divide recognized that “[i]f the normative project that is central to international public law were more closely linked with the empirical project of international relations scholars, both enterprises might be enriched.”⁴⁸

B. *Moving Towards Reintegration*

Literature that might bridge the gap appears to have grown organically from two distinct groups: (1) those bridging the gap between IR and IL, which this Essay refers to as IR/IL scholars,⁴⁹ and (2) the ELS

44. Ramsey, *supra* note 35, at 1250 (“As international law becomes more normative, there is likely to be an increasing gap between what international law’s expositors claim and the actual practices of nations.”).

45. Krasner, *supra* note 38, at 98; *see also* Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 982 (2000) (“[S]cholarship is characterized by policy prescriptions that reflect author preferences, or criticisms of practices deemed to violate international law. These tendencies are exacerbated by a powerful idealism. International law academics tend to see themselves as part of an ‘invisible college’ devoted to world justice.”).

46. Krasner, *supra* note 38, at 99.

47. AREND, *supra* note 38, at 5.

48. Krasner, *supra* note 38, at 99; *see also* Dickinson, *supra* note 17, at 551 (arguing that a “New” New Haven school of international law “should likewise welcome empiricism” and “be a home for such qualitative empirical studies” that helps develop “a more complete understanding of the complex and multivariate processes” of international law).

49. *See* Abbott, *supra* note 39, at 167–68 (introducing the concept of a “joint discipline” that was “the study of organized international cooperation”); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 383–84 (1998) [hereinafter Slaughter et al., *A New Generation*] (re-

scholars. Until now, these literatures appear to have functioned in relative isolation.

1. *The IR/IL Fusion*

The benefits of integrating IR and IL were not lost on some international scholars, particularly those with an inter-disciplinary approach to law.⁵⁰ IR/IL scholars have begun to integrate these two disciplines to their mutual benefit.⁵¹

Much of this work might be characterized as “first generation” IR/IL, which explains the mutual theoretical benefits from bridging the divide between IR and IL scholarship and mapping out a way of moving forward together. First generation scholarship has focused on how IR theory can enhance IL doctrine.⁵²

ferring to the proposed collaboration that is a nexus between IR/IL for “what might be thought of as a ‘joint discipline’”); *see also* The Journal of International Law and International Relations (JILIR), <http://www.jilir.org/about.html> (describing JILIR, founded in 2004, which aims to promote “interdisciplinary debate on the intersection of international law and international relations”) (last visited Mar. 4, 2008). *But see* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 206 (1993) [hereinafter Slaughter, *Dual Agenda*] (referring to a “dual agenda” for IR and IL); Slaughter et al., *A New Generation*, *supra*, at 368 (referring to Robert Keohane’s lecture “International Relations and International Law: Two Optics”).

50. The benefits of an interdisciplinary approach are not exclusively limited to international law. In psychology and biology, researchers acknowledged that where behavior is complex and implicates a variety of disciplines, an inter-disciplinary solution is warranted to solve a shared problem. *See* Zing-Yang Kuo, *The Need for Coordinated Efforts in Developmental Studies*, in DEVELOPMENT AND EVOLUTION OF BEHAVIOR 181, 181, 191–92 (L.R. Aronson et al. eds., 1970) (observing that, “owing to the lack of an adequate theoretical perspective and coordination among various investigators, the current work on behavioral ontogeny has been disjunctive and fragmentary,” and recommending the creation of an interdisciplinary research center); *see also* Hari Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005) (suggesting an interdisciplinary approach to solving legal issues related to climate change).

51. *See generally* Slaughter et al., *A New Generation*, *supra* note 49 (and sources cited therein); *see also* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989) [hereinafter Abbott, *Prospectus I*]; Abbott, *Prospectus II*, *supra* note 20; Abbott, *supra* note 39; AREND, *supra* note 38; Helfer & Slaughter, *supra* note 20; Slaughter, *Dual Agenda*, *supra* note 49; Slaughter, *supra* note 43.

52. IL scholars may draw on IR theory to “(1)...diagnose international policy problems and to formulate solutions to them; (2) to explain the function and structure of particular international legal institutions; and (3) to examine and re-conceptualize particular institutions or international law generally.” Slaughter et al., *A New Generation*, *supra* note 49, at 373. Other scholars have suggested that in a modern approach to international law, “behavioral assumptions of international legal regimes must be...systematically theorized and investigated” in order to “facilitate the development of an integrated theory of regime design—one that accounts for the various social mechanisms, specifies the conditions under which they predominate, and identifies the regime design features that best harness these forces.” Goodman & Jinks, *Challenges*, *supra* note 20, at

While a useful starting point, the benefits could go deeper. A “second generation” of scholarship might provide concrete applications where empirical methodologies can aid the assessment of international legal issues.⁵³ Political scientists have called for international law to return to “an examination of empirical data” to re-examine “fundamental principles of international law.”⁵⁴ Although they have not conducted their own research, international law scholars, such as Harold Koh and José Alvarez, have also advocated the use of quantitative and qualitative empirical methods⁵⁵ to garner the benefits for international law. But the benefits can flow in both directions. International lawyers—with an appreciation for nuances in international law and a deep understanding of institutions—can aid political science research. IL scholars can identify potential areas for IR research. IL scholars can also add value by formulating research questions that are institutionally sensitive and legally accurate.

Given the scope for integration,⁵⁶ social scientists have seized opportunities. Some political scientists have analyzed how structural varia-

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53. This could address Arend’s concerns that international “legal scholarship seems to have been removed from this basic, but often very time consuming and complicated, exploration of the behavior of international actors.” AREND, *supra* note 38, at 7; *see also* Goodman & Jinks, *Challenges*, *supra* note 20, at 983; Goodman & Jinks, *How to Influence States*, *supra* note 20, at 624.

54. AREND, *supra* note 38, at 3–4.

55. José E. Alvarez, *Do States Socialize?*, 54 DUKE L.J. 961, 961–62 (2005) (commenting favorably on an empirical approach but suggesting a need for case studies); Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 979–980 (2005) (discussing the growth of empiricism in international law recommending the use of modern case studies); *see also* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104, 152 (1990) (suggesting “empirical study is necessary” to establish certain historical propositions related to international dispute settlement).

56. Commenting on the inclusion of an “Empirical Work and Human Rights” panel at the American Society of International Law Annual Meeting, Ryan Goodman observed that “[t]he fact that the panel title...is framed in very general terms suggests how new empirical scholarship is to the field. It is difficult to imagine a conference panel in another academic field with a general title like ‘empirical work and corporate law,’ ‘empirical work and contracts,’ or ‘empirical work and employment law.’” Ryan Goodman, *The Difference Law Makes: Research Design, Institutional Design, and Human Rights*, 98 AM. SOC’Y INT’L L. PROC. 198, 198 (2004). Paul Berman’s work on pluralistic approaches to international law recommends using a more “micro-empirical analysis of how transnational, international, and non-state norms are articulated, deployed, changed, and resisted in thousands of different local settings.” Berman, *supra* note 42, at 322, 327; *see also* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1178 (2007) (suggesting legal pluralists rely on more than formal authority to articulate norms and observing an interest in “study[ing] empirically which statements of authority tend to be treated as binding in actual practice and by whom”).

tions can affect compliance rates with international treaties.⁵⁷ Other social scientists have analyzed international treaties and the availability of dispute resolution.⁵⁸ In contrast, IL scholars have perhaps been less active⁵⁹ even though they have identified areas ripe for analysis, such as the European Court of Justice, World Trade Organization (WTO), NAFTA, the World Bank, and their related dispute resolution mechanisms.⁶⁰ To the extent that these institutions create data that is amenable to collection, coding and analysis, they provide natural repositories for empirical work.⁶¹

2. *ELS Scholarship*

IR/IL scholars could draw upon the methodological debates and methodologies used in ELS scholarship.⁶² ELS scholarship, for example, has considered the proper contextualization of research results and

57. See, e.g., Ronald B. Mitchell, *Regime Design Matters*, 48 INT'L ORG. 425 (1994).

58. See Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189 (2007); see also John Gamble, *Comprehensive Statistical Database of Multilateral Treaties (CSDMT)* (paper presented at the Annual Meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington D.C., Sept. 1, 2005), abstract available at http://www.allacademic.com/meta/p41936_index.html (describing the creation of a database including multi-lateral treaties from 1648–1995 and coding the treaties according to sixteen different variables, one of which relates to the availability of dispute resolution).

59. Cf. Ramsey, *supra* note 35, at 1252 (suggesting that the lack of an empirical foundation for international law “need not be problematic, if it is recognized for what it is”).

60. Slaughter et al., *A New Generation*, *supra* note 49, at 370.

61. To the extent that such scholarship is being conducted, it has largely been done in the context of international trade. See ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW (Ernst-Ulrich Petersmann & Günther Jaenicke eds., 1992); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 475–76 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL. STUD. 557 (2005); Guzman & Simmons, *supra* note 18; Kenneth Kelly, *Empirical Analysis for Antitrust and International Trade Law*, 61 U. CIN. L. REV. 889 (1993); Amanda Perry, *An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality*, 15 AM. U. INT'L L. REV. 1627 (2000); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996).

62. International law empiricism should draw upon synergies with ELS, but it also might benefit from other disciplines such as economics, psychology, philosophy, sociology, anthropology, and history. For example, there is a rich tradition in law and economics that can provide useful insights into empirical analysis of social phenomena. See, e.g., William M. Landes, *The Empirical Side of Law & Economics*, 70 U. CHI. L. REV. 167 (2003).

the effectiveness of different methodologies to present such results.⁶³ In addition, ELS scholars have produced research that has informed topics such as the decline in civil trials, long-term trends in civil awards, the outcome of employment discrimination cases and fee awards in Chapter 11 bankruptcy cases.⁶⁴

Both of these aspects have potential value for international law. The former serves as a reminder that there is value in drawing from the methodological debates of related disciplines to craft sound research protocols and to contextualize results properly.⁶⁵ The latter can serve as an instructive example of how empirical research can offer information to those managing disputes—such as adjudicators, advocates, and parties—to promote informed choices on policy issues.⁶⁶ Despite the suc-

63. There is debate within the legal field over whether ELS requires additional methodological rigor. *See, e.g.*, Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6, 11 (2002) [hereinafter Epstein & King, *The Rules*] (noting that rigorous attention to methodology is lacking in current legal empiricism, which the authors find “deeply flawed,” and adapting the “rules of inference” from natural and social science scholarship for empirical legal inquiry); Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002) (endorsing the “rules of inference” but criticizing Epstein & King’s own methodology in evaluating current legal scholarship); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 155 (2002) (contesting whether “rules of inference” exist as “universally agreed-upon methods” and whether such rules benefit legal scholarship); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002) (criticizing Epstein & King’s attacks on current empirical legal scholarship); Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191, 209 (2002) (defending the use of the “rules of inference” and concluding that “legal scholarship is sufficiently important and distinct that it too needs its own methodology subfield”); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167 (2004) (proposing specific disclosure mechanisms to promote objectivity and critical dialogue in legal empiricism). For discussion about improving the presentation of empirical results in legal scholarship, see Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006) and Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801 (2007).

64. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1744 (2004).

65. Slaughter and Helfer have applauded empirically integrated methodologies—even where they disagree with the underlying substantive conclusions. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 955 (2005).

66. Heise suggests:

Our legal literature would be enriched if more academics, particularly law professors, became more engaged in empirical legal research and produced more of it. Increased production of empirical scholarship would enhance and supplement the legal literature as well as our understanding of crucial legal questions. Empirical work sheds important light on old legal issues and identifies and speaks to issues that the more traditional theoretical and doctrinal genres cannot reach.

Heise, *supra* note 30, at 834.

cess of the application of empirical methodologies in domestic contexts,⁶⁷ ELS scholars have not necessarily focused on international law phenomena, which suggests that they may also gain from cross-fertilization.

C. *The Nexus of ELS and IR/IL*

ELS and IR/IL literatures have experienced little dialogue. For example, groundbreaking work by Melissa Waters uses empirical processes to assess normative claims about the use of human rights treaties in litigation.⁶⁸ Her work usefully explains that it draws upon the scholarship of Anne-Marie Slaughter and Larry Helfer but does not acknowledge the work of empirical legal scholars.⁶⁹ Such cross-referencing would have had several benefits. First, it contextualizes research to build expressly on existing research literatures. Particularly in areas like investment treaty dispute resolution, where the literature is not developed, this promotes the creation of a solid foundation for the literature. Moreover, it offers transparency about those literatures influencing a researcher's methodological choices. This aids the analysis of what research questions were asked, which were omitted, and how research choices were made. This, in turn, creates opportunities to assess the integrity of a scholar's methodological choices, evaluate research results, and promote nuanced research in the future.

67. Empiricism may have particular force in the United States, "where a spirit of pragmatism limits the plausible boundaries of political debate." McGinnis, *supra* note 1, at 48. *But see* Ulen, *supra* note 11 (suggesting that the public trust of scientific methodologies is decreasing). There appears to be an ELS movement in the United Kingdom, but it is not clear whether there is a mutual dialogue about shared objectives. *See* University College London, Centre for Empirical Legal Studies, Empirical Legal Research at UCL Laws, <http://www.ucl.ac.uk/laws/socio-legal/empirical/index.shtml?about> (last visited Mar. 4, 2008). Likewise, an international conference on professional responsibility in Australia in 2006 specifically targeted the empirical analysis of ethics as an area of analysis: "Empirical research provides all interested parties with a snapshot about the realities of experience. Empirical research is a powerful tool that has the potential to critically examine our practices and recommend reliable changes that will enhance the provision of legal services and the education of those entering the profession." Third International Legal Ethics Conference, http://lawprofessors.typepad.com/legal_profession/files/legal-ethics-conference-brochure.pdf (last visited Mar. 4, 2008).

68. Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 687-91 (2007). The research involves an analysis of ninety-two judicial opinions from Australia, Canada, New Zealand, and the Privy Council. She uses the data from the opinions, for example, to examine how often national courts use various interpretive techniques. *Id.* at 687-88.

69. *Id.* at 653 n.97.

Professor Waters is not alone. In a Westlaw search⁷⁰ that tried to identify recognition of the ELS literature in the work of Slaughter and Helfer, only two articles mentioned certain ELS scholars in a passing footnote.⁷¹ Searches on the work of other international law scholars interested in empiricism yielded similar results.⁷²

The isolation appears mutual.⁷³ Empirical legal scholars do not appear to reference the work of international law scholars or discuss how international law could promote further empirical research.⁷⁴ One search suggested that IL scholars referenced work of empiricists such as Daniel Klerman, whose scholarship addresses aspects of IL and empiricism, and Thomas Ulen.⁷⁵ This suggests that there are opportunities for enhanced cross-fertilization of these two literatures.

Cross-fertilization may not be appropriate in every case, and its utility may depend upon the scope of research being conducted. Nevertheless, both ELS and IR/IL scholars could gain from an interchange. They share a common objective of improving the law and legal institutions by using social science methodologies to analyze data and offer information. IL/IR scholars could draw on the methodological insights and debates about contextualization of empirical legal research results to en-

70. For a preliminary inquiry in an exploratory essay, the author selected the work of IR/IL and ELS scholars with whom she was familiar. This sample therefore suffers from case selection bias, and inferences should therefore be drawn from this Section with great caution. Future research may provide a listing of all scholars that have written in these two disciplines and search databases beyond Westlaw, such as SSRN or EconLit. This may provide a more thorough assessment of the scope of interaction between the two literatures. The author welcomes the comments of other scholars who work at the intersection of empiricism and international law to provide a better measure for future analysis.

71. On April 4, 2008, the research syntax used in the JLR database was: AU(SLAUGHTER HELFER) & ((THEODORE /S EISENBERG) (LEE /S EPSTEIN) (MICHAEL /S HEISE) (LEANDRA /S LEDERMAN) (JENNIFER /S ROBBENNOLT) (STEWART /S SCHWAB) (NANCY /S STAUDT) (THOMAS /S ULEN) (MARTIN /S WELLS)). Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 107 n.39 (2000) (citing ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 84 (2d ed. 1997)); Helfer & Slaughter, *supra* note 20, at 283 n.25 (citing Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481–91 (1980)). The author recognizes the limited and biased nature of the search terms that necessarily leaves out the work of a variety of other esteemed empirical legal scholars and limits the generalizability of inferences.

72. See Annex 1 (listing the eleven results of a Westlaw search for articles by international law scholars that cite ELS scholars).

73. See Annex 2 (listing the nine results of a Westlaw search for articles in which ELS scholars cite international law scholars).

74. This lack of citation may also be driven by the domestic nature of the empirical research.

75. For example, Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455 (1999), is cited by IL scholar Jacob Cogan. See Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 428 n.80 (2008).

hance the quality of their research.⁷⁶ Likewise, ELS scholars could gain new audiences for their research and consider how a different condition (i.e., an international context) may impact their research. The lack of a mutual discourse may inhibit both literatures from maximizing mutual interests. Recognizing that empirical methodologies may not be appropriate in every area of international law, the next Part sketches different methodologies that scholars might use to reach across disciplines and garner a more nuanced understanding of common problems faced by related disciplines.

II. SKETCHING A FRAMEWORK OF EMPIRICAL METHODOLOGIES

One area for development is international economic law.⁷⁷ While in a “state of flux” in an era of globalization,⁷⁸ international economic law has tangible international law obligations in treaties, and there is associated data that are ripe for empirical analysis.⁷⁹ As a result, there is “a small but increasing amount of international economic law scholarship that takes an empirical approach.”⁸⁰ Nevertheless, as Jeffery Atik explains, “[i]nternational economic law needs more empiricism. Our ability to generate idealistic views of international law far outstrips our ability to challenge these notions through observation and critical analysis.”⁸¹

While it is one thing to suggest that empirical analysis is an appropriate avenue for international law scholarship, it is a different matter to explore what should be done and consider how it might happen. This section develops the debate by sketching, on a preliminary basis, what empiricism might consist of for international economic law before turn-

76. While ELS is one place to start, it is not necessarily an exclusive option. One might also draw on related social science disciplines such as political science, economics, or anthropology, where there are related methodological debates and insights that may, perhaps, be closer to the relevant research question.

77. For the purposes of this Essay, “international economic law” refers to international trade, international tax, and international investment law occurring through treaty-making. While they are used in different ways, these are all tools for promoting international economic growth.

78. Gamble et al., *supra* note 18, at 74 (“International economic and trade law is an area of international law where the relationship between public and private spheres is in a state of flux.”).

79. John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT’L ECON. L. 17, 20 (1996) (“[W]ork on international economic law matters often seems to necessitate more empirical study than some other international law subjects.”).

80. Shaffer, *supra* note 12, manuscript at 4.

81. Jeffery Atik, *Uncorking International Trade, Filling the Cup of International Economic Law*, 15 AM. U. INT’L L. REV. 1231, 1244 (2000).

ing to the potential application for international investment law and dispute resolution.

One of the core questions to address is what form empirical methodologies might usefully take. Without wanting to create a false dichotomy, one might imagine a full spectrum of research methodologies that could form the core of an empirical approach.⁸² Irrespective of where research might fall on the spectrum, presumably the overall objective would be to analyze collected data to understand and explain phenomena we cannot observe and/or make inferences about (statistical or otherwise).⁸³

At one end might be the more quantitative forms of analysis, involving a study of the influence of independent variables, whether in the form of regressions, factorial analysis of variance, and the like. At another end, there may be more qualitative approaches where systematic approaches are taken to descriptively analyze data collected in individual case studies, ethnographies, surveys, or structured interviews.⁸⁴

A mixed-methods approach that blends elements of both quantitative and qualitative approach also has value. This might mean, for example, hypotheses and observations generated by qualitative research could be later quantitatively analyzed. It might involve coding qualitative data (such as taped interview responses) into quantitative data that can be subjected to analysis using statistical models. It might also mean that statistical outliers in quantitative research could provide the basis for a subsequent qualitative case study or detailed ethnography.

Rather than creating an “either/or” dichotomy, international economic law could embrace a “both/and” approach to empiricism. Encouraging scholarship from multiple scholars with a broad set of perspectives and skill sets can promote nuanced understandings of population parameters and encourage the replication and convergence of research.

82. “Empirical research, however, does not necessarily mean statistical research in the sense used in many policy explorations. For some key issues of international law, there are too few ‘cases’ on which to base statistical conclusions (such as correlations), so we are constrained to use a more ‘anecdotal’ or case study approach.” Jackson, *supra* note 79, at 20.

83. Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After the Lawyering Process*, 10 CLINICAL L. REV. 349, 353 (2003).

84. See, e.g., DRUMBL, *supra* note 19, at 97–98 (describing interviews in connection with international criminal law); SHAFFER, *supra* note 19, at ix–x (conducting 100 systematic interviews with public officials and private actors to analyze WTO disputes); see also Burke-White, *Complementarity in Practice*, *supra* note 19; Burke-White, *Domestic Influence*, *supra* note 19.

While one might imagine that particular research areas or research questions may be more suited to a certain methodological approach,⁸⁵ it is preferable not to exclude potential insights by an overly narrow conception of acceptable empirical methodologies. Moreover, promoting an inclusive approach to empiricism fosters an atmosphere that welcomes scholars who do not have graduate level statistical training but who nevertheless appreciate the value of rigorous and detailed analysis.⁸⁶ International lawyers might theoretically conduct research on an individual basis; but they might also consider opportunities to form dynamic collaborations with their social science counterparts to benefit from the existing resources and methodological discourse.⁸⁷

The emphasis should be on *how* researchers employ methodologies.⁸⁸ In order to avoid “cafeteria empiricism,” it is vital to avoid picking among aspects of approaches that are most likely to support pre-existing normative assumptions. Likewise, it is critical to avoid making generalized inferences on the basis of limited research without recognizing the limitations and implicit caveats. A more holistic approach is preferable. This could be done by employing rigorous and transparent research

85. One can imagine situations in which access to data is limited and more creative approaches are necessary. For example, where there is little data available in existing databases of party satisfaction with international dispute resolution procedures, one might imagine teasing out information through carefully compiled surveys or through interviews. Or if a holistic, in-depth investigation is needed, a case study might be appropriate. A CASE FOR CASE STUDY (Joe R. Faegin et al. eds., 1991). Likewise, where there is a plethora of economic data available about the international dispute resolution process, such quantitative data is well-suited for quantitative analysis.

86. The objective is to avoid sloppy work and encourage scholarship that adheres to tried and tested methodological approaches from existing social science disciplines such as anthropology, economics, geography, history, linguistics, political science, psychology, or sociology.

87. See, e.g., Marc L. Busch et al., *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO* (International Centre for Trade and Sustainable Development, 2007), <http://userwww.service.emory.edu/~erein/research/capacity.pdf> (collaborating between political scientists and an international law professor on international trade); Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT’L ORG. 811 (2006) (collaborating with a political scientist, an international relations scholar, and an international law professor with economics Ph.D. on international investment).

88. The objective is to ensure that whatever the approach used, it is methodologically rigorous. While writing in the context of clinical research, Neumann and Krieger argue “there are a number of common features to ‘good’ empirical social science research.” Neumann & Krieger, *supra* note 83, at 355. These include: (1) open-mindedness and not setting out to prove a theory, (2) concrete and narrow methodological designs, (3) selection of unbiased data, (4) the use of valid and reliable standards for measuring data, (5) “critical analysis” of the data, and (6) making the research public and available. *Id.* at 355–60.

methodology for data collection and analysis, acknowledging potential research biases, and understanding the limitations of the inferences.⁸⁹

There will inevitably be methodological differences related to the type of research question asked and the traditions of social science sub-disciplines.⁹⁰ It is nevertheless key for scholars to describe research methodology expressly and adopt methodological approaches that are supported by existing social science practices.⁹¹ Clarity about methodological approaches is critical in terms of: (1) the general methodology employed, (2) how data is collected, and (3) how data is analyzed.

Recognizing that these suggestions do not form an exhaustive list and that there may be particular practices among social science disciplines,⁹² there can be various ways to promote the transparency of research methodology. In terms of data collection, researchers could explain how and why they chose particular sampling frames or case studies for analysis. For example, qualitative researchers could make their list of questions (and the order in which they were asked) available for review and explain why and how particular questions were asked. Likewise, quantitative researchers might construct code books, which explain the basis of coding decisions, and make them available for review. On the analytical side, researchers should be clear about what is being analyzed (or omit-

89. See, e.g., Epstein & King, *The Rules*, *supra* note 63.

90. There are social science methodologists whose scholarly research focuses on quality research tools and methodologies. GARY KING, UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE (1989); MULTIPLE PATHS TO KNOWLEDGE IN INTERNATIONAL RELATIONS: METHODOLOGY IN THE STUDY OF CONFLICT MANAGEMENT AND CONFLICT RESOLUTION (Zeev Maoz et al. eds., 2004) [hereinafter MULTIPLE PATHS]; MODELS, NUMBERS, AND CASES: METHODS FOR STUDYING INTERNATIONAL RELATIONS (Detlef F. Sprinz & Yael Wolinsky-Nahmias eds., 2007) [hereinafter MODELS, NUMBERS, AND CASES]. International economic law might also benefit from encouraging the development of a group of scholars or encouraging collaborations with social science methodologists to aid research. Neumann & Krieger, *supra* note 83, at 395; see also Matthew Spitzer, *Evaluating Valuing Empiricism (At Law Schools)*, 53 J. LEGAL EDUC. 328 (2003).

91. This might mean, for example, that when conducting a case study, international law scholars should make an effort to comply with research protocols and ethical standards encouraged for sociological or anthropological research. Likewise, it might mean applying protocols employed by economists when conducting regressions on economic data. While there is inevitable debate in individual fields about the appropriate type of research methodology, international law scholars may find it useful to employ the dominant methodology in the area. Subsequent research could branch out to other modalities suggested by the relevant literature and the particular research question.

92. See, e.g., EARL R. BABBIE, THE BASICS OF SOCIAL RESEARCH (2005); KING, KEOHANE & VERBA, *supra* note 14; MODELS, NUMBERS, AND CASES, *supra* note 90; MULTIPLE PATHS, *supra* note 90; SOCIOLOGICAL METHODOLOGY (P.V. Marsden ed., 1995). The author thanks Asif Efrat for his guidance in connection with the political science and international relations scholarship.

ted), how it is being analyzed, and why a particular choice has been made. Qualitative researchers could explain how they have decided to organize, discuss, and analyze in the format they have chosen. Meanwhile, quantitative researchers can make their datasets publicly available and, when reporting their results, provide information underlying their statistical conclusions.⁹³

Transparency about research methodology also means researchers should be up-front about the potential biases they bring to the research questions which may, inadvertently, influence the way questions are asked and analyzed.⁹⁴ Transparency at these levels might make it possible to conduct meta-analysis⁹⁵ to combine the results of studies with different methodological approaches and promote a more coherent understanding of a particular phenomenon. Such an analysis might, in turn, enhance the expansion and integrity of future research efforts irrespective of whether researchers utilize qualitative, quantitative, or mixed methods.

Beyond having a broad construction of acceptable methodological approaches, international economic law empiricism could have a broad vision of appropriate research areas. In a recent essay in the *European Journal of International Law*, Guglielmo Verdirame expresses his concern—and skepticism—about what he sees as the United States' legal academy over-reliance on empiricism. Verdirame critiques U.S. scholars as “vying to come up with an empirical model, based on quantitative data, that can provide the ultimate explanation of state behaviour.”⁹⁶ While Verdirame may be rightly concerned that empiricism could be-

93. This might mean, for example, that when conducting an analysis of variance, data such as the F-test value, the p-value, the sample size, number of conditions, degrees of freedom, degrees of freedom error, mean square error, standard deviations, confidence intervals, and effect sizes should be made available.

94. The author's original training was in psychology and political science research methods and has more recently involved quantitative course work in the J.D./Ph.D. program in Law and Psychology at the University of Nebraska. While her initial research has been quantitative, she would welcome an opportunity to work with qualitative or mixed-methods research.

95. Meta-analysis synthesizes empirical literature, helps statistically summarize the results in an empirical area, and identifies moderator variables that may influence the findings of particular research. Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 201–03 (2007); see also Lisa A. Bero, *Evaluating Systematic Reviews and Meta-Analyses*, 14 J.L. & POL'Y 569, 572–73 (2006); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 611–13 (2006).

96. Verdirame, *supra* note 11, at 560–61; see also *id.* at 565 (referring to the role that “empirical observations on the process of judicial decision-making” have played in the development of rule-skepticism).

come a tool for flattening discourse in international law,⁹⁷ this critique misses a vital point.⁹⁸

Empiricism can also be a way to expand—rather than constrict—social discourse. Empiricism is a methodological lens, and it is not an exclusive one. The lens of empiricism cannot and should not be limited to analysis of state behavior, let alone a single aspect of state behavior.⁹⁹ It can also consider government bureaucrats, international organizations, corporations, private individuals, NGOs, and the interactions between these actors as appropriate subjects of analysis.¹⁰⁰ Moreover, a single empirical study cannot corner the market on “truth.” Social scientists have rejected the “critical experiment” approach and the idea that a single study reveals truth for all time.¹⁰¹ Instead, the dominant framework encourages converging operations where multiple studies ask different questions and utilize multiple methodologies to try to assess, though perhaps never completely capture, the complexity of reality.¹⁰² Empiricism is one tool that can begin to isolate variables, combinations of variables, or contextualize experience to aid a more nuanced understanding of phenomena. These insights may be of interest to: (1) governmental decisionmakers thinking about their domestic regulation or making choices about entering into international obligations, (2) parties involved in international disputes who are thinking about what dispute

97. HERBERT MARCUSE, *ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964); see also Verdirame, *supra* note 11, at 563 (referring to “the limited tool of reductionist empirical enquiry”) (emphasis in original).

98. It is possible that Verdirame’s critique is limited to the empirical analysis of state behavior. If that is the case, he may be less troubled by the use of empiricism as an analytical tool in connection with other international law matters. For example, he might have a different perspective on the use of empirical data to analyze investment treaty dispute resolution, which would require an assessment beyond state behavior.

99. Verdirame primarily discussed state compliance with international law obligations. See Verdirame, *supra* note 11, at 560–61. While this is an important area of analysis, it is not an exclusive one.

100. Case studies and ethnographies, for example, are useful methodologies for gaining detailed information about these types of actors. For examples of valuable case studies, see *supra* note 19. For an argument that sociological perspectives on international law provide valuable information, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1266 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

101. See KEITH STANOVICH, *HOW TO THINK STRAIGHT ABOUT PSYCHOLOGY* (8th ed. 2007).

102. For discussion of the converging operations model and its advantages, see Robert J. Sternberg & Elena L. Grigorenko, *Unified Psychology*, 56 AM. PSYCHOLOGIST 1069, 1069, 1071 (2001) and Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 129 n.192 (2002) (observing that converging, or convergent, operations are useful in eliminating the inadequacies and inadvertent sources of bias inherent in any single study).

resolution practice to pursue or how they might use empirical data to provide evidence in the course of their own dispute, and (3) NGOs who are involved in advocacy and assistance at the local level.

Ultimately, international lawyers should be both thoughtful producers and consumers of international empirical scholarship. Even if it cannot perfectly capture reality, the proper use¹⁰³ of empirical methodologies offers a valuable service. It provides tools to assess the accuracy of normative statements and/or potentially self-serving assertions about the state of the world.¹⁰⁴ As mentioned earlier, President Morales of Bolivia asserted that transnational corporations always win investment treaty arbitrations and then began efforts to withdraw Bolivia from a World Bank dispute resolution body. The data, however, flatly contradict Morales' statement.¹⁰⁵ Without the empirical data and analysis, it is more challenging to put the focus on the political and economic (rather than legal) forces behind the decisions of sovereign states, private individuals, and NGOs.

Ultimately, empiricism is a set of different methodological approaches. Not everyone need do empirical research. Likewise, not all research questions are well-suited to empirical methodologies. Nevertheless, to the extent that empiricism can provide new factual information to enrich analysis, it has a value for underexplored areas of international law like investment treaty dispute resolution.

While this Essay argues for a broad approach to empiricism, there will inevitably be debates about the proper methodologies and scope of subjects for international economic law empiricism. Such a discourse is welcome, and the self-reflection will no doubt provide useful insights about how an empirical approach should evolve. This Essay is a step on the journey intended to encourage greater debate on how that evolution might most usefully occur. In order to develop that discussion, the next Part considers the application of empirical methodologies to international investment law and dispute resolution.

103. Proper use would include primary research conducted in accordance with accepted social science procedures. It would also involve secondary commentators making appropriate inferences on the basis of the data by understanding the caveats and limitations of the primary research.

104. Franck, *supra* note 25, at 48.

105. *Id.* at 49.

III. APPLYING EMPIRICAL METHODOLOGIES TO INTERNATIONAL INVESTMENT LAW AND DISPUTE RESOLUTION

Certain areas of international economic law, such as trade,¹⁰⁶ tax,¹⁰⁷ intellectual property,¹⁰⁸ or hybrid areas¹⁰⁹ might benefit from expanded

106. Trade law scholars have played a vital role in using empirical methodologies to provide information. This scholarship considers WTO, GATT, and regional trade agreements, which provide legal obligations and procedures for resolving disputes. These agreements and dispute resolution processes provide useful data for scholars tracking the efficacy of the substantive standards and dispute resolution rights. *See supra* notes 23 and 61. Trade law scholars could continue with and even expand upon this fruitful enterprise. Research methodologies such as experimental approaches might, for example, explore cognitive biases potentially affecting adjudications under the WTO's Dispute Settlement Understanding. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (exploring cognitive biases of U.S. judges). Recent research by Ji Li offers a useful model for mixed-methods approaches to analysis of international trade and dispute resolution. Ji Li, Note, *From "I'll See You In Court!" To "See You In Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L. 485 (2007). The work, however, does not make distinctions between associative and causal interpretability. *See id.* at 495. While researchers may seek causal relationships, reliable statistical relationships (that is, associations) are not the same as causal relationships where there is both a reliable statistical relationship and an experimentally manipulated independent variable.

107. International tax law might also benefit from using empirical methodologies to assess the substantive rights, procedural remedies, and utility of dispute resolution systems currently contained in tax treaties. There are over 2,000 double income taxation treaties in force with a non-binding dispute resolution procedure (a Mutual Agreement Procedure (MAP)). Lee Burns, *Commentary*, 53 TAX L. REV. 39, 43 (1999); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa*, 71 BROOK. L. REV. 639, 653 (2005). The OECD recently proposed a model dispute resolution procedure for international tax treaties that ostensibly permits taxpayers to initiate an "arbitration" mechanism to finally resolve disputes. It appears to have done so, however, without the benefit of a systematic analysis of data that assessed the scope of existing problems, isolated variables causing the most mischief, and recommended methods to address the diagnosed problems. *But see* OECD Questionnaire for Business on Tax Procedures for Resolving International Tax Disputes, <http://www.oecd.org/dataoecd/34/7/17272766.pdf> (indicating that the OECD is interested in collecting input from the business community for consideration in shaping policy). While doctrinally interesting, policy choices may have been made on the basis of aberrations or normative assertions that do not reflect a measurable reality. *See* WILLIAM W. PARK & DAVID R. TILLINGHAST, *INCOME TAX TREATY ARBITRATION* 10 (2004) ("[T]ax treaty arbitration...often falls victim to careless analysis."); *see also* William W. Park, *Finality and Fairness in Tax Arbitration*, 11 J. INT'L ARB. 19 (1994); William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803 (2002) [hereinafter Park, *Treaty Arbitration*].

The empirical assessment of tax treaty conflict could be a fruitful research area. It might start with the assessment of the existing rights under the over 2,000 tax treaties currently in effect. A quantitative analysis of tax treaty disputes and qualitative case studies could add value. There might also be interviews or surveys of stakeholders, such as states and taxpayers, to assess their view of the efficacy and acceptability of the tax treaty dispute resolution process. International tax law scholars might draw on the research methodologies of scholars such as Leandra Lederman who have made significant headway in empirically analyzing tax disputes in the domestic context. *See, e.g.*, Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235 (2006); Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predic-*

use of empirical methodologies to gather additional information and offer further analytical insights. This Essay, however, generally confines itself to opportunities for international investment¹¹⁰ and dispute resolution.¹¹¹

While there is a small but growing body of empirical work on international dispute resolution,¹¹² there is little empirical analysis of in-

tors of Failure to Settle, 49 CASE W. RES. L. REV. 315 (1999); James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005). Data from such empirical assessment could promote more considered policy determinations and negotiations on the terms of international tax treaties. The author thanks Allison Christians for her comments on these points.

108. Larry Helfer, Karen Alter, and Florencia Guertzovich are involved with a project that uses a mixed-methods empirical approach to analyze an international intellectual property regime. See *The Politics of Intellectual Property Disputes in the Andean Community*, <http://www.vanderbilt.edu/americas/English/pagemanager.php?page=helfer.php>; see also Paul J. Heald, *Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study*, 10 J. INTELL. PROP. L. 309 (2003) (critiquing existing empirical work about the role of intellectual property on international investment).

109. There are potential areas of overlap amongst various areas of international economic law including investment, trade, tax, and antitrust. Some scholarship looks at the intersection of trade and tax law. See Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79 (1998); Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, but Not Reconciled*, 25 VA. TAX REV. 251 (2005). Other scholars consider the interplay between trade and investment law. See Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 23 (2005); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35 (2003). Still others address intersections between tax and investment law. See Christians, *supra* note 107; Park, *Treaty Arbitration*, *supra* note 107.

110. Various aspects of international investment law might benefit from empirical assessment, including (1) comparison of national investment laws, (2) assessment of the role of international commercial treaties, such as CISG, on investment, (3) analysis on the role of soft law rules on good governance, (4) analysis of international investment agreements, such as bilateral and multilateral investment treaties, or (5) research at the intersection of these areas. There is existing scholarship that categorizes and analyzes empirically the terms of investment treaties. There are obviously challenges in conducting this research. See Jason W. Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 34 BROOK. J. INT'L L. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903680.

111. Dispute resolution research might focus upon: (1) developing scholarship about how to design international investment law doctrine on the basis of available data, (2) evaluating factors affecting the design process, and (3) obtaining data to begin that analysis in a tangible manner.

112. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (1996); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 298 (1996); SHAFFER, *supra* note 19; TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION*

vestment treaty conflict. Given its nascent nature,¹¹³ this may not be unexpected.¹¹⁴ Consideration is nonetheless critical, and scholars call for systematic analysis of investment treaties and the dispute resolution system.¹¹⁵

The empirical scholarship on investment treaties has a peculiar gap, however. Having focused on the benefits of treaties,¹¹⁶ there is little empirical assessment of the costs of investment treaties. More specifically, there is little analysis of the dispute resolution processes or an assessment of how investors use their new procedural and substantive rights.¹¹⁷ To the extent that such research is available, its methodology has been suspect¹¹⁸ or it focuses on quantitative descriptive analysis.¹¹⁹ While analyzing archival data about treaty disputes to provide descriptive data is a necessary starting point for testing descriptive research hy-

11 (Jacob Bercovitch ed., 1996); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 533–34 (2000); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analytical Research Report*, 15 AM. REV. INT'L ARB. 525 (2004).

113. The first investment treaty was signed in 1959. Elkins et al., *supra* note 87. The first publicly available award was issued in 1990. University of Victoria Faculty of Law, Investment Treaty Arbitration (site administered by Andrew Newcombe), http://ita.law.uvic.ca/chronological_list.htm (last visited Mar. 4, 2008).

114. A lack of empirical research can result from “unevenness in various fields’ overall intellectual development and maturity” and the uneven “availability of data.” Heise, *supra* note 5, at 825–26.

115. *See supra* note 34 and accompanying text.

116. Political scientists, economists, and international law scholars have used different methodologies—and reached different substantive conclusions—in their analysis of whether investment treaties achieve their stated goals of fostering foreign investment. *See, e.g.*, Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788 (2004); Mary Hallward-Driemeier, World Bank, *Do Bilateral Investment Treaties Attract FDI? Only a Bit...and They Could Bite* (2003), http://econ.worldbank.org/files/29143_wps3121.pdf; Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?*, 33 WORLD DEV. 1567 (2005), available at <http://ideas.repec.org/a/eee/wdevel/v33y2005i10p1567-1585.html>; Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005); Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131 (2005); Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties* (Nov. 14, 2006) (unpublished article), available at http://www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc.

117. Franck, *supra* note 25.

118. *Id.* at 13–16, 41–42 (explaining methodological difficulties in research done by UNCTAD, Rubins, and Anderson and Gursky).

119. *Id.* at 83.

potheses,¹²⁰ the research could be developed further. For example, it would be useful to use quantitative methods, such as factorial analysis of variance or multivariate regressions, to test associative research hypotheses and look for reliable statistical relationships.¹²¹ Qualitative research may also be appropriate for investment treaty dispute resolution. Such research may help to appropriately contextualize quantitative data to encourage research to “take account of particular social contexts and power dynamics.”¹²² Research might also take a mixed-methods approach. Given these opportunities for gaining different types of valuable information, international investment law and dispute resolution could benefit from a pluralistic approach to empirical research. By replicating and expanding research in different contexts using different designs and methodologies, converging operations can help provide useful insights to international investment law.

To move beyond hortatory statements¹²³ about using empirical methodologies to gather more information, it is useful to explore how that might actually occur. This Part therefore evaluates the benefits and costs of integrating empirical methodologies to research investment treaties and dispute resolution. It then proposes five steps that international investment scholars might utilize to construct an empirically infused research agenda.

A. *The Benefits of Integrating Empiricism and Investment Treaty Dispute Resolution*

Fusing investment treaty dispute resolution and the empirical methodologies (and methodological critiques) from ELS scholars and social scientists offers an opportunity to create new information. That information could be used to foster informed debates, aid nuanced problem solving, and develop reality-based legal doctrine. This Section therefore

120. A descriptive research hypothesis might involve assessing whether governments win or lose investment treaty arbitrations and at what stage. See KING, KEOHANE & VERBA, *supra* note 14, at 7–8, 15, 34–38 (explaining descriptive research and the value of combining descriptive analysis with other research methods).

121. An associative research hypothesis might involve looking for a reliable statistical relationship between governments who win and lose investment treaty arbitration and whether a win or loss is reliably associated with the country’s development status. See Daniel B. Wright, *Causal and Associative Hypotheses in Psychology: Examples from Eyewitness Testimony Research*, 12 PSYCHOL. PUB. POL’Y & L. 190 (2006) (explaining associative hypotheses and distinctions from causal hypotheses).

122. Shaffer, *supra* note 12, manuscript at 4.

123. Ramsey, *supra* note 35, at 1247 (“Understanding the practices of nations on any given point is a daunting empirical project in any age.”).

explores the mutual benefits of integrating the methodological insights of empirically-minded scholars with international investment law and dispute resolution.

1. *Benefits for Investment Treaty Dispute Resolution*

While they have not yet capitalized on the momentum of empirical legal scholars,¹²⁴ investment treaty dispute resolution scholars could use the insights and energy of ELS. The methodological approaches of ELS scholars and social scientists offer critical tools to develop investment treaty dispute resolution research agendas in at least three ways.¹²⁵

First, ELS can enhance the appreciation of different research methodologies. The more empirical research methodologies a scholar understands, the more tools are lurking at his or her fingertips for avenues of further research and understanding their research area. This also means that scholars can make informed choices about what methodologies are likely to be most useful in answering particular research questions.

Investment treaty dispute resolution could obtain useful information by using different research methodologies (whether they be quantitative, qualitative, or mixed methods) to evaluate key questions.¹²⁶ For example, empirical methodologies might help answer questions about whether the developing world is unfairly burdened by investment treaty dispute resolution or assess statements that the system is “bias[ed] in favour of allowing claims and awarding damages against governments.”¹²⁷ To aid this process, investment treaty dispute resolution scholars might start with basic descriptive statistics looking for frequencies, means, and standard deviations about amounts awarded. More advanced statistical models, such as an analysis of variance (ANOVA) of amounts awarded by investment treaty tribunals can analyze whether there is a reliable statistical relationship between amounts awarded against Organization for Economic Cooperation and Development (OECD) and non-OECD member countries. Likewise, a chi-square analysis can perform a similar function to see if there is a reliable statis-

124. See Ulen, *supra* note 11, at 876.

125. While this Section tends to focus on quantitative methods, this does not eliminate the potential value of more qualitative analysis. The author has chosen to focus on more quantitative approaches as a result of her current research.

126. See *infra* Section III.A.

127. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 153 (2007); see also Kyla Tienhaara, *What You Don't Know Can Hurt You: Investor-State Disputes and the Environment*, 6 GLOBAL ENVTL. POL. 73 (2006) (focusing on how developing countries have been subjected to investment treaty arbitration).

tical difference in win/loss rates for OECD and non-OECD countries. These “2x2” analyses, however, are relatively simple and may benefit from more complex designs such as a multiple group ANOVA, factorial analysis, or regressions that are more likely to reflect the complexities of reality and decrease statistical error.¹²⁸ These types of analyses could begin to aid the assessment of assertions that the potential liabilities of investment treaty arbitration for developing countries “can be crippling”¹²⁹ or unfairly affect the developing world.¹³⁰

By way of another example, Ecuador is currently involved in efforts to withdraw particular categories of disputes (namely oil and mining) from investment treaty dispute resolution at the International Centre for Settlement of Investment Disputes (ICSID).¹³¹ It might therefore be useful to analyze the implications of such a choice. One might observe from quantitative, descriptive data that international investment disputes are most likely to arise in the energy sector.¹³² One might then conduct interviews to determine what factors make the energy sector more susceptible to investment disputes. Based upon this qualitatively gathered data, researchers might refine quantitative models about factors related to dispute resolution risk in investment treaties. Governments could then be in a better position to think strategically about how and when to provide investment rights to investors in particular sectors.

Second, methodologists—whether ELS scholars or social scientists—can encourage considered choices about how to study particular phenomenon and assess the costs and benefits of particular methodolo-

128. As suggested by Part II, this does not presume that quantitative can, should, or must be the exclusive methodology of analysis. Rather, it may be that these designs are useful for answering research questions about differences in population.

129. VAN HARTEN, *supra* note 127, at 123–24. The data that van Harten relies upon for his assertion that the cost of defending claims is overly burdensome for developing countries is primarily anecdotal and not systematic. *Id.* at 123 n.13, 141–42. Likewise, the data on state liability is neither systematic nor comprehensive. *Compare id.* at 123–34, with Franck, *supra* note 25. Quantitative empirical research can aid in the assessment of anecdotal evidence that is not gathered in a systematic or methodologically rigorous manner.

130. *See, e.g.*, SARAH ANDERSON & SARA GRUSKY, INSTITUTE FOR POLICY STUDIES, CHALLENGING CORPORATE INVESTOR RULE: HOW THE WORLD BANK’S INVESTMENT COURT, FREE TRADE AGREEMENTS, AND BILATERAL INVESTMENT TREATIES HAVE UNLEASHED A NEW ERA OF CORPORATE POWER AND WHAT TO DO ABOUT IT (April 2007), <http://www.ipsdc.org/reports/070430-challengingcorporatinvestorrule.pdf>.

131. Bank Information Center, Ecuador Rejects ICSID Arbitration over Extractive Industry Disputes (Dec. 17, 2007), <http://www.bicusa.org/en/Article.3629.aspx>; Bretton Woods Project, Ecuador Withdraws from ICSID? (Dec. 4, 2007), <http://www.brettonwoodsproject.org/art-558781>.

132. Franck, *supra* note 25.

gies.¹³³ For example, if one wanted to assess the biases affecting investment treaty arbitrators, empirical methodologies could be used to construct a laboratory experiment to analyze the decision-making of arbitrators exposed to different conditions (i.e., an independent variable). Such an experiment, presumably involving random assignment of arbitrators to experimental groups, would have a high degree of internal validity and may permit causal interpretation of some research hypotheses. It also would have the benefit of assessing arbitrator decision-making without waiting for an economic disaster.

Methodological guidance from the empirical literature offers guidance on the potential cost of such an approach—namely that there would be problems with external validity and limitations on real-world replicability.¹³⁴ Likewise, analyzing archival data from public arbitration awards may be easier than creating a survey that assesses the experience of different stakeholders whose backgrounds reflect different languages and different cultural traditions. It is likely easier to work with available data rather than developing a methodology to create something entirely new.¹³⁵

Nevertheless, every benefit has a corresponding cost. Choosing to analyze pre-existing data may minimize some costs, but it may also create others. For example, pre-existing data may be limited in terms of population, time, or setting, which can adversely affect external validity and the generalizability of data.¹³⁶ It also may prevent analysis of hypotheses as the data may not be present in the pre-existing data set. In any event, empirical perspectives could aid the proper contextualization of the value of particular designs and the potential limitations of the data, design, and resulting analysis.

Third, ELS offers a pre-existing literature to promote the understanding of methodological issues related to statistical inference and the limi-

133. See, e.g., KING, KEOHANE & VERBA, *supra* note 14.

134. This is a question of external validity.

135. This might include drafting a survey where parties answer questions about their experience with investment treaty dispute resolution. Such a survey would need to be translated into multiple languages. There may be challenges selecting a sample and obtaining a mailing list; and then there may still be difficulties in getting a sufficient number of responses to eliminate a response bias. Likewise, resources would also need to be expended to secure the permission of an internal review board that would authorize the research on human subjects.

136. Working with publicly available awards inevitably means there are limitations for the data's generalizability. A case selection bias may mean there is a difference between the data from public and non-public awards. For surveys, there may be problems with the reliability and validity of the survey and challenges related to response bias. For example, if only investors or governments who were successful in cases chose to respond to the survey, there would be problems generalizing the results to the larger population.

tations of both anecdotes and primary research of legal phenomena. In order to enhance the quality of their empirical analysis, investment treaty dispute resolution scholars might immerse themselves in the cautionary literature of ELS scholars to appreciate the limitations of their data, design, and inferences. Quality empiricism should, for example, treat anecdotes or conventional wisdom with caution. Anecdotes provide a “sticky” narrative that is simple, transparent, easy to communicate, and requires little expertise to generate the expected reaction. In the context of investment treaty dispute resolution, “data” can involve war stories and anecdotes shared at conferences, on listserves or blogs,¹³⁷ or through written publications, or compiled by journalists.¹³⁸ While anecdotal evidence is a useful starting point, it is insufficient.¹³⁹ More data, gathered systematically, is necessary.¹⁴⁰ Presumably this will provide guidance to determine whether anecdotes (as opposed to thorough case studies or ethnographies) are “typical or atypical, frequent or infrequent, ordinary or extreme.”¹⁴¹ For example, a reference to a US\$270 million damage award in an investment treaty dispute tells a powerful story about the value of the process. Suggesting that the award is representative of the larger population is potentially both inappropri-

137. For example, OGEMID is a list-serve of investment treaty arbitration practitioners, arbitrators, parties, and academics. OGEMID Electronic Discussion List, <http://www.dundee.ac.uk/cepmlp/journal/html/ogemidannounce.html>; see also José E. Alvarez, *The Democratization of the Invisible College*, ASIL NEWSL., Nov. 8, 2007, available at <http://www.asil.org/ilpost/president/pres071108.html>.

138. See, e.g., Michael D. Goldhaber, *Treaty Disputes: Arbitration Scorecard*, AM. LAW. (FOCUS EUR.), Summer 2007, at 22, 22–27, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Inside&id=1180947929487>; Michael D. Goldhaber, *Arbitration Scorecard: Treaty Disputes*, AM. LAW. (FOCUS EUR.), Summer 2005, available at <http://www.americanlawyer.com/focuseurope/treaty0605.html>; Michael D. Goldhaber, *Big Arbitrations*, AM. LAW. (FOCUS EUR.), Summer 2003, at 22, available at <http://www.americanlawyer.com/focuseurope/bigarbitrations.html>; LUKE ERIC PETERSON, INT’L INST. FOR SUSTAINABLE DEV., INVESTMENT TREATY NEWS: 2006—A YEAR IN REVIEW (2007), http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf.

139. Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT’L ARB. 23, 24 (2003); Franck, *supra* note 27 (compiling anecdotal evidence about the impact of investment treaties on foreign investment rates, observing the information’s limitations, and recommending systematic empirical research).

140. Heise, *supra* note 30, at 808 (“[A]necdotal evidence supplies a risky foundation upon which to form generalizations applicable to a larger population.”); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1475 (2005) (discussing limitations of an anecdotal—rather than systematic—approach to empirical research).

141. Drahozal, *supra* note 139, at 23; see also Heise, *supra* note 30, at 808 (“[S]cholars possess few, if any, mechanisms to assess anecdotal evidence for truthfulness, typicality, or frequency.”).

ate and misleading.¹⁴² The *Financial Times* recently referred to a series of awards involving: (1) “hundreds of millions of dollars in compensation,” (2) a claim by Mobil for “billions of dollars,” and (3) Bolivia’s “loss” in a case against Bechtel.¹⁴³ Empirical information aids the assessment of such claims.¹⁴⁴ It aids their contextualization to know: (1) the average value of awards is in the order of US\$10 million, which suggests a US\$140 million award is a statistical outlier,¹⁴⁵ (2) the difference between amounts claimed and awarded has been in the order of US\$333 million,¹⁴⁶ and (3) Bolivia’s “loss” at the jurisdictional phase, where most governments lose as the case proceeds to the merits phase,¹⁴⁷ actually resulted in a settlement where the investors dropped their claims and were paid nothing.¹⁴⁸

Quality empiricism should acknowledge the difficulty in drawing inferences about the system as a whole if one is only observing a small and biased subset of cases.¹⁴⁹ Drawing upon the literature that acknowledges the strengths and weaknesses of different empirical designs is therefore vital. This means when governments make policy choices—for example, negotiating and entering into investment agreements—on the basis of empirical scholarship, stakeholders can properly contextualize the primary research.¹⁵⁰ While some scholars rushed to produce empirical work related to investment treaty dispute resolution, they failed to do so in a valid and reliable manner with proper caveats.¹⁵¹ While timeliness is a virtue, it is possible to “produce credible results by

142. Franck, *supra* note 25.

143. Alan Beattie, *Concern Grows over Global Trade Regulation*, FIN. TIMES, Mar. 12, 2008, at 9.

144. Heise, *supra* note 30, at 808–09.

145. Franck, *supra* note 25, at 58.

146. *Id.* at 58–60.

147. *Id.* at 52–53.

148. Bechtel Corporation, Cochabamba Water Dispute Settled (Jan. 19, 2006), <http://www.bechtel.com/2006-01-19.html> (“[T]he claims against Bolivia...will be withdrawn. There will be no compensation paid by the Government of Bolivia.”).

149. See Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STAT. ASS’N 665, 668 (2000).

150. It is vital to have “scientifically valid input into current debates about public policy” to make “important and dramatically influential contributions.” Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311, 314 (2003).

151. United Nations Conference on Trade & Dev., *Investor-State Disputes Arising from Investment Treaties: A Review*, 10–11, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005), available at http://www.unctad.org/en/docs/iteiit20054_en.pdf (implying that a trend existed but failing to explain the methodological basis for the conclusion); Noah Rubins et al., *ICSID Arbitrators: Is There a Club and Who Gets Invited*, 1 GLOBAL ARB. REV. 11, 11–12 (2006) (failing to provide a full explanation of methodology).

merely doing the best you can and appropriately reporting the uncertainty in your estimates.”¹⁵² Being attuned to the limitations of data, the power of inferences, and the value of replication can enhance the credibility of empirical claims and make the research more persuasive.¹⁵³ It would then be more difficult to dismiss empirically founded claims about investment treaty dispute resolution as irrelevant, inaccurate, or unrepresentative.

Ideally, infusing investment treaty dispute resolution with empirical information could promote better research that lends itself to a more informed development of international investment law. At present, investment treaty dispute resolution’s “weak empirical mooring undermines efforts to make the legal system more accessible and efficient.”¹⁵⁴ The lack of research can inhibit the development and correct application of international investment law doctrine.¹⁵⁵ For arbitrators trying to determine how to exercise their discretion and parties creating arguments to influence the tribunal, systematic data about how and why past tribunals exercised their discretion would be useful. For example, with cost shifting, tribunals have the discretion to shift the costs of the arbitration process, but there is little guidance on how that should occur. Arbitrators also claim to comport with a “common practice” of cost shifting, but do not provide the underlying evidence of what that practice is.¹⁵⁶ An empirical assessment of cost-shifting patterns could aid tribunals when deciding how to exercise their discretion,¹⁵⁷ permit parties to

152. Epstein & King, *supra* note 150, at 314.

153. Jackson, *supra* note 79, at 20 (observing that certain empirical techniques related to correlation have particular methodological limitations and recommending caution in some areas).

154. Heise, *supra* note 30, at 813; *see also* Bok, *supra* note 33, at 581.

155. Certain U.S. Supreme Court justices appear to lament the dearth of empirical information. *See* Chandler v. Florida, 499 U.S. 560, 578–79 (1981) (“[A]t present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect...”). *But see* McCleskey v. Kemp, 481 U.S. 279 (1987) (declining to rely upon statistical findings that race is correlated to the imposition of the death penalty in Georgia).

156. *See* Malaysian Historical Salvors SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 150 (May 17, 2007), available at <http://ita.law.uvic.ca/documents/MHS-jurisdiction.pdf> (stating that “it is common ICSID practice for each party to bear its own legal costs and for the arbitration costs to be divided equally regardless of the outcome of the arbitration” but without providing a basis for the assertion).

157. This presumes that arbitrators understand, are interested in, and wish to use this research to base their current practice on the historical antecedents of other tribunals. There is a debate about the *de jure* relevance of such awards. Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin Picker et al. eds., forthcoming 2008); *see also* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L

make more efficient arguments, and give credibility to the ultimate award. Moreover, the lack of an empirical footing can create difficulties for the persuasiveness of theories¹⁵⁸ that rest on untested empirical assumptions.¹⁵⁹ The recent emergence of the “legitimate expectations”¹⁶⁰ standard in investment treaty arbitration is an example of this, where there are empirically unsubstantiated assumptions about what are the reasonable or “legitimate” expectations of international investors. Having an empirical foundation, however, creates opportunities for the creation of nuanced rules and legal doctrines that decrease the scope for misunderstanding among those signing treaties, enforcing laws and the reality experienced by the subjects of those laws.

2. *Benefits for Empirical Legal Scholars and Social Scientists*

Empirical legal scholars and social scientists stand to benefit from integration. Expanding their focus to consider international investment law issues can do two critical things. Not only can they gain new audiences for their work—in different countries and in new disciplines—and continue to develop the “‘scientification’ of legal scholarship [that is] increasingly evident”;¹⁶¹ they can also diffuse empirical perspectives to legal issues that stretch beyond national boundaries¹⁶² to expand the scope of their own research. This could happen in various ways.

Empirical analysis of investment treaties and dispute resolution could, for example, provide ELS scholars and social scientists with additional data for analysis. In an era of globalization, this has several benefits. First, a broader pool of data offers new research opportunities. For example, political scientists are performing useful research that ex-

L. REV. 845 (1999).

158. Heise, *supra* note 30, at 813.

159. Heise, *supra* note 5, at 827.

160. *Compare Int'l Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Arbitral Award (Jan. 26, 2006), ¶ 147, available at <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf> (“[L]egitimate expectations [relate to] a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”), with *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006), ¶¶ 304–05, available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf> (“[U]nfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.”).

161. Ulen, *supra* note 11, at 897.

162. Thomas Ulen observed that “legal scholars tend to write scholarly articles only about their own legal systems and only for those acting within that legal system.” *Id.* at 896.

amines whether third-party adjudication in the WTO provides domestic political cover;¹⁶³ such work might be expanded into the international investment law scholarship and then contrasted with the WTO research. Moreover, an empirical analysis of investment treaty dispute resolution could provide useful comparative baselines for domestic phenomena. This comparative angle, in turn, could enhance the value of domestically focused empirical scholarship. In addition, a broader pool of scholars using different empirical methodologies and distinctive research traditions, may offer unique insights by asking new questions or posing old questions in new ways.

Beyond this, working with international lawyers (particularly for international investment law and dispute resolution) offers value to social scientists. Lawyers have a deep sense of the particularities of how legal regimes operate and the practical subtleties of doctrinal distinctions. For example, work by some of the only political scientists analyzing investment treaty dispute resolution¹⁶⁴ refers to the ICSID “appeals process.”¹⁶⁵ ICSID’s internal annulment procedure, however, is not an appeal.¹⁶⁶ Collaborations with international lawyers could provide a nuanced understanding of the narrow scope of review, the limited grounds of review, and the limited powers of annulment committees. This in turn might promote a more sophisticated understanding of the legal mechanisms, the creation of more finely tuned research questions, and the development of methodologies to more accurately assess international legal phenomena.

163. See Todd L. Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219 (2006).

164. See Clint Peinhardt & Todd Allee, *The International Centre for Settlement of Investment Disputes: A Multilateral Organization Enhancing a Bilateral Treaty Regime 1* (paper presented at the Annual Meeting of the Midwest Political Science Association, Apr. 14, 2006), available at <http://www.utdallas.edu/~cwp052000/mpsa.peinhardt-allee.pdf> (observing that ICSID “has received very little attention in political science circles”).

165. Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Patterns of Dispute Resolution Design*, INT. ORG. (forthcoming) (on file with author); see also *id.* at manuscript 13 (suggesting that ICSID has “increased power to remove appeals from domestic courts”).

166. CHRISTOPH SCHREUER, *ICSID CONVENTION: A COMMENTARY* (2001). But see Peinhardt & Allee, *supra* note 164, at 9 (providing a more accurate description of issues related to annulment).

B. *The Challenges of Integration*

There are barriers to the use of empirical methodologies in analysis of investment treaty dispute resolution. Some of these problems are on the supply side of research and others are related to the demand side.¹⁶⁷

On the supply side, Gregory Shaffer has identified two key reasons why empiricism has not yet infused international economic law: (1) a lack of people trained to conduct the work,¹⁶⁸ and (2) a perception that empiricism is “less honored” within the legal academy than traditional doctrinal analysis and normative scholarship.¹⁶⁹ Reaching across literatures to learn from the work of ELS scholars and other social scientists can help ameliorate both of these problems. For the former, ELS scholars have been creating innovative programs to provide training to law professors in research methods and statistical analysis.¹⁷⁰ Blogs and conferences where empirical methodologies are discussed openly also help. Creating a public dialogue to promote information dissemination and answer research questions helps support empirical research agendas of those without traditional empirical qualifications. As regards the latter, the increasing regard for ELS (at least in the U.S. legal academy¹⁷¹) may help to redress this problem. Tracey George suggests that ELS is “arguably the next big thing in legal intellectual thought.”¹⁷² Empirical

167. Commentators “recognize the increased need (‘demand’) for empirical work, [but] the production of such work (‘supply’) has not yet responded adequately.” Heise, *supra* note 5, at 821; *see also, e.g.*, Epstein & King, *The Rules*, *supra* note 63.

168. *See also* Ulen, *supra* note 11, at 914 (“[An] additional reason that legal scholars have not done much empirical work is that they are not adept in it.”).

169. Shaffer, *supra* note 12, manuscript at 4 (citing Lawrence Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 766 (1986)).

170. For example, Northwestern University held a three-day workshop for basic empirical legal scholarship in 2006, and Northwestern and Washington University co-sponsored an advanced workshop on empirical legal scholarship in 2007. Conducting Empirical Legal Scholarship Workshop, May 22–24, 2006, <http://www.law.northwestern.edu/faculty/conferences/empiricalworkshop.html>; Conducting Empirical Legal Scholarship 2007: The Advanced Course, <http://cerl.wustl.edu/training/acels.php>; *see also* Posting of Jason Czarneski to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2006/05/a_recap_of_the_.html (May 25, 2006, 10:55 EST); Posting of Jason Czarneski to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2006/09/advanced_conduc.html (Sept. 17, 2006, 19:16 EST). The Inter-University Consortium for Political and Social Research’s summer programs are making an effort to reach out to the ELS community. Summer Program in Quantitative Methods of Social Research, <http://www.icpsr.umich.edu/sumprog/index.html>. Supportive administrative officials can also provide incentives for law professors to receive graduate level statistics training.

171. *See* Verdirame, *supra* note 11 (expressing skepticism about the value of empiricism in international law).

172. George, *supra* note 7, at 141.

approaches to the analysis of legal phenomena, whether domestic or international, can provide vital information for a more nuanced understanding of law and legal institutions. While it is neither an exclusive nor universally necessary method of amassing knowledge, the legal academy's capacity to recognize empirical methodologies as a valuable tool is appropriate. There is particular salience for investment treaty dispute resolution where empirical methodologies can provide basic information in an area of international importance.

There are additional supply-side difficulties beyond those identified by Professor Shaffer. There are costs associated with data gathering, coding, and analysis. Data collection in investment treaty dispute resolution faces particular challenges. Unlike wholly domestic contexts, there can be variations in how data is gathered and stored. There may be incompatible methods of gathering and storing data from different countries and institutions that make it difficult to create joint databases. Still other data may not be gathered at all, and other data may never even be created. Luckily, in investment treaty dispute resolution, there are websites and on-line databases that contain arbitration awards. There is not yet a single comprehensive database—such as U.S. court databases¹⁷³—that permit statistical analysis of key words, outcomes, and arbitrator voting behavior in the investment treaty resolution sphere. Should such databases become available, it is vital that data collection and coding be done in a systematic, valid, and reliable manner.

Language, cultural, and political barriers can also create difficulties in gathering data. Researchers may need additional language skills or the funds to hire appropriate translators, and even then, there may be subtleties that are lost in translation. While preliminary empirical work on investment treaty dispute resolution demonstrates that the vast majority of awards are in English,¹⁷⁴ there are also awards in Spanish and French.¹⁷⁵ For researchers without the requisite linguistic background,

173. See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1455–57 (2003) (“[R]esearchers have long used federal court data assembled by the Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center. The data include information about every case filed in federal district court and every appeal filed in the twelve non-specialized federal appellate courts.”); see also S. Sidney Ulmer Project: Research Databases and Data Archives, <http://www.as.uky.edu/polisci/ulmerproject/databases.htm> (providing access to a variety of existing databases for U.S. state and federal courts) (last visited Mar. 4, 2008).

174. Franck, *supra* note 25.

175. The language-barrier issue also presents problems for in-depth, systematic qualitative research with individuals (whether the researcher or the subject of research) who do not share a common language.

there will be costs associated with bringing in translators and/or using translation programs that do not appreciate linguistic subtleties of diplomacy or arbitration awards. For those researchers whose native language is not English, the number of English awards may likewise create difficulties.

There also may be supply-side challenges in recognizing that research methodologies may not reflect the cultural traditions shared by the subject of study. This may create difficulties in obtaining appropriate data. Likewise, international political sensitivities may inhibit access to data. For instance, it may be challenging to study a government's response to investment treaty dispute resolution. There may be obstacles in accessing officials for interviews. Moreover, obtaining candid answers on politically sensitive issues may prove difficult. Beyond this, there may be different understandings about the meaning of basic definitions, such as the meaning of customary international law¹⁷⁶ or non-precluded measures that permit states to act in emergencies.¹⁷⁷

There are other barriers to producing empirical research in investment treaty dispute resolution. Scholars, whether they focus on domestic or international issues, need institutional support.¹⁷⁸ Appropriate support may run the gamut from the availability of appropriate levels of internal funding for research, qualified research assistants, and up-to-date hardware and software packages or physical space for document storage. It may also involve an institutional appreciation for the long-term value and nature of empirical research. Such institutional support is instrumental to the creation of tangible empirically-grounded projects.

There are also challenges related to the demand for empirical analysis of investment treaty dispute resolution. Decisionmakers involved with investment treaty dispute resolution—whether policy makers, national court judges, or arbitrators—may not be trained to understand the material or assess the research's integrity. Likewise, lawyers and clients may not appreciate the opportunities and strategic benefits of empirical methodologies, or they may misunderstand the potential limits of infor-

176. Ramsey, *supra* note 35, at 1250–51.

177. See William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2008) (discussing different approaches to the meaning of non-precluded measures in investment treaties).

178. Heise, *supra* note 5, at 831–32; see also Heise, *supra* note 30 (suggesting the absence of empirical work is due to its difficulty, a lack of training, exposure to falsification, lack of prestige, lack of internal institutional incentives, and lack of external incentives).

mation provided.¹⁷⁹ Hopefully, exposure to information and training about how to analyze research could ameliorate these problems.¹⁸⁰

While these factors increase the cost of doing international empirical research, they do not undercut the benefits. Rather, these challenges simply mean that people undertaking the empirical analysis must be prepared to encounter a different set of risks. Research conducted in a systematic and careful manner that recognizes the limitations of its methodology is scarce in the context of investment treaty dispute resolution. That scarcity will ultimately increase the value of quality research. The key, then, is generating that research.

C. *Opportunities for Investment Treaty Dispute Resolution*

For those interested in research questions that might benefit from empirical methodologies, the question is: how might international investment scholars take steps to infuse their research with a more empirical approach?

While the list is by no means exhaustive, international lawyers might take various steps to promote an empirical research agenda in investment treaty dispute resolution. These steps might include: (1) building research capacity, (2) obtaining data, (3) designing the research methodology, (4) conducting the research and analyzing the results, and (5) disseminating the results to stakeholders for consideration. If any one of these thresholds is not met, it will be challenging to procure quality empirical research in international investment law and dispute resolution. Nevertheless, a bit like the Sisyphean challenge,¹⁸¹ the mission should be undertaken with the hope of creating tangible benefits. Attempting to meet these challenges is preferable to permitting international invest-

179. In Eisenberg's classic formulation, empirical analysis of legal issues can be divided "into three major branches: (1) the use of scientific empirical analysis by litigants to attempt to prevail in individual cases, (2) the use of *social* scientific empirical analysis in individual cases, and (3) the use of empirical methods to describe the legal system's operation." Eisenberg, *supra* note 149, at 665. *But see* Heise, *supra* note 5, at 821; Schuck, *supra* note 5 at 323. Although this Essay focuses on the third aspect, lawyers and clients might also use the former aspects.

180. Michael Ramsey suggests that consumers of empirical research should do more to acknowledge the serious empirical demands and challenges of the international law project. It is inappropriate, and borders upon abdication, for courts (and lawyers) to cite some strategically selected proxies, or strategically selected but nonrepresentative examples of practice, in the place of serious empirical inquiry.... The fact that the empirical project is hard, and in many cases will prove impossible, is no excuse. Ramsey, *supra* note 35, at 1260.

181. ALBERT CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 123 (Justin O'Brien trans., Alfred A. Knopf, Inc. 1955) ("The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy.').

ment law to struggle without the potential support that empiricism offers.

Step One is generating the capacity to form a critical mass of scholars with the interest in and capacity to conduct the research. Such capacity could be built for both international law scholars and their research assistants. For scholars (and perhaps their research assistants as well) this might include obtaining methodological training developed by schools such as Northwestern University, Washington University, and the University of Michigan to give research guidance to non-Ph.D.s. Other capacity building measures might also involve deans providing release time for faculty to take graduate level courses in social science research methods during the normal school year. Beyond this, institutions can provide support by offering integrated research facilities, such as the Survey, Statistics and Psychometrics Core Facility at the University of Nebraska, where scholars obtain assistance with designing research protocols, data entry programs, and/or conducting analysis. It might also take the form of inter-disciplinary collaboration with colleagues such as ELS scholars or social scientists with the appropriate methodological training.¹⁸² One might also imagine working with legal academics in other countries, such as Australia, where a graduate degree in law is a Ph.D. requiring a doctoral thesis that may have an inter-disciplinary focus.

As regards research assistants, it might be helpful to provide basic training on empirical research methodologies in the first year or early in the second year of law school. This could educate law students on the nexus between social science and the law, research design, methodologies for coding and analyzing data, and particular statistical software packages. It may also aid students in their own approach to legal practice in various ways. For example, it may provide a useful lens for developing factual investigation skills by becoming critical consumers of information. Understanding empirical methodologies also aids their development as future lawyers who may need to critically assess empirical claims made by opposing counsel, trial consultants, or expert witnesses.¹⁸³ Beyond priming students to be sensitive to empirical issues, this training would create a potential pool of research assistants with the basic knowledge of, and perhaps an interest in, conducting empirical re-

182. Such a collaborative approach may be particularly appropriate for those seeking external grants, such as those from the National Science Foundation.

183. Neumann & Krieger, *supra* note 83, at 395–96.

search, whether related to investment treaty dispute resolution specifically, or international economic law more generally.

Beyond basic capacity building, Step Two requires that data be available. As discussed earlier, in the international investment context, this element is vital but is also one of the most challenging. One place where researchers could look for data may be in the proceedings from investment treaty disputes. This might include, for example: (1) arbitration pleadings and transcripts of the proceedings, (2) procedural decisions,¹⁸⁴ (3) awards, (4) annulments, or (5) national court decisions related to the proceedings.¹⁸⁵ Providing such data after disputes are finished could aid the analysis of research questions. For example, if there is a linguistic or legal ambiguity in the language of the award, reference to the underlying pleadings will aid in the accurate gathering and coding of data.

Nevertheless, accessing existing data may prove difficult. Some of these materials may be readily available, for example, in the case of national court proceedings. In other cases, it may require encouraging parties to disclose information. Some governments, for example, may have Freedom of Information Act obligations or may have included transparency provisions in their investment treaties.¹⁸⁶ While this may facilitate certain disclosures, it will not guarantee full disclosure and it certainly does not eliminate the potential for biased data pools.¹⁸⁷ Until there is more systematic analysis about what is public and what remains confidential, it is difficult to assess the scope of the issue. In the interim, starting to gather data in as scientific a manner possible while recognizing its potential limitations is preferable to relying upon anecdotes and untested conventional wisdom.

Even for those arbitrations where some information is available, there are still problems with data collection. While theoretically available and

184. These procedural orders might include issues such as those related to confidentiality, participation of amicus curiae, interim measures, challenges to arbitrators, or consolidation.

185. Such national court proceedings may be in support of the arbitration process under a Stockholm Chamber of Commerce or International Commercial Arbitration & Conciliation arbitration. They might take the form of an application for interim measures, requests for disclosure of documents, challenges to arbitrators, applications to set aside awards, and challenges to enforcement of an award.

186. The United States and Canada have been proactive with the transparency of investment treaty arbitrations. It is unclear whether these two countries are representative of the broader population of respondents of investment treaty disputes. See Maria Dakolias, *Are We There Yet?: Measuring Success Of Constitutional Reform*, 39 VAND. J. TRANSNAT'L L. 1117, 1150–51 (suggesting that more than sixty countries around the world have Freedom of Information Laws).

187. "Empirical research on arbitration is thus difficult to conduct" and what we know may come from "presumably aberrant cases." Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 655 (2005).

potentially useful for empirical analysis, arbitrators may omit critical data points from written awards such as the place of arbitration, who appointed the arbitrators, and arbitration costs. Where one might wish to assess costs of the arbitration process, for example, this creates difficulties. While the tribunal's costs and the parties' legal costs in prosecuting and defending the dispute may be readily available, the tribunal may nevertheless fail to record all or part of that information in the award. In a recent preliminary analysis of the cost of arbitral tribunals, out of the fifty awards that analyzed the issue, only seventeen awards expressly quantified the amount.¹⁸⁸ Where researchers have a large amount of missing data, this limits the generalizability of any inferences and decreases the value of the work. One might therefore encourage the creation of a template that arbitrators could use in determining what information to include in awards. While arbitrators may be hesitant to do so, particularly where there may be sensitive information, such a framework would go a long way toward promoting more systematic data collection and cut down on missing data.

It also means that institutions, such as the United Nations Conference on Trade and Development (UNCTAD), that have gathered data in connection with investment treaty disputes should be encouraged to make the data publicly available.¹⁸⁹ The methodology for collecting the data should also be made transparent to encourage an assessment of the data's integrity. Likewise, arbitral institutions that support investment treaty arbitration tribunals should continue to supply data and the basis for its disclosure.¹⁹⁰ ICSID, for example, publishes data on their cases but, because of confidentiality obligations, may not distinguish between investor-State disputes arising under investment treaties and those arising purely under domestic law.¹⁹¹ Researchers should therefore use gen-

188. Franck, *supra* note 25, at 68.

189. UNCTAD recently released a database with basic information about various investment treaty disputes. See UNCTAD Interactive Database, <http://www.unctad.org/Templates/Page.asp?intItemID=3199&lang=1> (last visited Mar. 4, 2008).

190. Institutions may provide limited data about the number of new arbitration proceedings or sanitized awards. Institutions may not distinguish between domestic commercial law disputes and investment treaty claims. There may also be challenges when institutions publish data according to non-transparent criteria. Gillis Wetter, *The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years*, in *THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTURY CONFERENCE 85*, 95–100 (Martin Hunter et al. eds., 1995); see also Drahozal, *supra* note 14, at 294–95.

191. For researchers analyzing investment treaty conflict, reliance on ICSID data raises validity concerns. ICSID data relates to investor-State conflicts and does not confine itself to pure investment treaty cases. If one wishes to assess investment treaty cases on the basis of ICSID data, one must find a way to distinguish treaty claims from non-treaty claims in a replicable manner.

eral ICSID data with caution as it may not be an appropriate measure of investment treaty dispute resolution.¹⁹² We may also wish to encourage institutions—whether commercial or otherwise—to create repositories where data is publicly available.¹⁹³ It would be preferable for such data to be transparent and free of charge so that researchers, irrespective of their economic background, could be in a position to conduct relevant analysis.

Beyond these more archival methods, commentators should consider other ways of collecting data. This may require utilization of different research methodologies, whether through case studies, structured interviews, surveys, or experiments.¹⁹⁴ Creating such data and making it publicly available allows other researchers to use it in different ways to ask related, or even slightly different, research questions to enhance the discourse in the area of investment treaty dispute resolution.

Step Three involves using human capital and data to create real research protocols to answer questions about the resolution of disputes under investment treaties. This Essay has identified certain methodologies for consideration. For example, scholars might design experiments to assess arbitrator reasoning. Commentators could also develop surveys to assess satisfaction with the dispute resolution process; structured interviews also might be useful for obtaining data on the use of dispute resolution processes other than arbitration or court litigation. Scholars may also consider detailed case studies or ethnographies of countries like the United States or Argentina to explore their particular experiences with managing investment treaty conflict. Creating these research protocols may also involve an analysis of archival data. Such analysis might be done on a descriptive level to assess conventional wisdom about investment treaty disputes, whether related to the size of awards or the cost-shifting decisions of tribunals. More sophisticated research could lead to the development of a multivariate model analyzing what factors—for example, whether the respondent is an OECD country, the size of the original damages claim, the nationality or gender of the chair

192. UNCTAD also does not make clear distinctions between those investor-State cases arising out of treaties and those arising out of other disputes (i.e., commercial contracts or national legislation). Franck, *supra* note 25.

193. The author participated in a project at Oxford University Press to create headnotes for investment treaty arbitration awards. There were “headnote templates” and certain “instructions” that were revised. Case commentators were not otherwise trained to adhere to a common coding protocol for the awards. There was, however, a supervisory editorial board.

194. KING, KEOHANE & VERBA, *supra* note 14.

of the arbitral tribunal—affect the outcome of the dispute resolution process.

Step Four involves conducting the research and engaging in analysis, statistical or otherwise, in order to make inferences from the data. This step takes time, more resources, and patience. Scholars must accept the limitations of their data and contextualize their inferences appropriately. They must also be willing to accept the risk that their projects may not come to fruition. A survey with a 1% response rate, for example, would be of little scientific value. Likewise, scholars attempting to code investment treaties to analyze dispute resolution rights may be unable to achieve a high level of inter-coder reliability. Such challenges may be particularly difficult for more junior scholars where such research consumes valuable pre-tenure time and resources and may not provide tangible results, particularly in regards to the creation of doctrinally and theoretically based pieces.

Nevertheless, “failures” need not be viewed as such. Rather, where such difficulties occur, it would be useful to: (1) use the information to refine and improve the research methodology for the future, and (2) use those methodological experiences as a basis of scholarship. This latter aspect could be particularly useful as the author is unaware of literature in the context of investment treaty dispute resolution that shares information about the success and failure of methodological approaches. Creating a literature where scholars can learn from the experiences of others and have a meaningful debate about the costs and benefits of particular methodological approaches could add value to the academic discourse.

Step Five involves stakeholders considering and using the data to make choices. Commentators make normative recommendations on the basis of data, and stakeholders can implement or modify recommendations in light of contextual concerns. It may, for example, involve investment treaty negotiators reconsidering or revising model treaty language to improve the acceptability of dispute resolution procedures. It also may involve investors making particularized dispute resolution choices—whether to pursue arbitration at all and if so what arguments have the greatest chance of success—on the basis of inferences from data. The data must be used carefully, however, and with the knowledge of the limitations of the research and a particular sensitivity to the gap in the generalizability of research results to a particularized political, economic, cultural, and historical context that may be markedly different in critical ways.

Despite its utility, empirical analysis of investment treaty disputes is not a cure for all ills. Stakeholders may never read, or may ignore, the research. Policy makers may misrepresent or misunderstand the research. While these are inevitable risks of social science research, this should not stop the scientific inquiry. Changes in government or context may increase interest in empirically-based decisionmaking. Similarly, educating stakeholders about the dangers of overgeneralization may enhance the degree of care they take in decision-making. Like their scholarly counterparts, stakeholders should acknowledge the limitations of particular methodologies when making choices. For investment treaties, this means policy makers and other actors should be sensitive to issues of case selection bias, missing data, generalizability, and the trade-offs of using particular empirical methodologies. It would be preferable if such actors acknowledged that they were making decisions on the basis of imperfect information; but they could likewise recognize that carefully conducted research is better than an empirical vacuum.

CONCLUSION

While not an exclusive lens nor an appropriate approach for every research area, use of empirical methodologies could infuse international economic law with additional information to inform normative choices. This applies with particular force in the resolution of investment treaty disputes, where there is a debate about the utility and proper terms of international investment agreements. Empirical research and scholarship holds the potential to dispel myths, test assumptions, provide data to promote efficient conflict resolution, and develop investment law doctrines that are grounded in reality. These insights could aid major constituencies of investment treaty conflict—namely, governments and investors, their lawyers, arbitrators, and the public. As Chris Drahozal aptly noted in the context of international commercial arbitration, the benefits of empirical legal research

are enormous: for parties, who will know more about what to expect from their dispute resolution choices; for practitioners, who can better represent their clients; for arbitrators who can make more informed decisions on both procedural and substantive matters; and for academics, who not only can develop and test theories in a more systematic way, but who can better train future

generations of lawyers for the practice of...arbitration.¹⁹⁵

These benefits are even more vital in the context of investment treaty dispute resolution, which is subject to public scrutiny given the public implications.¹⁹⁶

Ultimately, scholarly choices about what precise research questions to pursue will involve highly individualized choices. Scholars should be free to pursue their research, empirical or otherwise, on the basis of doctrinal, theoretical, and policy questions that interest them the most. Nevertheless, this Essay has attempted to explicate general ideas about what form that empiricism might take in the context of investment treaty dispute resolution and how to develop empirically grounded research.

While the process may not be easy given the learning curve, time, and energy involved, there can be a real joy in adding an empirical lens to one's research and testing one's theoretical assumptions. The more methodologies one learns, the more tools at one's disposal for a more nuanced understanding of one's research area. And it is these tools that permit legal scholars to answer questions such as: is there a reliable statistical relationship between the amount that tribunals award to foreign investors and the development status of the host state? This in turn can provide insights into whether the dispute resolution process itself treats the developed world unfairly and/or suggest areas for further consideration. Despite the challenges, the net benefits from the professional satisfaction of creating research that impacts the real world can be decidedly worth the cost.

The integration of empiricism into international investment law dispute resolution "will almost certainly not be smooth, yet the prospect remains bright,"¹⁹⁷ particularly if researchers could apply the five steps identified in this Essay. Beyond its capacity to aid parties, policy-makers, and the public, a renewed focus on empiricism will continue the dialogue and could promote synergies between areas of related study. While integrating empiricism into investment treaty dispute resolution will face challenges, at this stage, the benefits of attempting to generate further empirical insights outweigh the costs and cannot be overlooked lightly.

195. Drahozal, *supra* note 139, at 33–34.

196. In the United States, for example, there is an ongoing debate about the proper terms for investment treaties and the renewal of the Trade Promotion Authority Act. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.A. §§ 3801–13 (West 2005 & Supp. 2007).

197. Abbott, *Prospectus II*, *supra* note 20, at 275.

ANNEX 1

On March 9, 2008, the research syntax in Westlaw's JLR database was: AU((KENNETH /3 ABBOTT) (ROBERT /3 HUDEC) (JOHN /3 GAMBLE) (RYAN /3 GOODMAN) (ANDREW /3 GUZMAN) (OONA /3 HATHAWAY) (DEREK /3 JINKS) (DANIEL /3 KLERMAN) (HAROLD /3 KOH) (GREGORY /3 SHAFFER) (MELISSA /3 WATERS)) and ((THEODORE /3 EISENBERG) (LEE /3 EPSTEIN) (MICHAEL /3 HEISE) (LEANDRA /3 LEDERMAN) (JENNIFER /3 ROBBENNOLT) (STEWART /3 SCHWAB) (NANCY /3 STAUDT) (THOMAS /3 ULEN) (MARTIN /3 WELLS)). This search resulted in eleven documents.¹⁹⁸

198. While the Goodman articles discuss empiricism in more detail (and only one article addresses international human rights scholarship), the remainder of the articles cite one source in passing. See Ryan Goodman, *The Difference Law Makes: Research Design, Institutional Design, and Human Rights*, 98 AM. SOC'Y INT'L L. PROC. 198, 199 n.3 (2004) (citing Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002)); Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 645 n.7 (2001) (citing Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1058 (2000)); Andrew Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 930 n.171 (2002) (citing Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996)); Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1286 n.15 (2000) (same); Andrew Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1541 n.123 (1998) (same); Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 624 n.94, 629 n.119 (2001) (citing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)); Lisa Bernstein & Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 GEO. L.J. 2215, 2244 n.81 (1995) (citing ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 348-49 (1988)); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455, 456 n.2 (1999) (citing Gregory B. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998)); Daniel Klerman, *Introduction*, 26 J. LEGAL STUD. 475, 475 (1997) (introducing Eisenberg's empirical research on punitive damages in a symposium on tort reform); Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. ILL. L. REV. 1167, 1167 (2002) (thanking Thomas Ulen for reviewing a draft); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2399 n.40 (1994) (referring to Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980)).

ANNEX 2

On March 9, 2008, the research syntax in Westlaw's JLR database was: AU((THEODORE /3 EISENBERG) (LEE /3 EPSTEIN) (MICHAEL /3 HEISE) (LEANDRA /3 LEDERMAN) (JENNIFER /3 ROBBENNOLT) (STEWART /3 SCHWAB) (NANCY /3 STAUDT) (THOMAS /3 ULEN) (MARTIN /3 WELLS)) and ((KENNETH /3 ABBOTT) (ROBERT /3 HUDEC) (JOHN /3 GAMBLE) (RYAN /3 GOODMAN) (ANDREW /3 GUZMAN) (OONA /3 HATHAWAY) (DEREK /3 JINKS) (DANIEL /3 KLERMAN) (HAROLD /3 KOH) (GREGORY /3 SHAFFER) (MELISSA /3 WATERS)). This search resulted in nine documents.¹⁹⁹

199. Citations to the international law scholars tended to be a passing reference in a footnote that drew on substantive international law themes rather than a discussion of a shared empirical focus; one document from the search was simply a result of the University of Illinois's symposium on "Empirical and Experimental Methods in Law," which ELS scholar Thomas Ulen organized and international law scholar Daniel Klerman attended. See Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1148 n.14 (2005) (citing an unpublished manuscript by Melissa Waters, *Mediating Norms and Identity* (2004)); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 7 n.17, 25 n.96, 99 n.393 (2005) (citing Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002), HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990), and Oona A. Hathaway, *The Court Puts the White House in Its Place*, NEWSDAY, June 29, 2004, at A33)); Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization*, 70 LAW & CONTEMP. PROBS., Summer 2007, at 115, 116 n.3 (citing Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177 (2000)); Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1245 n.53 (2006) (citing Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996)); Richard H. McAdams & Thomas S. Ulen, *Introduction*, 2002 U. ILL. L. REV. 791, 800 (2002) (introducing symposium and referring to contribution of Daniel Klerman); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1276 n.3 (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003)); Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Decisions*, 13 SUP. CT. ECON. REV. 63, 66 n.9 (2005) (citing Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 SO. CAL. L. REV. 455 (1999)); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 635 n.114 (2004) (citing Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001)); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 836 n.308 (2003) (same).